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WITH KEY-NUMBER ANNOTATIONS

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CIRCUIT COURTS OF APPEALS, DISTRICT
COURTS, AND COMMERCE COURT
OF THE UNITED STATES

MARCH — APRIL, 1913

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JUDGES

OF THE

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³ Recess appointment expired March 4, 1913.

⁴ Recess appointment, March 26, 1913, to succeed John M. Cheney.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE DISTRICT COURTS, AND THE COMMERCE COURT

CASEY v. BARBER ASPHALT PAVING CO.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,161.

MASTER AND SERVANT (§ 121*)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—SAFEGUARDING MACHINERY—"FACTORY"—"MILL."

Machinery consisting of a mixer, grinder, heater, rolls, and elevators for hoisting materials, all operated by a large gasoline engine, and assembled on a flat car used in preparing the machinery for street paving, and moved from place to place on ordinary railroad tracks according to exigencies of defendant's paving business, was a "factory" or "mill" within Wash. Factory Act March 6, 1905 (Laws 1905, c. 84), as amended by Wash. Laws 1907 (Laws 1907, c. 205), requiring every person, firm, or corporation operating a factory, mill, or workshop where machinery is used to provide safeguards for all shafting, gears, etc.; the word "factory" being deemed to include any premises where steam, water, or other mechanical power is used in the aid of any manufacturing process without reference to whether it is inclosed in a building, the word "mill" being also defined as a common name for various machines which produce a manufactured product, or change the form of raw material by continuous repetition of some action, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2642, 2643; vol. 5, pp. 4506-4508.]

In Error to the District Court of the United States for the Southern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by E. L. Casey against the Barber Asphalt Paving Company. A judgment (192 Fed. 432) for defendant non obstante was entered, and plaintiff brings error. Reversed and remanded, leaving judgment for plaintiff on the verdict in full force.

The plaintiff in error brought this action in the court below to recover damages for personal injuries, alleging in his complaint, among other things, that on the 6th day of August, 1909, the defendant to the action was operating a certain mill, factory, and workshop in the city of Walla Walla, Wash., in the mixing, grinding, and manufacturing of asphalt paving, the plaintiff being one of its employes; that prior to and at the time mentioned the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 202 F.—1

defendant negligently and in violation of its duty to the plaintiff and to its other employes, and in violation of the laws of the state of Washington, caused and permitted a certain revolving shaft and coupling which was a part of the machinery of the said mill, factory, and workshop to be left unguarded and in such a condition that the said employes, including the plaintiff, were constantly liable to come in contact with the shaft and coupling while in the performance of their duties, and negligently failed to provide reasonable or any safeguards against damage to them, although such protection could have been effectively given with all due regard to the ordinary use of the machinery; that the defendant negligently left the said machinery, shaft, and coupling in a defective and dangerous condition, with a certain cotter pin unnecessarily and dangerously projecting therefrom in such a position as to be likely to catch and injure the employes; that by reason of such negligence the plaintiff, on the day mentioned, while in the performance of his duty in and about the said mill, factory, and workshop, was caught by the said projecting pin and greatly injured.

The answer of the defendant put in issue the allegations of negligence, and set up as affirmative defenses carelessness of the plaintiff, and that the latter assumed as a part of his employment the risks and dangers incident thereto.

The evidence showed that the defendant corporation was engaged in the business of laying asphalt pavement in streets and roads, and that in the prosecution of its business it maintained and operated certain machinery for the purpose of grinding, mixing, heating, and preparing the crushed rock, sand, cement, and asphalt out of which the pavement is made; that the machinery, except the elevators, was assembled on a car about 60 feet long and about the width of an ordinary flat car, and consisted of a mixer and grinder, a heater, rolls, and elevators for hoisting the materials, all of which were operated by a large gasoline engine. There was also, according to the plaintiff's testimony, a platform on each side of the car, one of which platforms was for the employes to walk on in and about their work, and the other was for use in and about the handling of the wagons. According to the evidence, the car is moved by the defendant as its business requires on ordinary railroad tracks, and is conveyed to the particular point desired by means of a side track constructed from the main track, and the temporary track is then removed, and is replaced when the defendant desires to remove the plant to some other point. The machinery in the center of the car is not covered, but there is a tin roof over the vats and rolls. In addition to the car and its contents, and the platforms and elevators, there were, according to the testimony of the plaintiff, two sheds, built in connection with the plant, for the storage of tools and oil, and also a small office for the company in which a telephone was placed. Six or eight men were engaged in the operation of the plant at the time of the plaintiff's injury. Several photographs of the plant were introduced in evidence, and, as indicating its extent and method of operation, we extract briefly from the plaintiff's testimony:

"I now have in my hand Plaintiff's Exhibit 4. The crushed rock and sand was taken in at this end from the left end of the machine, as shown by the picture.

"Q. How was it taken in? A. It was taken in by this chain of buckets or cups, and was carried up into the rolls, the two large rolls on the left end of the machine, and there heated.

"Q. Where was it taken from? A. From the ground.

"Q. Was there a hopper there? A. Yes; there was a hopper there to place the material so the chain of buckets would catch it and carry it into the machine.

"Q. Go ahead. A. It was taken into the rolls and heated and about the center of the machine it was carried into the elevator there that you see near the smokestack. Then the asphalt was brought to the right side of this picture looking at it this way, and was put into a large vat there. This little derrick between here and the smokestack was to pull up the asphalt from the ground in barrels and put it in the vat. When in the vat they

were heated and transmitted to the center of the plant in the vicinity of this elevator, where the mixer or grinder was, where the asphalt and sand or the asphalt and crushed rock, as the case might be, were ground and mixed together thoroughly. After that the material was transferred into the wagons to be hauled to the streets.

"Q. How was it put into the wagons? A. There was an elevator there that, when the vat was full and thoroughly mixed, the elevator would turn over and the bottom of the box would open and drop it into the wagons.

"Q. Now, how much of this material would be ground through there in a day about approximately? A. I do not remember the number of loads. If my recollection serves me right, I believe they made a wagon load of that material in seven minutes. I may be a little off one way or the other.

"Q. Was it operated all day? A. Yes, sir; it was started up, and, if working properly, was worked all day. It was never shut down for noon, but worked on until night."

Upon the conclusion of the plaintiff's evidence, the defendant moved for a nonsuit, which was denied by the court, and upon the conclusion of all of the evidence the defendant requested an instruction to the jury directing a verdict in its favor, which motion was also denied by the court.

The verdict of the jury was in favor of the plaintiff for the amount sued for—\$7,500—and costs.

Subsequently, on motion of the defendant, the court below entered judgment in its favor notwithstanding the verdict, and the case is brought here by the plaintiff by writ of error.

J. G. Thomas and W. A. Toner, both of Walla Walla, Wash., and Bennett & Sinnott, of The Dalles, Or., for plaintiff in error.

Post, Avery & Higgins, F. T. Post, and A. G. Avery, all of Spokane, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). An act of the Legislature of the state of Washington approved March 6, 1905 (Laws 1905, c. 84), as amended by an act passed in 1907 (Laws 1907, c. 205), provides:

"That any person, firm, corporation, or association, operating a factory, mill, or workshop where machinery is used, shall provide and maintain in use * * * reasonable safe-guards for all vats, pans, trimmers, cut-off, gang edger, and other saws, planers, cogs, gearings, belting, shafting, coupling, set screws, live rollers, conveyors, mangles in laundries and machinery of other or similar description, which it is practicable to guard, and which can be effectively guarded with due regard to the ordinary use of such machinery and appliances, and the dangers to employes therefrom, and with which the employes of any such factory, mill, or workshop are liable to come in contact while in the performance of their duties. * * *

Section 2 of the act of 1905 provides that:

"Every factory, mill, or workshop where machinery is used and manual labor exercised by the way of trade for purposes of gain, within an enclosed room * * * shall be provided in each workroom thereof with good and sufficient ventilation," etc.

Section 3 of the act of 1905 provides that:

"The openings of all hoistways, hatchways, elevators, and well-holes and stairways in factories, mills, workshops, storehouses, warerooms, or stores, shall be protected where practicable by good and sufficient trapdoors, hatches, fences, gates, or other safeguards," etc.

Section 4 of the act of 1905, as amended by section 2 of the act of 1907, provides that it shall be the duty of the Commissioner of Labor, annually and from time to time, to examine all factories, mills, workshops, warehouses, warerooms, stores and buildings, and machinery and appliances therein contained to which the provisions of the act are applicable.

Section 5 of the act of 1905, as amended by section 3 of the act of 1907, provides that:

"Any person, firm, corporation, or association carrying on business to which the provisions of this act are applicable, shall have the right to make written request to said Commissioner of Labor to inspect any factory, mill or workshop, and the machinery therein used, and any storehouse, wareroom or store, which said applicant is operating. * * *

Section 6 of the act of 1905 provides that the employé of any person, firm, corporation, or association shall notify his employer of any defect or other failure to guard the machinery, appliances, ways, works, and plants with which or in and about which he is working, and that the employé may complain to the Commissioner of Labor of any such defects or failure to guard such machinery.

Section 7 of the act of 1905, as amended by section 4 of the act of 1907, provides that whenever, upon examination or re-examination of any factory, mill, or workshop, store or building, or the machinery or appliances therein to which the provisions of the act are applicable, the property so examined and the machinery and appliances therein conform in the judgment of the Commissioner of Labor to the requirements of the act, he shall issue a certificate, etc.; that a copy of the certificate shall be kept posted in a conspicuous place on every floor of all factories, mills, workshops, storehouses, warerooms, or stores to which the provisions of the act are applicable, and that, if the provisions of the act have not been complied with, the Commissioner of Labor shall notify the person operating the mill, factory, or workshop of that fact.

The sole question presented and argued by counsel in this court is whether the plant in question was a "factory, mill, or workshop" within the meaning of the above-mentioned legislation of the state of Washington. The court below held that it was not, for the reason that the plant was not located in a permanent building, and should be likened to a threshing machine, a steam shovel, a wrecking car, and other similar machines and appliances, and to the small concrete and asphalt mixers which are frequently seen in use upon the streets of cities and towns. We are unable to take that view of this plant. That it was built and operated for the purpose of manufacturing out of crude material the finished product with which the defendant company paved streets and roads is not denied. It is true that it was not manufactured in any sort of a house, but we do not understand that a house is an absolutely essential element of either a factory or a mill. It is, of course, readily conceded that a factory usually and perhaps almost invariably embraces one or more buildings, and, where machinery constitutes a part of the factory, such machinery is undoubtedly usually housed; but even at common law the factory is not

limited to the building or buildings, but includes as well the premises or place where its operations are carried on.

In Black's Law Dictionary the word "factory" is thus defined:

"In the English law the term includes all buildings or premises wherein, or within the close or curtilage of which, steam, water, or any mechanical power is used to move or work any machinery employed in preparing, manufacturing, or finishing cotton, wool, hair, silk, hemp, or tow. Later this definition was extended to other manufacturing places."

The statute of Massachusetts defines factory as "any premises where steam, water, or other mechanical power is used in the aid of any manufacturing process there carried on." Revised Laws of Massachusetts 1902, p. 916, c. 106, § 8.

A similar definition is contained in the statutes of Kansas of 1901 (section 6650), in the Annotated Revised Statutes of Missouri (1906, section 10104), and in the General Statutes of Minnesota of 1894 (section 2264). In 26 Cyc. p. 531, it is said, among other things, that:

"Various establishments have been held to be factories or manufactories under certain statutes, and the statutory meaning is sometimes wider than the common definition."

See, also, 26 Cyc. p. 530, and numerous cases there cited.

The real question here is, What is the meaning of the words "factory, mill, or workshop," as used in the above cited statute of the state of Washington? Among the definitions given by Webster of the word "mill" is:

"A common name for various machines which produce a manufactured product, or change the form of raw material by continuous repetition of some action, as a saw mill, a stamp mill, etc."

The title of the act of the state of Washington of March 6, 1905, as well as many of its provisions, are substantially the same as that of the preceding Factory Act of the state entitled "An act providing for the protection of employes in factories, mills, or workshops where machinery is used" (Laws of Washington 1903, p. 40), concerning which prior act the Supreme Court of the state said, in the case of Ward v. National Lumber & Box Co., 54 Wash. 307, 103 Pac. 2:

"The act further provides for ventilation and sanitary conditions, guarding of trapdoors and hatchways, etc.; so that it will be seen from a reading of the act that the evident intention of the Legislature was to protect operatives in factories in every manner and in every particular in which they could be protected consistent with the reasonable operation of the particular factory which was engaged in business. The appellant invokes the rule of ejusdem generis, and insists that the friction wheel, not being specified in the factory act, and not being of the same kind or genus as any of the machinery specially mentioned, does not fall under the head of machinery of other or similar description, and that, therefore, the assumption of risk attaches in this kind of a case. Considering the whole scope of the factory act and the evident intention of the Legislature, we are unable to reach the conclusion contended for by the appellant. There is no doubt that the general rule is that the general word must take its meaning and be presumed to embrace only things or persons of the kind designated in the specific words; but, as is said in 26 Am. & Eng. Ency. Law (2d Ed.) p. 610, the object of the rule in question being not to defeat but to ascertain and effectuate the legislative intent, it will not be applied where the application would be in the face of the evident meaning of the framers of the law. In other words, the maxim

has no application where there is no room for construction but only when the meaning is not apparent from the language itself; and it is also said: 'Nor does the rule obtain where the specific words signify subjects greatly different from one another, for here the general expression might very consistently add one more variety. In such case, the general term must receive its natural and wide meaning.' This is peculiarly the case under our statute, where the specific words signify subjects greatly different from one another, vats, pans, trimmers, cut-off, gang-edger, and other saws, planers, cogs, gearings, belting, shafting, coupling, set screws, live rollers, conveyors, mangles in laundries, etc., all or nearly all being machinery or parts of machinery of different character. We think, in the face of the statute, it would be doing violence to the evident intention of the Legislature to hold that the duty to guard the machinery in question was not imposed upon the millowner; and the testimony is undisputed that this machine could have been guarded without affecting the efficiency of its operation."

The primary purpose of all such legislation is to promote the public welfare by securing the safety of employes, and, as said by Mr. Justice Story in *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740, cited with approval by the Supreme Court in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 18, 25 Sup. Ct. 158, 162 (49 L. Ed. 363), the proper course in all such cases "is to search out and follow the true intent of the Legislature and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature."

It is not contended by the plaintiff in error, and it is obviously not true, that the Legislature of the state of Washington by the legislation in question undertook to require the safeguarding of all machinery and like appliances. What it did declare is that every person, firm, corporation, or association operating a factory, mill, or workshop where machinery is used shall, among other things, provide and maintain in use reasonable safeguards for such machinery as that which caused the injury of the plaintiff in error; and we are of the opinion that to say that the plant of the defendant in error is not embraced by the words "factory" or "mill," because not permanently located in a building, is an inadmissible limitation of the scope of the terms of the statute in view of its manifest purposes; and we think the doctrine of the opinion of the Supreme Court in the case of *Johnson v. Southern Pacific Co.*, supra, confirms this view. We see nothing in conflict with it in the fact that the act of March 6, 1905, as amended by that of 1907, contains many specific provisions applying to factories and mills located in permanent buildings, with many rooms and floors.

It results that the action of the court below in granting the motion for judgment notwithstanding the verdict was erroneous, and must be and hereby is reversed, with costs to the plaintiff in error, leaving the judgment entered upon the verdict in full force.

LEWIS v. BLOEDE et al.

(Circuit Court of Appeals, Fourth Circuit. November 7, 1912.)

No. 1,091.

1. TORTS (§ 12*)—RIGHT OF ACTION—WRONGFULLY PREVENTING CONTRACT.

The doctrine being well established that an action in tort will lie for a wrongful interference with the performance of an executory contract, the same principle will sustain an action for wrongfully preventing one from entering into a contract, where the evidence establishes with sufficient clearness that but for such interference, the contract would have been made.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 13; Dec. Dig. § 12.*]

2. APPEAL AND ERROR (§ 927*)—REVIEW—PRESUMPTIONS—DIRECTION OF VERDICT.

In passing on an exception to an instruction directing a verdict, the evidence is to be considered in the light most favorable to the party against whom the verdict is directed; and where there is a contradiction between witnesses in regard to a material question, it must be taken that the jury would have accepted the testimony of the witnesses for such party as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.*]

3. TORTS (§ 28*)—ACTION—SUFFICIENCY OF EVIDENCE.

Plaintiff and defendant submitted to the Bureau of Engraving and Printing competitive bids to furnish a certain kind of black for making ink under contract for a year, as called for by specifications. The ink maker of the bureau, on whom the committee in charge of the bids and the director relied as an expert, gave plaintiff's sample the highest rating, and reported that its price was the lowest, and the director stated publicly to plaintiff that it would be awarded the contract. Subsequently the ink maker addressed a letter to the director, stating that he had perfected an ink which was superior to that in use, such as was made from the black on which plaintiff bid, and recommending that all bids therefor be rejected, which was done. The ink maker had previously entered into a contract with defendant by which he was to receive \$25,000 for his process, to be paid from the proceeds of sales to the bureau. This product was covered by another item on which bids were made, and defendant's bid was accepted, and during the year it furnished 191,000 pounds thereunder at 45 cents per pound; plaintiff's bid on the item which was rejected being 29 cents. In an action by plaintiff against defendant for wrongfully and maliciously inducing the ink maker to deprive it of the contract, there was conflicting testimony as to whether the ink maker in fact originated the process by which the black furnished by defendant was made. It was also shown that defendant and the ink maker were subsequently indicted for conspiracy to defraud the United States on account of the transaction, pleaded guilty, and were fined. *Held* that, on such evidence, plaintiff was entitled to have the case submitted to the jury, and that the direction of a verdict for defendant was error.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 35-37; Dec. Dig. § 28.*]

4. TORTS (§ 12*)—"MALICIOUS."

The word "malicious," as characterizing the action of a defendant in interfering with the business or contract rights of a plaintiff, does not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

import personal ill will, but merely a wrongful purpose to injure, or to gain some advantage at plaintiff's expense.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 13; Dec. Dig. § 12.*

For other definitions, see Words and Phrases, vol. 5, p. 4307; vol. 8, p. 7714.]

In Error to the Circuit Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action at law by George B. Lewis, receiver of the Slingluff & Glacken Chemical Company, against Victor G. Bloede and the Victor G. Bloede Company of Baltimore City. Judgment for defendants, and plaintiff brings error. Reversed.

The facts disclosed by the record, material to the decision of the question presented upon plaintiff's bill of exception, are:

The Bureau of Engraving and Printing is a subdepartment of the Treasury Department of the United States, created by act of Congress. Act July 11, 1862, c. 142, 12 Stat. 532. For a number of years prior to 1901-02, the Department used large quantities of printing inks. These inks were made in the ink-making division, under the control of an officer known as the "chemist and ink maker." The Department made contracts annually for the materials required in its work, beginning on July 1st of each year. Pursuant to the law and rules of the Department, the Director caused specifications of the several kinds of ink, and other materials required, to be made, and, on February 1, 1901, advertised the same, inviting persons to submit bids or offers for furnishing inks and such supplies during the fiscal year. Among other specifications advertised, and for which bids were invited, were the following:

"5. Black No. 1. Pure Carbon Black. Must not contain more than 4½% ash, nor any admixture of carbon black. Must be exactly same in color, degree of fineness, and texture as specimen sent, and must coincide with specimen in chemical analysis and physical properties." In the specification it was estimated that 40,000 pounds would be required during the year, to be called for in requisitions of 10,000 pounds each.

"6. No. 2. Pure Calcined Black. Must be thoroughly calcined of a uniform sharp grain, free from all adulterations, such as barytes, etc., and exactly the same as specimens sent bidder in color and texture and physical properties." It was estimated that 75,000 pounds would be required during the year, to be called for in requisitions of 15,000 pounds each.

"7. Hard Black. Suitable for the finest plate work. No specimen will be sent bidder." It was estimated that 1,000 pounds would be required during the year, to be called for in requisitions of 500 pounds each.

"8. Soft Black. Suitable for finest plate work. No specimen will be sent bidder." Estimated quantity required during year 1,000 pounds, to be called for in requisitions of 250 pounds each. It was stated that: "It is contemplated to make requisition for not less than the estimated quantity for the year for each requisition stated in the schedule, except that it may be desirable to order larger quantities than stated in items 7 and 8, and correspondingly smaller quantities in items 5 and 6. But, as the requisitions of the Bureau will be subject to fluctuations that may not be accurately anticipated, the right is reserved to make requisitions as often as necessary and for any quantity, more or less, than stated, or to make no requisition in the year for any color that may not be needed."

This was an unusual statement, and had not theretofore been made in the specifications. Mr. Thomas, a witness for plaintiff, and clerk in the Bureau, describes the method pursued by the Bureau in receiving and dealing with bids made by persons proposing to furnish supplies. He says that they are all submitted in cipher; that is, in containers sent out by the Bureau, which are uniform. Each sample has a small tag having on it the item number,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with the cipher number adopted by the bidder. The samples in cipher are submitted to the several examiners for their reports; he giving the tag on the sample a number and preparing a new tag, with corresponding number. He detaches the original tag and replaces it with the new tag. All of the tags removed from the samples are placed in an envelope and kept intact until the day of the opening. All of the samples are promptly referred to the chemist in charge of the ink-making department of the Bureau, whose duty it is to test, or have them tested, and report the ratings to the Director in a ratio of 100 per cent, for the best sample. The tags containing the cipher number are removed from the samples, placed in an envelope, and kept intact until the day of the opening. At that time the envelopes containing the cipher words of the several bidders are disclosed. Up to that time no one in the Bureau is supposed to know the identity of any bidder, or the price. When all reports are in, the Director issues a circular to each bidder, inviting him to be present on a day named. On this day the envelopes are opened and the identity of the bidders disclosed. After the ratings are announced, the samples are turned over to a committee of three for the preparation of a report to the Director of the Bureau. This committee is made up from the employes of the Department. Edwin M. Van Dyck was, during the year 1900 and 1901, the chemist and ink maker in charge of the ink-making division. The Slingluff & Glacken Chemical Company, in response to the advertisement of February 1, 1901, submitted samples of "5 Black, No. 1, Pure Bone, Carbon Black," and "6, No. 2, Pure Calcin'd Black," together with prices. Defendant Victor G. Bloede Company also submitted samples and prices for the same specifications. Defendant corporation also submitted sample and bid for "7 Hard Black" and "8 Soft Black."

In accordance with the custom and rules of the Bureau, the bids being all in, and tests made, notice was given that, on May 7, 1901, all bids would be opened. Raymond M. Glacken, of the Slingluff & Glacken Chemical Company, was present on the day named. He testified, and it appears from the record that the examiner's report showed, that the samples submitted by the Slingluff & Glacken Chemical Company, for "5 Hard Black" was rated "100 Ash, 3.68%, price 29 cents per pound." This was the highest rating and the lowest price for this "Black." This report was signed and submitted by E. M. Van Dyck, examiner, and approved by J. P. Swan, chief of printing division.

Glacken testified: The Director, after the superior quality of No. 5 had been announced, decided and stated that the contract would be given to the Slingluff & Glacken Chemical Company, but he would reserve the right to call for a 100-pound sample. He stated publicly and confirmed it to me personally and privately afterwards. He announced publicly that the Slingluff & Glacken bid was the best bid and the price was the lowest, and he would reserve the right to ask for a 100-pound sample. Afterwards I walked up to the desk, just like I would go to speak to his honor here, and he confirmed the same thing, and said: 'You will receive a requisition for a 100-pound sample.' The sample for "5 Black" submitted by the Victor G. Bloede Company of "5 Black" was rated lower than that of the Slingluff & Glacken Chemical Company. Glacken testified that the Chemical Company was, at all times, prepared, ready, willing, and able to furnish the 100-pound sample, but was never called on for it; that he made several efforts to learn the reason why the sample was not called for, but failed; that the Chemical Company was equipped and able to furnish the quantity of "5 Black" required by the Bureau; that they had expended large sums of money in preparing for the manufacture of the ink. The price which they were to receive was 29 cents per pound; the cost of manufacturing was 14 cents per pound. The plaintiff company could have furnished, if called upon by the government, 190,000 pounds. No requisition was made for the 100-pound sample. Witness Glacken testified that he made two trips to the Director to inquire why the requisition was not made, but got no information. He also wrote to the Department two letters, but received no reply. He also testified that Charles Schon, representing the Bloede Company, was present when the bids were announced. After the announcement, he saw Mr. Schon

go to the telephone and ask for Bloede Company in Baltimore, and to be connected with Victor G. Bloede. He heard him say that the Slingluff & Glacken Company had submitted the lowest price and had a good sample on No. 5; that Bloede need not be worried; that he thought that they still had a good chance of getting their black through. Schon was Bloede's brother-in-law. The record of the Department was introduced, showing the report of the committee appointed to "classify and arrange proposals." In this report, immediately following a list of the bids for "Item 5, Black No. 5, Black 1," are the words: "All bids rejected. The article will not be required"—and for "Item 7 Hard Black": "Bidder—Victor G. Bloede Company—at 45 cents (sample B) accepted."

Plaintiff alleges in the fifth count of his declaration: "That the said Slingluff & Glacken Chemical Company in the year 1901 made a bid to furnish a certain commodity known as 'blacks' to the Treasury Department of the United States, and was about to have a contract awarded it under which it would, at great profit to itself, have furnished a great quantity, to wit, about 190,000 pounds of said 'blacks' to the said Treasury Department of the United States, when it was prevented from obtaining said contract by the exertions and influence of one Edwin M. Van Dyck, then an official of said Treasury Department known as 'chemist and ink maker.' And the said Van Dyck was induced to interfere and prevent the said Slingluff & Glacken Chemical Company from obtaining said contract by the malicious, unlawful, and corrupt conduct of the defendant, Victor G. Bloede, who unlawfully paid money to said Van Dyck to induce him to interfere and prevent the award of said contract to furnish said 'blacks' to the said Slingluff & Glacken Chemical Company. And the said Victor G. Bloede was the president of the defendant, the Victor G. Bloede Company of Baltimore City, and was acting as its agent and in its behalf, when he so maliciously and corruptly paid said money to said Van Dyck. That the said corrupt bargain and conspiracy between defendant Bloede and Van Dyck was concealed, and discovered only by reason of a criminal prosecution instituted against them by the government, during the year 1907."

There are several counts in the declaration, but the foregoing is the averment upon which, in the light of the testimony, and the ruling of the court below, plaintiff's cause of action is based. Defendants denied each and every of the material allegations. Evidence was introduced tending to show that complaint had been made, by the printers, of the Black No. 5, upon which the Slingluff & Glacken Chemical Company had put in the bid, and that the Department, or the officer in charge, had, prior to 1901, made efforts to get a satisfactory ink—one that would meet the requirement of the Department. Experiments had been made for that purpose.

Van Dyck testified that, with a view of getting up an ink that would meet the requirements, he was experimenting to produce a black equal, or superior, to the Eddy black, which was conceded to be the only satisfactory black which had come into the Bureau. These experiments were carried on during, and after, business hours. His superior officers had no knowledge of what he was doing. In the latter part of 1900, or the early part of 1901, he had succeeded in making a black ink which was pronounced, by those who tried it, superior to the Eddy black. It was so pronounced in the proving room. When he had accomplished this result, he corresponded with, or spoke to, Bloede, telling him that he had succeeded in producing a black superior to the Eddy black, and that he wanted to sell his product. A letter was introduced by defendant from defendant Bloede to Van Dyck, bearing date Feb. 19, 1901, replying to a letter from Van Dyck, in which he refers to a proposition submitted by Van Dyck for the sale of his discovery. Bloede, after discussing the financial aspect of the question, writes: "There are other objections, which have arisen upon full consideration, and that is the position the matter would put us in, in case we got the government contract, and any question should be raised. I cannot help but think that, in such case, the motives of the transaction would be questioned, and we would inevitably lose standing with the Department, unless direct permission were given by the powers that be for this special transaction. There never would

be any question on such work as you have been doing for us with the consent of Mr. Vanderlip, but I do not believe that the payment of \$25,000 would come within the scope of the matter as he understood it. Of course, this would apply equally, were the amount paid in one sum or installments; but if you were willing to put the matter before Mr. Vanderlip, and he made no objection, this would entirely remove objection to the deal on the grounds of policy or morals, whichever way one wants to put it, and we would be ready to deal with you fairly and justly, and to the full extent we think the business would warrant so far as the pecuniary interests are concerned."

To this letter Van Dyck replied, February 26, 1901: "From your letter, received this a. m., I am led to infer that you rather prefer to 'go it alone' on the whole matter of the black business. As you state, however, that you would be willing to 'treat with me' in the matter if I could get Mr. Vanderlip's full permission for the particular transaction, I have to-day seen Assistant Secretary (Mr.) Vanderlip and Secretary Gage (I could not go higher in my Department), and put the whole matter before them, with every possible contingency which might arise. I am very glad to state that Secretary Gage, in the presence of Mr. Vanderlip and myself, ruled that I had a perfect right to dispose of the 'products of my brain' (to quote Secretary Gage exactly) at any price which I might be able to secure, so long as I was not competing with the government or injuring its cause in any way, to which Secretary Vanderlip assented. Furthermore, they have given their pronounced desire to have those products used at the Bureau, if they are found to be equal to the test and can save money over the best. This is certainly a great encouragement for their ultimate use at the Bureau. I could not have asked for a more satisfactory interview, had I planned it. I stated that you were a possible customer, but no restrictions were placed on me as to customer or price. Now I have completely overcome one of your principal objections," etc. Van Dyck testified that what was stated in the letter took place between Mr. Vanderlip, Secretary Gage, and himself; that he had nothing to do with the "wording of the specifications"; that they were prepared by Mr. Sullivan, Assistant Director of the Bureau.

On March 14, 1901, Van Dyck entered into a contract with Bloede, reciting: "That whereas, Van Dyck, chemist for the Bureau of Engraving and Printing, had invented certain new and useful improvements for the production of what is known as hard and soft black for use in plate printing," etc., "and having received the permission of Hon. Lyman J. Gage, Secretary of the Treasury of the United States, who is the responsible head of said Bureau of Engraving and Printing, to dispose of said invention, is desirous of making such disposition to Victor G. Bloede of Baltimore City; and whereas, the said Bloede is desirous of securing said discoveries and inventions for his own exclusive use: * * * The said Edwin M. Van Dyck doth hereby sell, and the said Bloede doth hereby buy, said process for a consideration of twenty-five thousand dollars to be paid as hereinafter provided; one thousand dollars thereof being the consideration for the process of regulating the fineness of black, the said E. M. Van Dyck guaranteeing its efficiency, and twenty-four thousand dollars thereof being the consideration for the production of the said hard and soft blacks. For the consideration aforesaid, the said Van Dyck assigns and transfers his entire right and interest in and to said processes, and agrees to give to Victor G. Bloede all the knowledge, information, and details he possesses, or may hereafter acquire, with reference to the manufacture of the said blacks herein referred to, and to co-operate with the said Bloede for the production of the best possible results. * * * The method of payment of the agreed sum of twenty-five thousand dollars is to be as follows: Upon the signing of this agreement, and the delivery by said Van Dyck to the said Bloede of a full, accurate, and detailed description in writing of the processes and inventions covered by this agreement, the said Bloede shall pay to the said Van Dyck the sum of one thousand dollars. * * * Upon the approval by the said Bloede of the practicability of said processes and inventions for the manufacture of hard and soft blacks, the said Bloede agrees to immediately provide a practical plant for the further testing of the processes, as well as the production of the two grades of black

in such quantities as may be required to meet the commercial demands therefor. A full and accurate account of the cost of production of said special blacks, including therein interest on the actual value of said plants provided for their production, is to be kept by the said Bloede separate and distinct from his general business (said accounts are to be open to the inspection of the said Van Dyck at all reasonable times), and the net profits of the sales thereof, after deducting the cost of production as ascertained from said special account, shall be divided; two-thirds thereof being paid to the said Van Dyck and one-third to the said Bloede, the computations of profits and the division and payments thereof to be made quarterly." It was further provided that, when the profits had reached the aggregate sum of \$24,000, all further payments to Van Dyck should cease, and the processes and inventions should become the exclusive property of said Bloede. "Should, however, the said processes be found impracticable or commercially disadvantageous, it is agreed that the said Bloede may, at any time, discontinue the use thereof, and that, in such case, all liability on the part of said Bloede for any part of the said sum of \$24,000 then unpaid shall at once cease and terminate," etc.

On August 28, 1901, a "Supplemental Agreement" was entered into by the parties, whereby, in lieu of the division of the proceeds of the sale as provided in the first agreement, said Bloede agreed "to pay said E. M. Van Dyck the sum of ten cents per pound upon each and every pound of any of the black made by said process and sold at 45 cents per pound, the payment to said Van Dyck to be made as soon as any order for any of such black has been executed and the goods have been accepted and paid for by the customers." It was also provided that when the amount paid to Van Dyck, under said agreement, reached the sum of \$24,000, all further payments should cease, etc. Van Dyck testified that he received from Bloede, on account of said agreement, during the first year and nine months of its existence, on his part of the profits on the inks sold to the Department, the sum of \$24,000; that he received over \$1,000 a month from his contracts, while his salary was \$2,000 a year. He also testified that Mathew S. Hopkins had "absolutely nothing" to do with the preparation or experiments made in the preparation of the hard black for plate printing. He explained the process by which the experiments were made; that he had nothing to do with passing upon the samples of "Item No. 7." It was a complete black, it required no analysis. No. 7 was tested in the Printing and Engraving Department, of which Mr. Hill was chief, and not in the Chemist's Department. Attached to the record of the report made by the committee to the Department is a letter bearing date May 25, 1901, addressed to the Director, by Van Dyck, in the following words: "I have made up Hard Black No. 17 into a note ink, and have completed a very thorough practical press trial of same, and find it satisfactory in every particular, as report of superintendent in charge, herewith submitted, will show."

No. 17 is the same as Black No. 7. A letter in the same terms is attached signed by J. P. Swan, Chief of Printing Division, bearing date May 27, 1901. Other letters to the same effect are in the record, signed by the foreman of the press room and J. R. Hill, Chief of Engraving Division. There is also a letter in the record to the Director, bearing date May 27, 1901, in the following words: "Inasmuch as the so-called C. P. Black No. 1, now in use, has given considerable trouble during the last year in the working quality of the note and revenue inks, and also has certain properties which tend to make the notes printed with it less desirable than they should be, I respectfully recommend that all bids on this item be rejected, and that the blacks designated as 'Item #6, Black No. 2' and 'Item #7, Hard Black,' and 'Item No. 8, Soft Black,' be used during the year beginning July 1, 1901, in such proportions as may best subserve the interest of the Bureau." This was approved by W. M. Meredith, Director. Mr. Thomas further testified that the black was ordered from the contractor on the requisition of Van Dyck, the chief of the ink-making division; that he ordered, of No. 7, 191,351 pounds; that Van Dyck's official duties were preparing the inks used by the Bureau of Engraving and Printing for the printing of internal revenue stamps, national securities of all kinds, postage stamps, etc.

Mr. Steinbrenner, a member of the committee of three testified: "The committee relied on Mr. Van Dyck in everything in the chemical line in the ink-making division, he being a chemist, and we not being chemists, and he also being a practical ink maker, I understand, and we had to rely upon him for all reports and the awarding of the bids. The rejection of No. 5 depended upon Mr. Van Dyck's report to the committee. If there was not any report made, the committee would have to take the lowest bidder." Witness had been in the Bureau 17 years; had never known the report of the committee to be rejected by the Director.

Mr. Ferguson, Assistant Director of the Bureau, testified that he was clerk in charge of purchases and supplies, in the Bureau; that he had charge of preparing the specifications for the proposals; that he made up the copy for the printer, and ascertained what quantities it was estimated would be purchased; that he knew Van Dyck in 1901 as chemist and ink maker; he conferred with him about getting up these specifications, as well as with other chiefs of divisions about other kinds of material; he had no doubt he conferred with Van Dyck about the forms of specification of item 5 and item 7 in the specification of 1901; he does not particularly recall about this item; in the ordinary course he would rely upon what the ink maker wanted, always unless there was something unusual about it; that No. 5 had not been entirely satisfactory; when he came to draw his specification for 1901, No. 5 was still retained, but there was inserted No. 7 and No. 8, at the instigation of Mr. Sullivan to the best of his recollection; that he had no doubt consulted Mr. Van Dyck that year, but this particular change was made at the suggestion of Mr. Sullivan. The evidence showed that the No. 5 Black, upon which the Slingluff & Glacken Chemical Company made bid, was furnished, prior to 1901, by Bloede. It was of this black that complaint was made by the printers. Witness Roche testified that there had been considerable complaint against the ink in use then, and the union instructed the committee to go to the Treasury Department and lodge a complaint against the ink then in use, which they did, and had an interview with Mr. Vanderlip, Assistant Secretary of the Treasury. * * * Mr. Vanderlip ordered Mr. Morris to go out into the market and purchase an ink which would be satisfactory, and which would not cause a reduction in the salary of the plate printers. Several witnesses, who were connected with the Bureau, testified that they had no personal recollection of such complaints.

Defendant Bloede testified that he had been, since 1884, engaged in the manufacture of colors and chemicals; that, in consequence of conversations with Mr. Morris, who represented the Treasury Department, he undertook to have experiments made to produce a satisfactory black; that the No. 5 black was and had always been unsatisfactory. He gave a detailed account of his efforts and their connections with the Bureau; that during the years 1898 and 1899 continuous experiments were being made, with a view to bettering the product and discovering a better form of black to use; that these experiments cost the company \$20,000; that, during the course of these experiments, numerous samples were sent over to the Department, and tested by Mr. Van Dyck, and reported upon. He said: "Some time in the latter part of 1900, I think it was, possibly very early in 1901—I think, however, it was 1900—Mr. Van Dyck wrote to me that he would like to see me in Washington. I went over to Washington, and Mr. Van Dyck informed me that he had developed from these various carbons, that had been furnished him, by a treatment of his own, by reworking and regrounding, he had produced what he believed to be an ideal plate printing color. He then said he had spent a good deal of time and experimenting on the matter of the Eddy black, and the time he had spent had been most spent in his own time, and that he wanted to make some arrangement by which he would be compensated for the labor which he had put into this work. I called his attention then at once to the fact that it was very delicate ground; that I did not consider it well advised to take up the question of compensating him; that no matter how intimate the relations were then and how well he understood, and how well the Department understood, that the thing was absolutely fair and just, I felt that it would be an indiscreet thing to offer him any compensation

whatever for anything that he might have done. I told him that I would be willing to treat with him, however, of the whole matter. We were exceedingly friendly with the Secretary of the Treasury, and he was aware of everything that had been done in that line from beginning to end, especially Mr. Morris. * * * I told Mr. Van Dyck that I recognized the principle of the fact that he was an employé in the Department, and that that did not compensate him for the discovery of something that might prove very valuable. At the same time, with the confidential position that I occupied, I could not, under any circumstances, go into an arrangement of that kind with him, unless it should be with the full knowledge and consent of the Secretary of the Treasury. In other words, I suggested that the whole matter be laid before the Secretary of the Treasury. I then came home, and consulted my counsel on the subject, and told him just what I had done, and he approved it. He said it would not be a wise thing to do under any circumstances, unless Mr. Van Dyck can get that permission, but with that permission there was no earthly objection to my entering into this agreement with Mr. Van Dyck. As I understand it, the whole matter was laid before Secretary Gage." The witness says that he never discussed the matter with Secretary Gage—saw him afterwards and thanked him for giving permission to Van Dyck. The contract with Van Dyck was then signed. It cost less to make No. 7 than No. 5. Witness knew nothing of the preparation of the specifications of 1901 until they were exhibited. Absolutely nothing took place between Van Dyck and witness with a view of influencing his judgment in regard to the bids, etc., either before or after the bids were made or opened. They had no communication on the subject.

Plaintiff introduced M. S. Hopkins, who testified that he was a chemist; was in the employment of the Victor G. Bloede Company in 1900-01; that he was with the Bloede Company when they put in their bid for Hard Black No. 7 in 1901; witness identified Hard Black No. 7 by reading from the specifications for the fiscal year 1901-1902, and stated that he is thoroughly familiar with all the ingredients in it; that he devised the formula, and did pretty much all the work that was done on it; he does not regard it in the light of an invention, because he cannot take a patent on it; nor does he regard it as a discovery, because every ingredient in it was discovered years before; he compounded the black and ground the individual ingredients to a suitable state of fineness; he was the sole chemist employed with Bloede Company at that time; he compounded the black at Mr. Bloede's request. The witness gave a detailed account of his experimental work and its result, saying: "All the time that he had been experimenting with the black, the Bloede Company were having trials made in the Bureau of Engraving and Printing whenever they wanted them tried, and the Bureau gave a good report on it. Van Dyck tried them there. Witness says that he "devised this black"—that is, "I got up this black"—and that he was told what the specifications would be before they were sent out; "that they were going to specify for a black that could be used without admixture; * * * then we changed our match we had for the Wick's black. * * * The Bureau, at that time, was buying the Eddy black, and mixing a black that they got from the Wick's Company which they called the soft black. They were mixing these two before we had the contract, and using it. So we were told that they would use just one black, so we would mix them over here, and that when the specifications came out they would be so worded that that mixture would fill the bill and get the contract. * * * We sent a sample over and had it tested by Mr. Van Dyck out of the same lot that was sent over to him to see whether it was exactly what he expected it to be. This was before we put in the bid." That Van Dyck did not do any chemical work upon the sample that was sent with the Bloede bid for No. 7; that he added some ingredients, etc. Mr. Bloede contradicted this witness in almost every material part of his testimony.

Plaintiff introduced transcript of record from the Supreme Court of the District of Columbia, showing a bill of indictment found January 6, 1908, against E. M. Van Dyck and Victor G. Bloede for violation of the provision of section 5440, Revised Statutes, charging, in the second and third counts, a

conspiracy between said defendants to defraud the United States, in that E. M. Van Dyck, being a chemist and ink maker in the Bureau known as Engraving and Printing, conspired with defendant Bloede to defraud the United States by the means set out in full in the bill of indictment, and being the same matters and things hereinbefore recited. The record shows that defendants, after entering pleas of not guilty, subsequently withdrew said plea, and entered a plea of guilty to the second and third counts. The defendant Van Dyck was adjudged to pay a fine of \$10,000, and defendant Bloede a fine of \$5,000. Both of said fines were paid.

Both defendants testified that said plea was entered upon the assurance on the part of the District Attorney that their offense was a technical violation of the law involving no moral wrong. At the conclusion of the evidence defendants requested the court to instruct the jury: "That under the pleadings and evidence there is no legally sufficient evidence to show that the Slingluff & Glacken Chemical Company lost any contract, as claimed in the pleadings, by reason of any wrongful, malicious, or unlawful act of the defendants, or either of them, and their verdict shall be for the defendants." The prayer was given as requested, and verdict entered in accordance therewith. Plaintiff duly excepted, and sued out this writ of error.

T Rowland Slingluff and Fielder C. Slingluff, both of Baltimore, Md. (William S. Bryan, Jr., of Baltimore, Md., on the brief), for plaintiff in error.

Robert Biggs and Edgar H. Gans, both of Baltimore, Md., for defendants in error.

Before GOFF and PRITCHARD, Circuit Judges, and CONNOR, District Judge.

CONNOR, District Judge (after stating the facts as above). [1] The learned judge below having overruled a demurrer to the declaration, it must be taken, for the purpose of disposing of the plaintiff's exception, that a cause of action is stated—that is, a wrongful, unlawful invasion of a legal right, resulting in damage. In the light of the testimony and the statement made by the judge, it must be further taken that the plaintiff's right to recover rests upon the sufficiency of the evidence to sustain the fifth count in the declaration. Eliminating all immaterial verbiage, and reducing the pleading to its simplest form, the allegation, in this count, comes to this: The government, acting through one of its agencies, asked for bids or proposals to furnish certain materials described in the specifications, subject to certain provisions and conditions. Pursuant to this request, the Slingluff & Glacken Chemical Company, defendant Bloede Company, and others submitted proposals to furnish such material, accompanied by sample and price. Pursuant to the method prescribed by the government's officers, the Chemical Company's proposal was considered, in connection with others, and upon such consideration the Chemical Company was "about to have a contract awarded to it under which it would, at great profit to itself, have furnished a great quantity of said material"; that it was prevented from having—that is, making—such contract by reason of the malicious, unlawful, and corrupt conduct of the defendants, whereby the said company sustained great damage, etc. The recognition, by the courts, both in England and in this country, of the right of action to the party injured by reason of the malicious and wrongful interference by third persons with contract rights, is well

settled. The principle is clearly stated by Justice Brewer in *Angle v. Chicago, St. Paul, etc., Ry. Co.*, 151 U. S. 1, 13, 14 Sup. Ct. 240, 245 (38 L. Ed. 55), wherein he says:

"It has been repeatedly held that, if one maliciously interfere in a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can maintain an action against the wrongdoer."

This is but a recognition and application of the principle:

"That whenever a man does an act which, in law and in fact, is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce such an injury, an action on the case will lie."

The principle has been applied to a wrongful, malicious interference with an existing contract in *Lumley v. Gye*, 2 El. & Bl. 216, *Bowen v. Hall*, 6 Q. B. D. 333, and other cases cited in the plaintiff's brief. In *Quinn v. Leatham*, A. C. 495 (1901), Lord Macnaghten says:

"Speaking for myself, I have no hesitation in saying that I think that the decision (*Lumley v. Gye*) was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of a legal right, committed knowingly, is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference."

Mr. Justice Hughes, in *Miles Med. Co. v. Park*, 220 U. S. 373, 394, 31 Sup. Ct. 376, 379 (55 L. Ed. 502), recognizes it as "established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties and induces one of them to break that contract to the injury of the other"—citing *Bitterman v. L. & Nashville R. R.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; *Walker v. Cronin*, 107 Mass. 555; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Jones v. Stanly*, 76 N. C. 355. In *Knickerbocker Ice Co. v. Gardiner*, 107 Md. 556, 69 Atl. 405, 16 L. R. A. (N. S.) 746, the question is discussed by Boyd, C. J., and the authorities carefully reviewed.

It having been settled that an action, as for a tort, would lie for a malicious—that is wrongful—interference with the performance of an executory contract, the question naturally arose whether the principle extended to a case in which a third party, with like motive and without lawful excuse, by his interference prevented one from entering into, or making, a contract. The answer to this question is dependent upon the answer to another, which lies at the threshold of the inquiry: Does the right to enter into or make a contract come within the definition of a legal right, the wrongful interference with which is actionable? It is difficult to say, in many cases, at what stage of a negotiation the condition has arisen when it can be said that two persons would, but for the interference of a third party, have entered into contract relations. If A. make a definite proposal to B. to enter into a contract, the character, terms, etc., of which are sufficiently definite to be capable of acceptance, and, while B. is negotiating, or after he has determined to accept the proposal, C. maliciously interferes and prevents the acceptance on the part of B., or procures a withdrawal of the proposi-

tion by A., by reason whereof loss is sustained, can it be said that the party who is injured by such interference has sustained no legal wrong, and that by reason thereof has sustained no injury—that is, loss? Is there not in such case *damnum et injuria*, which constitute the elements of an actionable wrong? Assuming, *pro hac vice*, that the facts averred in plaintiff's declaration are true, is it not clear that the Chemical Company, being prepared to comply with the terms of the government's proposal to buy the ink, which was the subject-matter of the proposal, and, accepting the invitation of the government to bid for the contract, by furnishing the sample and stating the price, it secured, over other bidders, a status in the negotiation which, but for defendant's interference, would have resulted in its making the contract by the performance of which it would have made a profit, why did it not have a status, the unlawful interference with which by defendants was a wrong for which he is entitled to a remedy? It is true that the right is more difficult to establish—requiring another link in the process of proof—than where the contract has been entered into. When the parties have entered into a contract, the terms of which are fixed, the plaintiff is only required to show the malicious interference and the damage proximately resulting; whereas, if the ground of complaint is that he was about to make a contract, he is required to go further and show that he was not only "about to," but would, but for the malicious interference of defendants, have entered into the contract, etc. While there are but few adjudged cases throwing light upon the subject, we are not without authority to sustain the ruling of the court below in overruling the demurrer. In *Am. & Eng. Enc.*, vol. 16, page 1114, it is said that:

"According to some authorities, an actionable interference with contract relations is not confined to cases where the contract is binding and valid. It is actionable likewise to maliciously induce the termination of a contract, terminable at will, or to prevent the formation of contracts which, in the natural course and but for such interference, would have been formed."

For this statement of the law the author cites *Walker v. Cronin*, *supra*. In that case the declaration alleged that defendant did unlawfully, etc., molest and hinder the plaintiffs from carrying on their business of manufacture and sale of shoes—willfully persuaded a large number of persons who were in the employment of plaintiffs, and others, who were about to enter into their employment, to abandon, etc. It may be suggested that the question presented here did not necessarily arise because the declaration was good without reference to it. The language of Wells, J., however, indicates that he was making no such distinction. After citing authorities, he says:

"In all these cases, the damage for which the recovery is had is, not the loss of the value of actual contracts by reason of their nonfulfillment, but the loss of advantages either of property or personal benefit, which, but for such interference, the plaintiff would have been able to obtain or enjoy."

The language of the judge in *Templeton v. Russell*, 1 Q. B. 728, clearly indicates that the right of action accrues to the injured party, not only for maliciously "inducing persons to break contracts already

entered into, * * * but for inducing persons not to enter into contracts with the plaintiff"—the reason given being:

"That there was the same wrongful intent in both cases; wrongful, because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff, and so injure the plaintiff, it is actionable, but where he injures the plaintiff, by maliciously preventing a person from entering into a contract which he would otherwise have entered into, it is not actionable."

A careful examination of the facts and of the opinion of Mr. Justice Brewer in *Angle v. Chicago, St. Paul, etc., Ry.*, supra, discloses a number of elements found in this record. Without undertaking to set the facts out in full, they are substantially as follows: A corporation, called in the opinion the Portage Company, had procured a legislative grant for valuable lands, in consideration of its undertaking to construct a railroad. A contract was made with, and was in process of performance by, Angle for the construction of the road. A rival corporation, called in the opinion the Omaha Company, by bribery and other corrupt means, persuaded the Legislature of Wisconsin to repeal the act granting the lands to the Portage Company and grant them to itself, thereby preventing the Portage Company from carrying out its contract with Angle, and thereby inflicting heavy loss upon him. The learned justice says:

"That this was a wrongful interference on the part of the Omaha Company, and that it resulted directly in loss to the contractor and the Portage Company, is apparent. It is not an answer to say that there was no certainty that the contractor would have completed his contract, and so earned these lands for the Portage Company. If such a defense were tolerated, it would always be an answer, in case of any wrongful interference with the performance of a contract, for there is always a lack of certainty. It is enough that there should be, as there was here, a reasonable assurance, considering all the surroundings, that the contract would be performed in the manner and within the time stipulated, and so performed as to secure the land to the company. It certainly does not lie in the mouth of a wrongdoer, in the face of such probabilities as attend this case, to say that perhaps the contract would not have been completed, even if no interference had been had, and that therefore, there being no certainty of the loss, there is no liability."

To the suggestion that the Legislature of Wisconsin had the right and power to revoke the grant, and that, as between it and the Portage Company, it must be conclusively presumed that the Legislature was justified in doing so, that the question of the reason which prompted it to do so was not open to the Portage Company, etc., Judge Brewer says:

"Assuredly it does not lie in the power of the wrongdoer, the party whose wrongs created that condition which induced the legislative forfeiture, to excuse its wrongs on the ground that the Legislature had the power to forfeit, and might have done it any way."

The learned justice cites the cases of *Benton v. Pratt*, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623, and *Rice v. Manley*, 66 N. Y. 85, 23 Am. Rep. 30, stating briefly the facts, and saying:

"The point was made that the plaintiff could not recover because there was no binding contract between him and the third parties, but the point was overruled."

After citing other authorities, he says:

"The same line of thought applies to the case before us. While it cannot be affirmed with certainty that the Legislature would not have passed the act of forfeiture, yet it is reasonable to presume that it would not, and that its act was induced by the situation of the Portgage Company, which situation was brought about by the wrongful acts of the Omaha Company."

Assuming that to maliciously prevent the making of a contract is within the same principle, in respect to the remedy, as the interference with the performance of a contract, very much that is said in the Angle Case has a substantial bearing upon the case before us.

[2] In passing upon an exception to an instruction directing a verdict, the evidence is to be considered in the light most favorable to the plaintiff, and, where there is contradiction between witnesses in regard to a material question, it must be taken that the jury would have accepted the testimony of plaintiff's witnesses as true. In other words, a request by the defendant for an instruction directing a verdict is to be tested by the same rules as a demurrer to the evidence. *Parks v. Ross*, 11 How. 362, 13 L. Ed. 730; *Oscanyan v. Arms Co.*, 103 U. S. 264, 26 L. Ed. 539. We must, therefore, in passing upon the instruction given, take the testimony in the light most favorable to plaintiff, with all such inferences as a jury might reasonably have drawn therefrom.

[3] Considered from this viewpoint, we have this case: Competitive bids were made by the Chemical Company and the defendant Bloede Company to furnish "5 Black No. 1" as described in the specifications. Van Dyck, the ink maker, gave to the Chemical Company's sample the highest rating and reported that the price fixed was the lowest. This report was made to, and accepted by, the Director of the Bureau, with the public statement that the contract would be given to the Chemical Company, with the right reserved to call for a hundred pound sample. This is the uncontradicted testimony. The Chemical Company was ready, willing, and able to comply with this requirement, and to furnish the sample and such guaranty of the ink as might be called for in accordance with its bid. It is testified, without contradiction, that the committee of three appointed "to classify and arrange proposals" was composed of persons who were not chemists, and relied on Van Dyck for all reports in awarding the bids. The rejection of a bid depended upon Van Dyck, and if no report was made the committee "would have to take the lowest bidder." Steinbrenner, a member of the committee, says:

"The committee relied on Mr. Van Dyck for everything in the chemical line in the ink-making division, he being a chemist, and we not being chemists, and he also being a practical ink maker, I understand, and we had to rely upon him for all reports and the awarding of the bids. * * * Have never known the report of the committee to be rejected by the Director of the Bureau."

This witness had been in the Bureau 17 years. The bids were opened May 7, 1901. The committee of three were duly appointed, and, on May 25, 1901, Van Dyck writes to the Director, saying:

"I have made up a Hard Black No. 17 into a note ink, and have completed a very thorough practical press trial, and find it satisfactory in every particular," etc.

On May 27, 1901, he writes:

"Inasmuch as the so-called C. P. Black No. 1 now in use has given considerable trouble during the last year in the working quality of the note and revenue inks, and also has certain properties which tend to make the notes printed with it less desirable than they should be, I respectfully recommend that all bids on this item be rejected, and that the blacks designated as 'Item #6, No. 2,' and 'Item 7, Hard Black' and 'No. 8, Soft Black,' be used during the year beginning July 1, 1901, in such proportion as may best subserve the interest of the Bureau."

These two letters are attached to the report of the committee of three, and "C. P. Black No. 1," for which the Chemical Company had made its bid, and upon which Van Dyck had reported in its favor, and upon which report the Director had stated it would receive the contract, was rejected, and it was stated "the article will not be required"; and, by the same report, "No. 7, Hard Black, Bidder Victor G. Bloede Company, at 45 cents (sample B) accepted." It was also in evidence, uncontradicted, that the approval by the Secretary of the Treasury of the report of the committee of three was a matter of form—that it followed as a matter of course. The first essential step in the proof required that plaintiff should show, or, for the present purpose, introduce, evidence from which, if believed by the jury, it might reasonably be inferred that it was about to make the contract, and would have done so but for the interference of Van Dyck. Does not this undisputed evidence justify the inference that there was a reasonable assurance, considering all the surroundings, that a contract would have been made by the government with the Chemical Company for furnishing the ink—or black—but for the letters of Van Dyck? This was, at least, a question for the jury.

[4] Conceding that the jury may have so found, the plaintiff must go forward with his proof, and show—that is, produce evidence from which the inference might reasonably be drawn—that the interference by Van Dyck was malicious, and that defendant Bloede was a party to, or by corrupt means procured, such interference. It will be well to keep in mind the fact that the word "malicious," used in this connection, does not import personal ill will towards the Chemical Company. If the interference be with the design of injuring the plaintiff, or gaining some advantage at its expense, it is maliciously done. The testimony relating to the conduct of Van Dyck and of Bloede, in connection with the origin and discovery, or invention, of the process for making of "Hard Black 7," is interesting and somewhat contradictory. It seems that the Bloede Company had, for several years, furnished "5 Black No. 1," and that it had proven "unsatisfactory." Whether this was because of the quality of the black furnished by the Bloede Company, or because of some inherent defect in the ink, does not

clearly appear. There is evidence, coming from Van Dyck and Bloede, that experiments had been made, at the request of the Assistant Secretary of the Treasury, by Van Dyck, for the purpose of producing an ink or black to meet the complaints made by the printers of "5 Black No. 1." The evidence in regard to the making up of the specifications for 1901 is contradictory. Van Dyck says that he had nothing to do with it. Ferguson, who made up the specifications, says that he conferred with Van Dyck about getting up these specifications, as well as with other chiefs of division about other kinds of material; that he had no doubt that he conferred with Van Dyck about the forms of specifications of item 5 and item 7 in the specification of 1901—he does not particularly recall about this item; that it was made up at the instigation of Mr. Sullivan, etc. He leaves the question in some confusion.

In view of the fact that the theory upon which plaintiff's case is based, that a conspiracy or agreement existed between Van Dyck and Bloede to prevent the use by the Bureau of No. 5 Black, and supplant it with No. 7 Hard Black, every act of the parties in connection with, or bearing upon, the result which was finally brought about, becomes material. The form of specification was unusual—had not been used before—and while, by itself, of no special significance, when taken in connection with the series of acts and transactions which followed, might very naturally make an impression on the minds of a jury, if they should find that Van Dyck had knowledge of and suggested the language used. The significance of the language of the specification, in view of the fact that it had never been used before, is heightened, if the jury should accept Hopkins' statement that he was told what the specifications would be before they were sent out:

"That they were going to specify for a black that could be used without admixture; * * * that they would use just one black, so we would mix them over here, and when the specifications came out they would be so worded that our mixture would fill the bill and get the contract."

This is denied by Bloede, but its truth was a question for the jury. No sample of No. 7 Hard Black, was sent out with the specification.

In regard to the making of "7 Hard Black," the testimony of Van Dyck and Bloede appears to be, in many material respects, contradictory. Their theory is: That, at the request of the Secretary of the Treasury, Van Dyck made experiments, and that Bloede was, at the same time, carrying on a system of experiments in connection with the Bureau. These experiments resulted in the discovery, or invention, by Van Dyck of an ink which found its way into the specifications for 1901 as "7 Hard Black," etc. That, upon completing the process, Van Dyck wrote a letter to Bloede which is not in evidence. That, in reply to that letter, Bloede wrote Van Dyck February 19, 1901. From this letter it is manifest that negotiations had theretofore been had between the parties and that there was "a difference in their views." The question of "policy or morals" was raised by Bloede, with the suggestion that Van Dyck procure the consent of Mr. Vanderlip to the proposed transaction. On February 20, 1901, Van Dyck writes Bloede:

"I am very glad to state that Secretary Gage, in the presence of Mr. Vanderlip, and myself, ruled that I had a perfect right to dispose of the 'products of my brains' (to quote Secretary Gage exactly) at any price which I might be able to secure, so long as I was not competing with the government or injuring its cause in any way," etc.

This correspondence resulted in the contract of March 14, 1901, by which Van Dyck was to receive \$25,000 for his process—\$1,000 of which was to be paid in cash and the balance in two-thirds of the net proceeds of the sale, until the full amount was paid. It will be noted that, in this contract, the following provision was made:

"Should, however, the said process be found impracticable or commercially disadvantageous, it is agreed that the said Bloede may, at any time, discontinue the use thereof, and that, in such case, all liability on the part of Bloede for any part of said sum of twenty-four thousand dollars, then unpaid, shall at once cease and terminate."

Taking the testimony of Van Dyck and Bloede as true, this contract is very far removed from the permission given by Secretary Gage to "sell the products of his brain," etc. What other construction can be put upon this transaction than that, from and after March 14, 1901, Van Dyck, the chemist and ink maker in the employment of the government, with the duty imposed upon him described by the witnesses, was vitally interested to the extent of \$24,000 in having the bids for "5 Black" rejected and "7 Hard Black" accepted—the latter to displace the former? Does not this testimony justify a reasonable inference by a jury that, after having given to the sample of the Chemical Company the highest rating and reported its bid, the lowest price (unknown to him that the sample and bid were those of the Chemical Company), the success of his enterprise, or making the process "commercially advantageous," was dependent upon having "5 Black" rejected and "7 Hard Black" accepted? Is it not a fair inference that this condition explains Van Dyck's motive for writing the letters of May 25 and May 27, 1901, which brought about the "desired result"?

There is, however, another version of this transaction by a disinterested witness. The theory of defendants is that Van Dyck had discovered a new and valuable process, known only to himself, worth, if commercially advantageous, \$25,000 to the bidder for the contract. Hopkins testifies that, while in the employment of the Bloede Company, as its chemist, he was directed to make experiments upon "blacks" for the purpose of meeting the wishes of the Bureau; that he "devised the formula"; that he, with knowledge of what would be called for, "delivered the formula, and did pretty much all the work that was done on it; that Van Dyck did absolutely none of the chemical work upon the sample that was sent him with the Bloede bid for No. 7." The testimony of this witness is contradicted by Bloede and Van Dyck. If, however, the jury should accept it as true, the entire transaction assumes a different aspect from that presented by defendants. Van Dyck had nothing to sell. Knowing that the Black No. 5 made and furnished to the government by Bloede had "proven unsatisfactory," and that it

was desired that some other ink be used, Van Dyck proceeds to have a specification made in advance. This is given Bloede's chemist, with instruction to experiment on it. The result is accomplished by the chemist. It is desirable to attribute the discovery to Van Dyck, to interest him in securing its adoption in place of No. 5, and for his service to pay him \$25,000, provided it proves commercially advantageous. The desired result is brought about by the "interference of Van Dyck." "No. 5," notwithstanding it has the highest rating and is offered at 29 cents per pound, is "rejected," and "No. 7," which costs less to make, is "accepted" at 45 cents per pound, and Van Dyck, under a contract with Bloede, differing only from the contract of March 14, 1901, in method of payment, receives \$25,000. This is plaintiff's theory, which he claims is sustained by the evidence. We express no opinion, nor make any intimation in regard to the weight of the conflicting evidence. That was a question for the jury. They may have accepted Hopkins' testimony as true. If Hopkins' testimony is true, Van Dyck had no "product of his brain" to sell. The agreement on the part of Bloede to pay him \$25,000 could have had no other consideration than that he should use his official power to secure the contract for "No. 7, Hard Black." After "No. 5" had, by a competitive bid, secured a status from which, in the light of surrounding circumstances and conditions, a reasonable inference may be drawn that, but for the interference of Van Dyck, induced by the promise of Bloede to pay him \$24,000 for doing so, a contract would have been made by the government with the Chemical Company. Van Dyck practically instructed the committee of three to reject No. 5.

We concur with counsel that the plea of guilty to the indictment, entered by defendants, was not an admission that they were engaged in a conspiracy to injure the Chemical Company. The plea was an admission that, in securing the contract for No. 7, Hard Black, Van Dyck was not acting in good faith and with the purpose of serving the government, but that his real purpose was to defraud—that is, make a profit out of, and at the expense of—the government, and that Bloede was a party to such scheme. The value to be attached to the explanation of the reason for entering the plea is lowered by more than one pregnant fact and circumstance. The record shows that they were represented by counsel. If this explanation, etc., is rejected by the jury, the admission of record, that they were engaged in a conspiracy to defraud the government, and that its success was concealed until discovered after eight years' investigation by the agents of the secret service of the government, it might very well have impressed their minds and caused them to hesitate in accepting defendants' version of the transaction as it affected the Chemical Company. Notwithstanding their contention that they were only seeking to promote the interest of the government in a plan by which the article of the highest rating at the lowest bid was rejected, and the process of defendants was accepted, to the great profit of Van Dyck and Bloede, the jury might well find that the real motive of Van Dyck, in writing

the letter of May 27, 1911, was to injure the Chemical Company and to make a profit for himself; and this, the law declares, was a malicious, unlawful, and wrongful interference with a right of the Chemical Company. We are not inadvertent to the principle, sustained and illustrated by numerous cases, that fair competition in trade, although resulting in loss to the injured party, does not give a right of action. It is equally well settled that, if unlawful methods are resorted to, and the motive to injure be shown, it is an actionable wrong. It will hardly be contended that the means charged to accomplish the wrong, prompted by the motive charged, brings the conduct of defendants within the domain of fair competition for trade.

Defendants earnestly insist that, if all of this be conceded, yet the instruction was correct, because the Chemical Company had no property interest, or legal right, to demand of the government that, after submitting its bid and sample securing the rating, it make a contract for the ink. *Colorado Paving Co. v. Murphy*, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630, is cited. There the appellee, the lowest bidder for certain paving material, sought to enjoin the board of public works from giving the contract to a higher bidder. The bill charged a conspiracy, etc. The court properly held that it could grant no relief, because the plaintiff had acquired no legal right to demand that the contract be awarded to it, which a court of equity would enforce. The principle involved here is clearly distinguishable. The gravamen of this action is that defendants, by a malicious interference, deprived the Chemical Company of the opportunity to enter into a contract under the conditions shown by the evidence. As we have seen, the authorities uniformly hold that, when the action is for malicious interference with a contract, the guilty party will not be heard to say that the contract interfered with was invalid and not enforceable. The question in such case is: Does the evidence tend to show that "in the natural course, and but for such interference, the contract would have been formed"? The basis of the action is "for maliciously preventing a person from entering into a contract which he would otherwise have entered into." Adapting the language of Judge Brewer to the testimony in this case, it is no answer to plaintiff's complaint to say that there was no certainty that the contract would have been made. If such a defense were tolerated, it would always be an answer, in case of any wrongful interference with the making of a contract, for there is always a lack of certainty. It is enough to show that there is a reasonable assurance, considering all the circumstances, that a contract would have been made. It is, of course, conceded that the plaintiff must show, not only *damnum*, but also *injuria*. To show the former without the latter is *damnum absque injuria*, and therefore not a remediable wrong.

The defendants contend, and the learned judge concurred with them, that the evidence failed to show that, if the defendants had not interfered, the Chemical Company would have received the contract, and that the evidence in that respect was uncontradicted.

If, however, the evidence would have reasonably sustained an inference or conclusion to the contrary, or if, in the language of the courts in numerous cases, fair-minded men of intelligence may have drawn different conclusions from the evidence, the question was for the jury, and not for the court. In such cases, the jury are entitled, not only to weigh the testimony, but to draw reasonable inferences from it. With deference to the learned judge, we think that such was the state of the case upon all of the evidence. It is true that in certain phases the evidence was of such character as to leave the question open to debate, and reasonably calculated to sustain a conclusion favorable to defendants' view; but this is not the standard by which the power of the court to direct a verdict is measured. The persons in charge of the Bureau had not determined to reject "5 Black No. 1," nor to adopt "7 Hard Black" for 1901-02, although they had the same information in regard to the merits of each at the time the specifications were made as at the time Van Dyck wrote the letter to the "committee of three." It will be noted, also, that, in estimating the requisition for "5 No. 1, Hard Black," the amount was put at 75,000 pounds, whereas, for "7 Hard Black," only 1,000 pounds would be required. This certainly falls far short of showing a prior determination to "reject all bids" for "5 Hard Black." It is hardly consistent with fair business methods to attribute to the officers in charge of Bureau a purpose, when the specifications were drawn, to trifle with the bidders for "5 Hard Black." That it had not given satisfaction may be conceded, and that, if "7 Hard Black" was found to meet the difficulty, it is probable that this would have supplanted the other. It is significant that, after the specifications were drawn in the usual form, the language relied upon by defendants to defeat the action, was added. If this entire transaction from "start to finish" is open, fair, and free from moral wrong, then many of the badges to the contrary are of no import.

If the jury should find for plaintiff, it may be conceded that it will be difficult to fix the amount of the loss sustained by the Chemical Company; but that it did sustain loss reasonably follows from the undisputed testimony. We express no opinion in regard to the measure of damages which should guide the jury. The question is not free from difficulty. We have discussed the evidence, as we are required to do upon this record, from the same point of view that the court below did in directing a verdict, and are brought to the conclusion that the plaintiff was entitled to have his case passed upon by the jury. This will be certified to the court below.

Reversed.

MITSUI et al. v. ST. PAUL FIRE & MARINE INS. CO. †

(Circuit Court of Appeals, Ninth Circuit. January 13, 1913.)

No. 2,085.

1. APPEAL AND ERROR (§ 181*)—NECESSITY OF OBJECTIONS AND EXCEPTIONS.

Where no objections or exceptions have been saved as shown by the bill of exceptions, no errors of law occurring at the trial can be reviewed on appeal, but only such questions as arise on the record, and which it is not the office of a bill of exceptions to present.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1141-1151, 1157, 1158, 1160; Dec. Dig. § 181.*]

2. APPEAL AND ERROR (§ 544*)—RULINGS ON PLEADINGS—ERRORS OF RECORD.

Action of the court in overruling or sustaining a demurrer to the complaint is a matter which appears by the record, and need not be presented by a bill of exceptions in order to authorize a review thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2428, 2449; Dec. Dig. § 544.*]

3. APPEAL AND ERROR (§ 725*)—ASSIGNMENTS OF ERROR—SUFFICIENCY—RULINGS ON PLEADINGS.

An assignment that the court erred in overruling defendant's demurrer to the second amended complaint sufficiently pointed out the error complained of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3002-3005; Dec. Dig. § 725.*]

4. PLEADING (§ 222*)—OVERRULING DEMURRER—LEAVE TO ANSWER.

On the overruling of defendant's demurrer to the complaint, defendant is authorized by district court rule 15 to answer without leave.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 570-574; Dec. Dig. § 222.*]

5. PLEADING (§ 418*)—DEMURRER—WAIVER—ANSWER.

Defendant does not waive a demurrer to the complaint for want of facts by answering over.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.*]

6. SHIPPING (§ 145*)—FREIGHT—MATURITY.

In general, freight is not due and payable until delivery of the goods to the consignee at the port of destination or acceptance of the cargo at an intermediate port by the owner.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 502-505; Dec. Dig. § 145.*]

7. SHIPPING (§ 146*)—FOREIGN TRANSPORTATION CONTRACT—CONSTRUCTION.

Defendants shipped cotton by rail from Oklahoma to be carried by steamer from Tacoma or Seattle to Japan, the bills of lading providing that the cotton was to be carried to port (A) Tacoma, Wash., and thence by steamship Tosca or steamer or steamers of the above companies to the port of (B) Kobe (or so near thereto as she or they may safely get), and to be delivered as consigned on payment of the freight thereon at the rate of \$1.35 per hundred pounds from Oklahoma City to Kobe, with all other charges, advanced charges, and average, and without any allowance or credit or discounts, freight, and advanced charges payable at the carrier's option, in advance, in cash, or immediately on discharge of the property at the port (B) Kobe in its equivalent in local currency, at bank demand rate of exchange on New York. The cotton arrived safely at Seattle, where it was transhipped by the G. Steamship Company, which prepaid the inland freight. The steamer stranded en route, and the cotton

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

† Rehearing denied March 3, 1913.

was totally lost. Prior to the prepayment of the inland freight, plaintiff insured the steamship company against partial or total loss, covering all inland freight and advanced charges, and after the loss paid the steamship company the marine loss, including the inland charges prepaid, whereupon the steamship company assigned to plaintiff all claims it possessed against defendants, and plaintiff brought suit to recover the inland freight so advanced. *Held*, that such contract was entire, and not divisible as between the inland and ocean freight, and hence, the cotton never having been delivered at destination, defendants were not liable for the inland freight.

[Ed. Note.—For other case, see Shipping, Cent. Dig. § 508; Dec. Dig. § 146.*]

Ross, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of California; Wm. C. Van Fleet, Judge.

Suit by the St. Paul Fire & Marine Insurance Company against Hachiroyemon Mitsui and others, doing business under the name of Mitsui & Co., sometimes known as Mitsui Bussan Kaisha. Judgment for plaintiff, and defendants bring error. Reversed.

Harrington, Bigham & Englar, of New York City (Howard S. Harrington, of New York City, of counsel, and Oscar R. Houston, of New York City, on the brief), for plaintiffs in error.

F. R. Wall, of San Francisco, Cal., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This is an action to recover for freight advanced by the assignor of the plaintiff for carriage and transportation of certain cotton from points in Oklahoma and Indian Territory to Tacoma and Seattle, Wash. The complaint contains 38 counts, and is based upon 19 different shipments of cotton from points in Oklahoma and Indian Territory to Kobe and Yokohama, Japan. The cotton was carried on railroad lines from points of shipment to Tacoma and Seattle, thence by steamer to the Orient. Bills of lading accompanied each shipment, whereby the consigned property was to be carried to Tacoma, Wash., thence by steamer to the port in the Orient designated. Under the proofs, it was shown that it was optional with the carrier whether to ship to Tacoma or Seattle, Wash., and thence by steamer to Japan. The freight charge on the consignments was \$1.35 per 100 pounds from point of shipment to port of destination. In the present instance the cotton was transhipped by the Great Northern Steamship Company on the steamship Dakota from Seattle. The steamship company, as had been its custom, prepaid the inland freight; that is, the freight from the point of shipment to Tacoma or Seattle. While en route to destination and in Tokio Bay, Japan, the Dakota stranded, and the cotton on board was totally lost. Prior to the prepayment of the inland freight, the defendant in error (plaintiff in the trial court) insured the Great Northern Steamship Company against partial or total loss by perils of the sea, including stranding of any and all inland freight and advance

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

charges paid by the steamship company. Later the defendant in error paid the steamship company the marine loss sustained by reason of loss of freight, including the inland charges prepaid, and thereupon the steamship company assigned and set over to the defendant in error all claims and causes of action it possessed against plaintiffs in error. Copies of the bills of lading and of the policy of insurance are attached to and made a part of the complaint. A demurrer was interposed to the second amended complaint, being the one last filed, on the ground that it does not state facts sufficient to constitute a cause of action, which was overruled. The issues being formulated, the cause was tried by the court, a jury being waived, resulting in a judgment for the defendant in error. From this judgment a writ of error is prosecuted.

The defendant in error has filed a motion to dismiss the writ, assigning several reasons, chief among which is that the bill of exceptions presents no ruling of the court made in the progress of the trial, and there are no special findings of fact.

[1] From an inspection of the bill of exceptions it is at once manifest that no objections or exceptions were saved, and hence no questions of law arising at the trial can now be presented to or considered by this court. But this is no obstacle to the court's considering such questions as may arise upon the record and which it is not the office of the bill of exceptions to present.

[2] The action of the court in overruling or sustaining a demurrer to the complaint is a matter which appears by the record, and no bill of exceptions is necessary for saving the questions pertaining thereto for the consideration of the appellate court. Whenever error is apparent upon the record, it is open to revision, whether it be made to appear by bill of exceptions or in any other manner. *Suydam v. Williamson et al.*, 20 How. 427, 15 L. Ed. 978. And it was specifically held in *Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42, that, irrespective of the bill of exceptions, the writ of error brings up for review the decision of the court below in overruling a demurrer. See, also, *Young v. Martin*, 8 Wall. 354, 357, 19 L. Ed. 418.

Assignment of error No. 1, namely, that the court erred in overruling the defendants' demurrer to the second amended complaint, is specifically objected to on the ground that it does not point out the particular error asserted or intended to be urged; that the record does not show leave of the court to answer over; that the demurrer was waived by answering; that no exceptions to the ruling on the demurrer appear; and that the questions involved were subsequently submitted to the court in the progress of the trial. These may be answered seriatim.

[3-5] The form of the assignment would seem to be ample, as it points out the error relied upon. It was not necessary that defendant obtain leave of court to answer. Rule 15 of the trial court permits that without special leave. Nor was the demurrer waived by answering over. In *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415, a demurrer was interposed to the complaint on the ground that it did not state facts sufficient to constitute a cause of

action. This was overruled with leave to answer, and answer was accordingly filed. As to the question involved here the court says:

"The error, if it be an error, of overruling the demurrer could have been reviewed on motion in arrest of judgment, and is open to review upon this writ of error. When the declaration fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial, without losing the right to have the judgment upon the verdict reviewed for the error in overruling the demurrer. The error is not waived by answer, nor is it cured by verdict. The question, therefore, whether the complaint in this case states facts sufficient to constitute a cause of action, is open for consideration."

The second objection is also not well taken. No exceptions are required to be saved to the ruling of the court on demurrer. The record shows the error if one is committed, and that is reviewable without further formality in saving the questions pertaining thereto for presentation in the appellate court. That the questions pertaining to the demurrer were further considered at the trial did not deprive the plaintiffs in error of their writ of error upon the record, whether they have a regular and formal bill of exceptions or not.

This answers also the objections to assignments Nos. 2, 3, and 4, which assignments are all that are now insisted upon. As to the merits of the controversy, it is plain that for want of a sufficient bill of exceptions the only question that can now be considered is whether the second amended complaint states facts sufficient to entitle the plaintiff to recover. The question presented is stated by counsel for plaintiffs in error as follows:

"Are the bills of lading involved indivisible contracts upon which freight is earned only on delivery of the goods at ultimate destination, or are they divisible into two parts, the land portion and the water portion, so that the inland freight is payable by the shipper on termination of the land carriage?"

It arises upon demurrer, as the complaint sets forth the bills of lading by copy, and turns upon the proper construction of such bills of lading.

[6] As a general rule, freight is not due and payable until delivery of the goods to the consignee. 6 Cyc. 493. As is said in *The Ann D. Richardson*, Fed. Cas. No. 410:

"The delivery of the cargo at the port of destination is considered a condition precedent to the right to freight, and without that the acceptance of the cargo at an intermediate place, by the owner of it, is necessary to enable the shipowner to maintain a claim to full, or pro rata freight."

See, also, *Burn Line v. United States & A. S. S. Co.*, 162 Fed. 298, 89 C. C. A. 278; *The Tornado*, 108 U. S. 342, 349, 2 Sup. Ct. 746, 27 L. Ed. 747; *Hunter v. Prinsep*, 10 East, 378, 394, cited and quoted from in the last-mentioned case.

[7] It is alleged by the complaint in effect that Mitsui & Co. shipped the cotton by rail from points of original shipment to be carried to Kobe or Yokohama in Japan under and in accordance with certain bills of lading, and that, in accordance with the terms of said bills of lading or contracts of affreightment, said Great Northern Steamship Company on or about the 17th day of February, 1907, paid as

inland or advance freight charges for the said transportation and carriage to Tacoma or Seattle, which has not been repaid. The contracts of affreightment, as shown by "Exhibit A" attached to the complaint, in so far as they provide for transportation of the cotton and touching the freight to be paid therefor, stipulate as follows:

"To be carried to the port of (A) Tacoma, Wash., and thence by S. S. Tosca or steamer or steamers of the above companies to the port of (B) Kobe (or so near thereunto as she or they may safely get) with liberty to call at any port or ports in or out of the customary route (in any order), and to be there delivered, as above consigned, or to his or their assigns upon payment of the freight thereon, at the rate of \$1.35 cents from Oklahoma City to Kobe, payable as above in United States gold currency, per one hundred pounds gross weight, with all other charges, advanced charges and average, without any allowance or credit or discounts; freight and advanced charges payable at carrier's option, in advance, in cash, or immediately on discharge of the property at the port of (B) Kobe in its equivalent in local currency, at bank demand rate of exchange on New York."

There is no suggestion that the carriers exercised or declared their option that freight and advance charges should be paid in advance.

That the inland freight was paid by the steamship company is not questioned, and we are to determine by what right, obligation, or authority it paid such freight and what obligation Mitsui & Co. are under to reimburse the steamship company. The strong contention of defendant in error is that the contracts of affreightment are divisible as to freight and the time of payment thereof, and the theory rests upon the fact that they contain two parts by designation, namely, 1 and 2; part 1 relating to the delivery of the cotton at port (A) and part 2 to the delivery at port (B) and upon certain provisions contained in paragraphs 2, 3, 11, and 12. The provisions as set out in the briefs read:

"2. No carrier is bound to carry by any particular train or vessel. Every carrier shall have the right, in case of necessity, to forward said property by any railroad or route between the point of shipment and the point to which the rate is given.

"3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route."

"11. No carrier shall be liable for delay nor in any other respect than as warehousemen, while the cotton awaits further conveyance; and in case the whole or any part of the cotton be prevented from going from said port in the first steamer of the ocean lines above-stated, leaving after the arrival of such cotton at said port, the carrier then in possession is at liberty to forward said cotton by succeeding steamers of said line, or if deemed necessary, by any other steamer.

"12. This contract is executed and accomplished and all liability terminates on the delivery of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien, due and payable by the steamship company."

The contracts are tripartite in form and purpose; that is, they are contracts in which the relations, duties, and obligations of three parties are set out and defined, namely, the connecting railroad lines, the Great Northern Steamship Company and Mitsui & Co. The contract for carriage itself is to be performed by the railroad companies

and the steamship company, they to carry from point of receipt of the cotton to port (A) namely, Tacoma or Seattle, thence by steamer to port (B) which is Kobe or Yokohama in Japan, all for the rate and sum of \$1.35 per 100 pounds, one undivided consideration or lump sum to be paid by the shippers, the property to be delivered at the latter ports to the consignee or assigns on payment of the freight thereon. The stipulations as to this we have set forth more fully heretofore. Then it is further agreed that the service to be performed shall be subject to the conditions, whether printed or written on the face or back of the contract. The division of the contract as to freight is effected, if at all, by the conditions printed on the back thereof. Part 1 of these conditions provides that "with respect to the service until delivery at the port of (A) Tacoma, Wash., first above mentioned, it is agreed," etc., followed by twelve paragraphs, included among which are 2, 3, 11, and 12 above noted.

Part 2 reads:

"With respect to the service after delivery at the port of (A) Tacoma, Wash., first above mentioned and until delivery at the port (B) second above mentioned, it is agreed," etc.

Then follow 19 paragraphs. The carriers, through their agents, signed the bill of lading "severally, and not jointly."

By a reading of the contract it will be seen that part 1 relates almost exclusively to stipulations between the shippers and the connecting lines of railroad carrying to Tacoma, and not beyond. The 12 paragraphs thereof relate to and define the rights and duties as between the shippers and connecting railroad lines carrying to Tacoma, with the one notable exception provided by the last clause of paragraph 12 that "the inland freight charges shall be a first lien, due and payable by the steamship company." This clause, of course, was assented to by the shippers, but it is clearly not an express stipulation on their part to pay the freight charges when the railroad lines deliver the property to the steamship company, or upon the steamship pier, for such company. It is a direct stipulation, however, on the part of the steamship company to pay the freight, that is, what is denominated the inland freight, at that time to the railroad lines. Part 2 relates almost wholly to matters of concern between the shippers and the steamship company. A number of stipulations contained in part 1 are repeated in substance in part 2, where applicable. Thus, for instance, clause 8 in part 2 provides for the manner of ascertaining the amount of claim for loss if any shall have been sustained. The same thing is provided for in clause 3 of part 1. This indicates a purpose of holding separate the stipulations of the inland carriers with the shippers from those of the ocean carrier; hence the shippers' agreement with the former is in a manner distinct from that with the latter. There is, however, in part 2 no reference whatever to the freight charges, or to the time or conditions of payment thereof, except as contained in paragraph 3. This provides, among other things, that the carrier shall have a lien on all goods for all freight,

primages, etc., and that if, on the sale of the goods at destination, the proceeds fail to cover freights and charges, the carrier shall be entitled to recover the difference from the shippers. This would seem to be indicative of an intendment that freight should be payable at destination. So it would appear that the dividing of the contract into parts 1 and 2 was but natural and analytical in the course of drafting, so that the shippers would be found to be dealing with the inland carriers and the ocean carriers separately, in so far as they could do so appropriately, and the mere fact of such division is not persuasive of a purpose to make the inland freight payable by the shippers to the railroad lines when the property is delivered to the steamship company while in transit to destination.

Nor do we think that the stipulations contained in paragraphs 2, 3, and 11 of part 1 indicate an intendment that such freight should be paid by the shippers or consignees at any time prior to the time of the delivery of the property at destination. The contention as to these is cogently and sufficiently answered by the opinion of the court in the case of *British & Foreign Marine Ins. Co. v. Southern Pac. Co.*, 72 Fed. 285, 288, 18 C. C. A. 561. Indeed that case, being so nearly parallel, is authoritative here. The court says:

"It is urged that since the bills of lading provide for successive transportations by successive carriers, with a provision that the liability of each carrier for loss or damage of the goods shall cease on his delivery of the cotton to the next carrier, each separate transportation should be treated as a separate voyage. But the contract is a single one for the entire transportation from the port of original loading to the port of ultimate destination. The carrier who received the goods agreed with the shipper, directly for himself and as agent for the two other carriers, that they would transport the cotton the entire distance for a stipulated freight, to be paid upon delivery at destination. The shipper sought carriage for his goods, not to New Orleans, nor to New York, but to Europe; and when three carriers, having formed a combination for the entire carriage, take his goods under a contract by the terms of which the entire compensation for that carriage is made dependent upon delivery at final destination, there is no reason why a court should alter those terms."

This leaves but one other clause for consideration, namely, paragraph 12 of part 2. As to this it is urged that since the shippers are parties to the contract they constituted the steamship company their agent to pay the inland freight, and thereby became bound when the steamship company so paid such freight to repay it to such company, and thus that there was an assent to a division of the freight and an obligation to pay accordingly. In this we cannot concur. The case of *The Hibernian*, 10 Asp. Mar. Cases, 501, is strongly relied upon in support of the view, but it seems not to be properly understood. In that case a part of the goods was lost en route. When the remainder arrived at destination, the consignee sought their delivery without paying the freight on the goods lost. The contract was drafted in two parts as the one in suit. The first set of conditions as denominated by the court contained a clause 12 identical with clause 12 in the present contract. As to this clause, after quoting it, Lord Alverstone, C. J., says: "This condition, in my judgment, has only

an indirect bearing upon the question we have to decide"—which was whether the carrier was entitled to freight upon the lost goods. The contract contained another clause, however, being 17, making the property covered by the bill of lading "subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at times of shipment and to all local rules and regulations at ports of loading and destination not expressly provided for by the clauses herein." Thus the regular forms of the bill of lading of the steamship company were also made a part of the contract. These forms provided, among other things, as follows:

"When the goods are carried at a through rate of freight, the inland proportion thereof together with the other charges of every kind (if any) are due on delivery of the goods to the ocean steamship, and the shipowner or his agent shall have a first lien on the goods in whole and in part until payment thereof."

While it was held that this clause last quoted was a counterpart of clause 12, and gave the ship a lien upon the property for advance freight charges paid, it was further held, based upon the idea that the ship thus acquired a lien upon the property, that the ship was entitled to enforce that lien upon the part of the goods carried to destination for the freight upon the goods lost as well as upon those not lost. Nothing beyond this was decided by the learned court. It is not authority for the contention that the shipper became bound to pay the accumulated freight when the property was delivered by the inland lines to the steamship company, and Moulton, L. J., was in great doubt whether the shipowner had a lien on the goods not lost for freight on goods lost as claimed.

The only reasonable interpretation of clause 12 is simply what it says, namely, that the inland charges shall be a first lien due and payable by the steamship company. The lien is in favor of the railway lines and for their protection. But, under the usages of connecting lines and steamship companies, the succeeding carrier pays the freight to those from whom the property being carried is received, and hence it is stipulated here that freight of the preceding railway lines shall be due and payable by the steamship company. This is in strict accord with the principal contract providing that the property shall be delivered at destination to the consignee on payment of freight. Any other view would be to cast a clause into the contract not found there.

We conclude, therefore, that the shippers were not bound to the payment of the inland freight when the cotton in transit was delivered to the steamship company at Seattle for further carriage to the Orient, nor did the shippers become bound to the payment of such freight to the steamship company upon its payment to the railway lines, although such company acquired a lien on the property for such freight paid. The property being lost, however, the lien was also lost, and the steamship company was without right of action against the shippers for the freight charges. The insurance company, the defendant in error, is in no better position than the steamship company; hence was not entitled to recover. Besides, British & Foreign Marine Ins. Co. v.

Southern Pacific Co., *supra*, the case of Scow No. 190, etc. (D. C.) 88 Fed. 320, supports this conclusion and is instructive.

The judgment of the Circuit Court will be reversed and remanded, with directions to dismiss the action.

ROSS, Circuit Judge (dissenting). I am unable to agree to the judgment in this case. As I read the bills of lading under which the cotton was shipped, they were several, and not joint, contracts. The whole frame of the instruments in my opinion shows this to be true; but, as if to make assurance doubly sure, the respective carriers by their agent expressly recited in the bills of lading, agreed to and accepted by the shipper that they were "severally, and not jointly," executed. And all of their stipulations were expressly made binding upon the shipper, among which were the provisions of the twelfth subdivision of the first of the two parts into which the instruments were divided, which reads:

"12. This contract is executed and accomplished and all liability terminates on the delivery of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien, due and payable by the steamship company."

Upon such delivery the railroad companies became entitled to the inland freight, and for its payment the steamship company became liable by virtue of its express contract contained in the clause just quoted, and for which the shipper was manifestly liable in the event the steamship company did not pay, for the debt was the debt of the shipper. But the steamship company did pay the inland freight, and that, of course, ended the shipper's liability therefor, and gave the steamship company the right of recovery against the shipper for such advance, to which right the appellee insurance company is justly entitled to be subrogated.

"The general doctrine," said the Supreme Court in *Myrick v. Michigan Central R. R. Co.*, 107 U. S. 102, 107, 1 Sup. Ct. 425, 429 (27 L. Ed. 325), "as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: That each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence." As will be seen from the provisions of the bills of lading in the present case, so far from there being anything to indicate any obligation or liability on the part of the railroad companies for any part of the water transportation involved, it was expressly stipulated that their obligation ended with the delivery of the property to the steamship company.

Nor do I see, in view of the express stipulations of the bills of lading to which reference has been made, that the fact that a through freight rate was therein fixed is of any importance. It was of no in-

terest to the shipper what portion of such rate was to go to the inland transportation companies and what portion to the steamship company. In a case somewhat similar to the present, *Cincinnati, N. O. & T. P. Ry. Co. v. N. K. Fairbanks & Co.*, 90 Fed. 467, 470, 33 C. C. A. 611, 615, Judge (now Mr. Justice) Lurton said:

"In this day of advanced methods in the carriage of goods, very little significance can be attached to the mere giving of a through rate for a shipment necessarily passing over the line of more than one carrier. The presumption is rather that it undertook to contract for itself and the connecting carrier, severally and not jointly."

In the present case there is no need to rely upon any such presumption, for the agreement between the shipper, the inland carriers, and the steamship company was clearly expressed.

In my opinion the judgment should be affirmed,

UNITED STATES v. HIAWASSEE LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. December 21, 1912.)

No. 1,102.

1. VENDOR AND PURCHASER (§ 231*)—DEEDS—VALIDITY OF REGISTRATION—NORTH CAROLINA STATUTES—NECESSITY OF PROBATE.

The North Carolina statute requires deeds executed before a commissioner outside of the state to be probated before a judge or clerk of court within the county where the property is situated before they are eligible for registration. Laws N. C. 1885, c. 147, § 1, known as the Connor Act, provides that "no conveyance of land * * * shall be valid to pass any property as against creditors or purchasers for a valuable consideration from the donor * * * but from the registration thereof within the county where the land lieth," with a proviso that the act shall not apply to deeds already executed until January, 1886, and a further proviso that no purchase from any such donor shall pass title as against an unregistered deed executed prior to December 1, 1885, when the person claiming under such deed shall be in possession, or when the purchaser shall have actual or constructive notice of the prior unregistered deed at the time of the purchase. *Held* that, under such statutes, as construed by the Supreme Court of the state, the registration of a deed executed outside of the state without having it probated as required by the act of 1868 was without authority and ineffective for any purpose; that, under the later act, such a deed previously executed and so registered, unless probated and registered prior to January 1, 1886, took effect to pass the legal title only from the date of such lawful registration, and was invalid as against a conveyance made and registered in the meantime under a decree of court against the grantor which left in him no title to pass thereunder.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 487, 513-539; Dec. Dig. § 231.*]

2. VENDOR AND PURCHASER (§ 244*)—BONA FIDE PURCHASER—ACTUAL NOTICE OF PRIOR CONVEYANCE.

Evidence considered, and *held* not sufficient to charge a purchaser of land at judicial sale with actual notice of a prior deed not legally registered.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 609-611; Dec. Dig. § 244.*]

3. JUDGMENT (§ 497*)—COLLATERAL ATTACK—JURISDICTION—EFFECT OF RECITALS.

Recitals in the decree of a court of general jurisdiction that summons was duly executed on the defendant, and that lands which were the subject of the suit were described in an exhibit attached to the complaint, which is referred to for such descriptions, import verity, and are sufficient as against collateral attack to show that the court had jurisdiction over the defendant and that lands sold under the decree were those involved in the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.*]

4. ACKNOWLEDGMENT (§ 47*)—PROBATE OF DEED—CURATIVE STATUTE—CONSTRUCTION.

Laws N. C. 1869-70, c. 32, providing that "the probate of all deeds * * * required to be registered, heretofore taken under laws existing prior to the adoption of the Code of Civil Procedure, is hereby declared to be valid to all intents and purposes and shall be admitted to registration as if the probate had been taken under existing laws," has no application to deeds which were registered without having been probated at all.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 235-240; Dec. Dig. § 47.*]

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville; Jas. E. Boyd, Judge.

Action at law by the United States against the Hiawassee Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

This was an action of ejectment, brought by the United States against the Hiawassee Lumber Company, in the District Court of the United States for the Western District of North Carolina, to recover 5,000 acres of land embraced in grant No. 3,110, situate in Clay county, N. C., as set out in the complaint. The plaintiff alleges its ownership of the land, and that the defendant is in the unlawful possession of the land and unlawfully withholds same from the plaintiff, to its damage in the sum of \$1,000.

The defendant in its answer denies the ownership of plaintiff of the land, and says that "it [the defendant] is in possession of tract No. 6,687, by virtue of grant No. 2,984, which tract is lapped in part by the land claimed by plaintiff, as plaintiff contends its tract is located, but defendant denies that plaintiff's tract can be located at all; and defendant denies that its possession of said land is wrongful, but avers that such possession is lawful and right under bona fide title superior to any title in or claimed by plaintiff." It also admits that it is a corporation, and sets up by way of affirmative relief that it is the owner in fee simple of tract No. 6,687, grant No. 2,984, is in possession of same, and that plaintiff claims some estate or interest in the land adverse to defendant, which is without foundation in fact or law, and is injurious to defendant's title and possession.

In the trial of the case in the court below the plaintiff introduced the following evidence:

(a) Grant No. 3,110, to E. B. Olmstead, dated November 10, 1867, registered in Cherokee county November 9, 1868, in Book K, page 561; and the certificate of survey attached to the grant, purporting to show a survey of tract No. 4,500 on February 20, 1854, by J. B. Baker, C. S. (county surveyor), and Thos. Holland and J. C. Huskins, chain bearers (C. B.)

(b) A deed from E. B. Olmstead et ux. to Levi Stevens, dated February 7, 1868, purporting to be registered in Clay county February 23, 1869, in Book A, page 329, and registered in Clay county May 20, 1896, in Book H, page 61, conveying said tract of land.

(c) A deed from Levi Stevens et ux. to the United States of America, dated March 15, 1869, purporting to be registered in Cherokee county August 4, 1871, registered in Clay county May 20-22, 1896, in Book H, page 67, conveying said 5,000-acre tract, and certain other tracts not relating to any lands embraced in this action, but which are situate now in Graham county.

(d) Sixteen grants, issued to E. B. Olmstead, each for 640 acres, dated November 10, 1867, namely:

Grant.	Entry.	Grant.	Entry.
3008	6681	3009	6682
3010	6683	3011	6684
3012	6685	3013	6686
2984	6687	2982	6656
2998	6671	3000	6673
2970	6557	2965	6550
2999	6672	3001	6674
3002	6675	2963	6541

—including the certificate of survey attached to each grant, the entries having been made on May 16, 1859, which were surveyed on May 31 and June 1, 1859. It was admitted that the descriptions in these grants embrace the lands described on the map as indicated by the entry numbers and grants marked and described thereon.

(e) A map made by the surveyors, Shearer and Hayes, showing tract No. 4,500 in *red* lines and the 16 tracts in *black* lines. Defendant claims the lands embraced in the black lines, under the said grants, and which came to them after the grants were issued, as follows:

(f) Deed from K. Elias, Commissioner, to A. Rosenthal, dated October 28, 1882, registered in Clay county October 17, 1890, in Book F, page 282. It conveys about 90 different grants, situate in the counties of Cherokee, Macon, Swain, and Jackson, which are severally described by metes and bounds, including Nos. 3,008, 3,009, 3,010, 3,011, 3,012, 3,013, 2,984, 2,982, 2,963, 3,002, 3,001, 2,999, 2,965, 2,970, 3,000, and 2,998, but does not include grant No. 3,110 for tract No. 4,500. This deed recites that it was made "by virtue of the decree of the superior court of Macon county, rendered at spring term, 1882, appointing, authorizing, and empowering K. Elias, commissioner, to make sale of the lands hereinafter mentioned and described; and whereas, by virtue of the authority and power vested in me, as commissioner aforesaid, I did sell and make a report thereof at the superior court of said county at its fall term, 1882, which report was in all things confirmed, at which time a further and final decree was made by the court authorizing and directing me, as commissioner aforesaid, to execute and deliver a deed of conveyance to A. Rosenthal, the purchaser."

As foundation for this deed, defendant introduced a record from the superior court of Macon county, N. C., certified by W. N. Allman, clerk, and under the seal of the court, dated October 25, 1882, in a case entitled "G. W. Swepson v. E. B. Olmstead," showing complaint; decree at spring term, 1882, signed by H. A. Gilliam, Judge, reciting that "a writ of summons has been duly executed on defendant and no defense was made to this action," and it is "ordered, adjudged, and decreed that the plaintiff have and recover of the defendant the lands mentioned in his complaint and marked 'Exhibit A,' amounting to 89,532 acres"; that defendant is trustee of plaintiff, and holds said land as trustee for plaintiff's benefit, and it is ordered that same be sold, and out of the proceeds of sale the sum of \$500 is to be paid to defendant, then pay costs, and pay the residue to the plaintiff, and the lands conveyed to the purchaser; and K. Elias is appointed commissioner to make the sale, conveyance, and payment. A report is made to the court at the fall term, 1882, showing a sale of the lands mentioned in the decree to A. Rosenthal for \$40,000, that he is ready to pay it into court upon confirmation of the sale, and that he has paid the \$500 to the defendant Olmstead. At the fall term, 1882, final decree is made by his honor, James E. Shepherd, Judge, confirming the sale in all things, and ordering the commissioner to make deed to Rosenthal upon payment of the residue of the money due the plaintiff.

(g) A deed from E. B. Olmstead et ux. to A. Rosenthal, dated October 31, 1882, registered in Clay county November 12, 1906, in Book M, page 337, quitclaiming all interest in all the lands set out in said deed from Elias, commissioner, to Rosenthal.

(h) A deed from A. Rosenthal et ux. to J. H. McAden, in trust for the heirs and devisees of Rufus Y. McAden, dated May 21, 1889, registered in Clay county May 21, 1906, in Book M, page 114, conveying all the lands embraced in the deed from Elias, commissioner, to Rosenthal, and from Olmstead and wife to Rosenthal.

(i) Certified copy of the last will and testament of George W. Swepson, devising all of his property to his wife, Virginia B. Swepson, dated July 14, 1882.

(j) Certified copy of a special proceeding in the superior court of Alamance county, entitled "In the Matter of the Petition of Mrs. Virginia B. Swepson, Executrix, and Sole Devisee and Legatee of George W. Swepson, Dec'd." A petition is sworn to by Mrs. Swepson on August 21, 1884, wherein, among other things, it is set out that the testator died indebted in the sum of about \$400,000; that he devised all of his estate to petitioner and appointed her sole executrix of his will; that his personal estate amounted to about \$6,000 and has been applied, as far as realized on, to costs of administration; that his equitable and legal real estate is situate in ten (designated) counties, and is set out in an attached inventory; that the will contains no power to sell—and asks for an order to sell so much of the real estate as may be necessary to pay his debts, with costs and charges of administration. An order is made by the clerk on August 21, 1884, finding the facts set out in the petition and adjudging it necessary to sell the whole of testator's lands to enable her to pay his debts, and authorizing and empowering her to sell the lands publicly or privately, for cash or on credit, and make report. Report was filed by her September 9, 1885, showing that, after due advertisement according to law, she sold the lands at public sale at the courthouse door in Graham, Alamance county, on September 7, 1885, half purchase money in 6 months, balance in 12 months, within interest, to various persons, among them: "Lot 53 to R. Y. McAden for \$1,000.00; lots 8 to 53, inclusive, are incumbered with a mortgage of over \$225,000.00, including interest." Decree, dated June 16, 1886, confirms the sale of September 7, 1885, and orders deeds to be made to the various parties, etc., and to this is attached an exhibit showing that "lot No. 53" contains, among others, the 16 grants under which defendants claim.

(k) Deed from Virginia B. Swepson, executrix, devisee, and commissioner, to R. Y. McAden, dated May 11, 1888, registered in Clay county June 28, 1888, in Book F, page 130.

(l) Will of R. Y. McAden, dated April 9, 1889, devising these lands to J. H. McAden, trustee, with power of sale, etc.

(m) Deed from Henry M. McAden et al., children and devisees of R. Y. McAden to S. E. Cover and others, dated February, 1905, registered in Clay county November 3, 1906.

(n) Deed from S. E. Cover and others to defendant, dated May 17, 1906, registered in Clay county July 8, 1909, in Book P, page 221.

It is admitted that these conveyances cover the lands set out in the boundary claimed by the plaintiff, but by other tract numbers and grant numbers, and described by metes and bounds and the numbers set out in the K. Elias deed.

(o) Defendants also introduced state grant No. 2,328 to G. W. Bristol, dated December 20, 1860, for entry No. 2,302, registered in Clay county June 12, 1862, containing 790 acres, and grant No. 2,325 to George Bristol, dated December 20, 1860, registered in Clay county June 26, 1862, and mesne conveyances bringing title into W. C. Walsh, all of record in Clay county, which is admitted to be located as shown on the map.

At the close of the evidence the defendant asked the court to direct a verdict in its favor upon the issues, which motion was granted. To the granting of this motion plaintiff excepted, and judgment was entered accordingly. The plaintiff sued out a writ of error, upon which the case comes to this court.

A. E. Holton, U. S. Atty., of Winston-Salem, N. C., and Stephen W. Williams, Sp. Asst. U. S. Atty., of Washington, D. C. (A. L. Coble, Asst. U. S. Atty., of Statesville, N. C., on the briefs), for the United States.

James H. Merrimon, of Asheville, N. C., and Marshall W. Bell, of Murphy, N. C., for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). In the determination of the questions involved in this controversy, the plaintiff in error will be referred to as the plaintiff and the defendant in error as the defendant, inasmuch as the parties sustain the same relation in this court that they did in the court below.

It is contended by the defendant that grant No. 3,110, which embraces the 5,000 acres involved in this controversy, is invalid on account of certain irregularities as respects the entry, survey, etc. It was admitted in the court below that the 16 grants, under which the defendant claims, embrace the lands sought to be recovered. We have carefully considered this point, and are of the opinion that it is immaterial as to whether the 5,000-acre grant, made to Olmstead, under which the government originally claimed, was valid or not, inasmuch as it is admitted that the grants made to Olmstead, and upon which the defendant relies, embrace this 5,000-acre tract, and as it appears that at the time Olmstead conveyed the land in dispute to Stevens he had acquired title thereto under the 16 grants to which we have heretofore referred.

The questions at issue in this controversy are within a narrow compass, and in order that we may fully understand the vital points it should be borne in mind that Olmstead, the common source through whom the plaintiff and the defendant both claim title, in 1868 made a deed to Levi Stevens which the plaintiff insists embraces the land in controversy. The execution of this deed was acknowledged before John S. Hollingshead, of Washington, D. C., commissioner of deeds for the state of North Carolina, February 7, 1868. The deed from Stevens to the United States was acknowledged before Charles Chauncey, of Pennsylvania, commissioner of deeds for the state of North Carolina, March 15, 1869. The Olmstead deed was first registered in Clay county February 23, 1869, but it does not appear that it was properly probated and ordered to be registered. The same deed was re-registered in the same county on May 20, 1896. The deed from Stevens to the United States was registered in Cherokee county August 4, 1871, but it does not appear that this deed was properly probated and ordered to be registered. This deed was re-registered in this county May 14, 1896.

As shown by the statement of facts, the defendant bases its claim of title upon a deed made by K. Elias, commissioner, to A. Rosenthal, pursuant to a proceeding instituted at the Spring term, 1882, of the superior court of Macon county by George W. Swepson against E. B. Olmstead, in which it was alleged that on the 1st day of October,

1867, the plaintiff was seized of the equitable title to the lands described in Exhibit A, attached to and made a part of the complaint, and that at that time the legal title was in the state of North Carolina; that the plaintiff had paid the state of North Carolina the purchase money for the same, and that the defendant had contracted with the plaintiff for all of said lands, amounting to 85,000 acres, and that the plaintiff had assigned his equitable title to the defendant to enable him to obtain the grant in his (defendant's name), with the express and distinct understanding that the defendant was to reconvey to the plaintiff such portion of the land for which he did not pay. The plaintiff prayed that the defendant be declared a trustee of said lands for the benefit of plaintiff, and that a commissioner be appointed to sell the same, and out of the proceeds of such sale the defendant be paid the sum of \$500 due him by the plaintiff, and the costs of the action.

The case was heard upon the complaint, proofs, and exhibits, and the jury returned a verdict in favor of the plaintiff, and a sale of the lands was decreed, and K. Elias was appointed commissioner to make such sale. Accordingly a sale of the lands was had, and A. Rosenthal became the purchaser of the same in the sum of \$40,000. The commissioner reported the sale, that the amount had been paid, and his report was confirmed, and, in pursuance of the decree confirming his report, he executed a deed to Rosenthal for the same. The deed thus obtained from K. Elias, commissioner, was properly registered in Clay county October 17, 1890, six years prior to the second registration of the deed from Olmstead to Stevens, and also six years prior to the re-registration of the deed from Stevens to the plaintiff.

The objection that is urged as to the registration of the deed from Olmstead to Stevens in the first instance also applies to the registration of the deed from Stevens to the plaintiff; it being insisted by the defendant that the registration of these deeds was invalid. Therefore, if we should reach the conclusion that the registration of the deed from Olmstead to Stevens was valid, it would necessarily follow that the registration of the deed from Stevens to the plaintiff was valid, and the legal title to the lands in controversy would thereby vest in the plaintiff. Hence the first question that arises is as to the effect of the registration of the deed from Stevens to the plaintiff in 1871. If this registration was not valid, and no title passed thereby, then the question naturally arises as to whether such attempted registration was either actual or constructive notice to subsequent creditors or purchasers for value. If we should determine this question in the negative, it would necessarily follow that the plaintiff would not be entitled to recover. This being an action of ejectment, the plaintiff must recover, if at all, upon the strength of its own title, and not upon the weakness of its adversary's title.

[1] What was the effect of the registration of these two deeds? It is insisted by counsel for the defendant that, inasmuch as these deeds were not probated by the judge of probate, the register of deeds was not authorized to place the same upon the record. Counsel for plaintiff cite certain cases bearing upon this question, but those cases have no reference to the requirements of the act of 1868. While it is

true that prior to 1868 the statute did not require that a probate taken by a commissioner of deeds out of the state should be adjudged to be correct, yet there can be no question that by the act of 1868 an adjudication was required and is essential. While it appears that these deeds were placed upon the record of the register of deeds in the respective counties, yet it nowhere appears that the same were properly probated by the clerk or other proper official, or that the register of deeds was directed to register the same. This question has been passed upon by the Supreme Court of North Carolina, and that court has uniformly held that the register of deeds is without authority to place a deed on the registration books unless it has been duly probated by one of the judges of the Supreme Court, superior court, or the clerk of the court or his deputy in the county where the land is situate. In the case of *Cozad v. McAden*, 150 N. C. 206, 63 S. E. 944, the court said:

"It has been uniformly held, since the enactment of the statute controlling this matter in 1868, that when the acknowledgment of a deed or other instrument requiring registration has been taken before some official outside of the state, in order to a valid probate, the deed with a proper certificate, should be presented to the resident clerk for approval, and there should be an express adjudication to that effect by the local officer."

In the case of *Evans v. Etheridge et ux.*, 99 N. C. 43, 5 S. E. 386, it appears that on the 2d day of May, 1866, Etheridge and wife executed a deed in trust to W. T. Brinkley, conveying to him the property therein mentioned and for the purposes named. This deed in trust was delivered to the register of deeds for Dare county and registered by him without the same having been probated. The court, in that case, in referring to this phase of the question, said:

"It is insisted by the appellees that the deed in question was proved in compliance with this section before a commissioner of affidavits, and that the adjudication of the clerk is only directory, and not an essential prerequisite to registration, and that, having been registered upon the certificate of the commissioner, though without any adjudication and order of registration by the clerk, it is valid, and, the purposes of registration being to give notice, the spirit and purpose of the law is fully met. We are referred to a number of cases (*Young v. Jackson*, 92 N. C. 144, *Holmes v. Marshall*, 72 N. C. 37, and other cases) in which it was held that, 'the provision requiring the certificate of probate by the probate judge of a county other than that of registration to be passed upon by the probate judge (the clerk) of the county of registration is directory, and that a registration which has not been so passed upon is not void.' The analogy between those cases and that before us is lost in the fact that the functions of the clerk are broader than those of the commissioner. He not only takes the proof of acknowledgment, but *adjudges* the fact of 'due execution,' whereas the commissioner of affidavits, and perhaps others, only take and certify the acknowledgment or proof. 'Probate of deed is taken,' says Pearson, J., in *Simmons v. Gholson*, 50 N. C. 401, 'by hearing the evidence touching the execution—i. e., the testimony of witnesses or acknowledgment of the party—and from that evidence *adjudging the fact of its execution*. Where the evidence is offered to the court, the entire probate is taken by it; but where the agency of a commissioner is resorted to, a part of the probate—i. e., hearing the evidence—is taken by him and certified to the court, and thereupon the probate is perfected by an adjudication that the certificate is in due form and that the fact of the execution of the deed is established by the evidence so certified.' In cases of probate before clerks who can both take the evidence and adjudicate the fact, it has been held that, though it ought not to be omitted, the fiat of the clerk of the county of regis-

tration is not an absolute prerequisite to a valid registration, but the validity of the registration in such cases rests upon the fact that there has been an adjudication of 'due execution' by an officer competent to both hear evidence and adjudicate. The register has no authority to put the deed upon his books unless proved and so adjudged in some one of the modes prescribed by the statute. 'The probate is his warrant for doing so,' and if registered without this warrant it does not create such an equity in the mortgage trustee as to affect creditors or subsequent purchasers for value. It was so adjudged in *Todd v. Outlaw*, 79 N. C. 235, and we refer to that case and the authorities there cited."

In that case the court held that, inasmuch as the deed in trust from Etheridge and wife to Brinkley was registered without proper warrant, such registration did not render it valid as against the plaintiff and his creditors. In the case of *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725, this doctrine was again announced by the Supreme Court of North Carolina.

An examination of the record discloses the fact that it was not contended by counsel for the plaintiff in the court below that the attempted registration of the deed from Olmstead to Stevens was sufficient to divest Olmstead of the legal title. In view of the provisions of the statute and the construction that has been placed upon it by the Supreme Court of North Carolina, we are of the opinion that the registration of this deed was invalid, and that the legal title did not pass thereby as against subsequent creditors and purchasers for value.

However, it is insisted by the plaintiff that Rosenthal took title to the 16 tracts of land now owned by the defendant with constructive or actual notice that the land in question had been conveyed to Stevens, and in turn by Stevens to the plaintiff. To support this contention our attention is called to what is known as the "Connor Act," contained in chapter 147 of the Laws of 1885, section 1 of which is in the following language:

"That section one thousand two hundred and forty-five of the Code be stricken out, and the following inserted in lieu thereof: No conveyance of land, nor contract to convey, or lease of land, for more than three years shall be valid to pass any property, as against creditors or purchasers, for a valuable consideration from the donor, bargainor or lessor, but from the registration thereof within the county where the land lieth: Provided, however, that the provisions of this act shall not apply to contracts, leases or deeds already executed, until the first day of January, 1886: Provided, further that no purchase from any such donor, bargainor or lessor, shall avail or pass title as against any unregistered deed executed prior to the first day of December, 1885, when the person, or persons holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person, or by his, her or their tenants, at the time of the execution of such second deed, or when the person or persons claiming under or taking such second deed, had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder."

It is obvious from the provisions of this act that, at the time of its enactment, the Legislature realized that something had to be done in order that conveyances of this character might be put upon a more certain basis, and thus remove all doubts as to the validity of titles and thereby prevent litigation. It appears that in many instances parties had failed to register their deeds, some had not registered their

deeds within the time allowed by law, and others had attempted to have them registered but had failed to comply with the statute then in force relating to the registration of such instruments. *Therefore this act was passed, requiring all unregistered deeds to be registered before the 1st day of January, 1886, and providing that only from the date of such registration should the legal title pass from the donor, bargainor or lessor.* The act adopts the language of the statute in force in that state prior thereto in regard to the registration of mortgages; its purpose being to place deeds in respect to their registration and its effect upon creditors and purchasers for value upon the same footing as mortgages. Therefore the decisions in regard to the registration of mortgages and its effect upon creditors and purchasers for value apply with equal force to the registration of deeds.

There are two provisos in this statute; the first being that the provision of the act should not apply to contracts, leases, or deeds already executed until the 1st day of January, 1886, and the second that—

"* * * no purchase from any such donor, bargainor or lessor, shall avail or pass title as against any unregistered deed executed prior to the first day of December, 1885, when the person or persons holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person or by his, her or their tenants, at the time of the execution of such second deed, or when the person or persons claiming under or taking such second deed, had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person or persons holding or claiming thereunder."

For some reason the plaintiff failed to avail itself of the provisions of this act by which it was given until the 1st day of January, 1886, to register its deed and thereby perfect its title. Therefore we must determine as to whether the former registration of this deed served as either actual or constructive notice to Rosenthal and those claiming under him. In considering this act it should be constantly borne in mind that the general rule incorporated therein *is that no deed shall be valid as against creditors and purchasers for value except from the date of registration.* Therefore, in our opinion, as to all deeds theretofore and thereafter executed, the registration was essential as against creditors and purchasers for value. It is well settled in North Carolina that the registration of a deed or mortgage is valid as against subsequent creditors and purchasers for value, not upon the theory that it puts them upon notice, but because it divests the title of the grantor, leaving nothing to convey—hence nothing passes. If its registration is without authority of law, it has no such effect, and is invalid as against purchasers for all purposes. The purpose of the act of 1885 was to remove all controversy as to what would constitute notice, either actual or constructive, and to make the registration the single essential act on the part of the grantee without which his deed was ineffectual to convey any title as against creditors and purchasers for value. In the case of *Collins v. Davis*, 132 N. C. 109, 43 S. E. 580, Judge Connor, in speaking for the court, said:

"Hollingsworth took his deed with such notice as the possession and the registration of the mortgage from Leonard to Tyson and Davis to Collins gave him of the condition of the title. His honor was of the opinion that

he purchased with notice, and therefore took subject to the incumbrances and equities of Davis. By the failure to record the deed from Leonard to Davis, it was, under the provisions of chapter 147, Laws 1885, invalid as against Hollingsworth, who purchased for value. The proviso to said act, saving the rights of persons in the actual possession of land, applies only to deeds executed prior to December 1, 1885. In *Maddox v. Arp*, 114 N. C. 585, 19 S. E. 665, *Shepherd. C. J.*, says: "The present case not being within the proviso of the act, actual notice of a prior unregistered contract to convey cannot, in the absence of fraud, affect the rights of a subsequent purchaser for value, whose deed is duly registered according to law." It will be observed that the act of 1885 is an exact copy of section 1254 of the Code, with the insertion of the words 'conveyance of land or contract to convey or lease,' etc., placing deeds upon the same basis, in regard to registration as mortgages and deeds of trust; hence, as said by this court in *Allen v. Bollen*, 114 N. C. 560, 18 S. E. 964, 'thus applying to the registration of deeds the same rule applicable to the registration of mortgages.' Since the passage of the act of 1829 (chapter 20), brought forward and incorporated in the Code as section 1254, *Reade, J.*, in *Robinson v. Willoughby*, 70 N. C. 358, says: "The decisions have been uniform that deeds in trust and mortgages are of no validity whatever as against purchasers for value and creditors, unless they are registered, and that they take effect only from and after registration just as if they had been executed then and there. * * * No notice, however full and formal, will supply the want of registration." In *Hooker v. Nichols*, 116 N. C. 157, 21 S. E. 207, *Fairecloth, C. J.*, quoting the language of chapter 147 of the Laws of 1885, says: "It will be noted that the effective words of this act are identical in substance with section 1254 of the Code, and we are driven to the conclusion that the Legislature, with full knowledge of the meaning and effect of said act of 1829, intended to apply the same rule to all conveyances of land as declared in the late act of 1885, and we must give the same effect to it."

The same rule is announced in *Tremaine v. Williams*, 144 N. C. 114, 56 S. E. 694, in which the court, said:

"No notice to purchasers, however full and formal, will supply the want of registration"

—citing *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99, in which Chief Justice Clark announced the same rule.

[2] It is also insisted that Rosenthal had actual notice of the transfer of this land from Olmstead to Stevens, and by Stevens to the United States, by virtue of the following statement contained in the complaint filed in the case of *Swepson v. Olmstead*, *supra*; it being the proceeding wherein the lands in controversy were decreed to be sold, and in pursuance of which Rosenthal purchased the land and took his deed:

"That the defendant failed to pay for all of such lands, except 32,000 acres, for the said 32,000 acres of land he did pay for, which are situated in Stecoah township, in the county of Graham, N. C., and which were conveyed (as plaintiff is informed) by defendant to the government of the United States."

It is also further insisted that the publication of notice of sale of these lands by the plaintiff in the *News and Observer*, a daily paper of that state, wherein a description of the same was contained, was notice to Rosenthal and Swepson; it appearing from the statement of the editor of that paper that "to the best of his knowledge and belief" Mr. Swepson was a subscriber. We are of opinion that the cases to which we have referred effectually dispose of this point. However,

if the rule were otherwise, we do not think the reference contained in the proceeding to which we refer would be sufficient to put Rosenthal on notice as to the claim of the plaintiff. If he had undertaken to investigate the matter, he certainly could not have ascertained anything definite from the reference made therein. By an examination of the records of Graham county he could not have found any deed conveying these lands either to Stevens or to the plaintiff, because neither of the deeds were registered in that county. If he had gone to Stecoah township, in Graham county, he could not have located the same in accordance with the description contained in the complaint filed in the proceeding by virtue of which he became purchaser of these lands for value. Nor do we think that the evidence as respects the publication of notice in the News and Observer would be sufficient to bring this case within the rule for which plaintiff contends. These circumstances are entirely too vague, uncertain, and indefinite to serve as notice under the law and decisions of the Supreme Court of North Carolina on this subject. In the case of *Hinton v. Leigh*, 102 N. C. 28, 8 S. E. 890, the court, in referring to the question of notice, said:

"The mere fact that the trustee of the deed of trust, and the purchasers for a valuable consideration claiming under it, and creditors, may, at the time of its registration, have had notice, however clear, of the prior unregistered mortgage, could not at all prejudice them. This is well settled by numerous adjudications of this court. It would be otherwise, however, as to such creditors or purchasers who should *fraudulently* prevent or delay the registration of the prior mortgage or deed of trust."

There is not the slightest intimation by counsel for the plaintiff that Rosenthal did or said anything that could be construed as an attempt on his part to fraudulently prevent or delay the registration of these deeds. The Connor Act is eminently fair, and at the time of its enactment afforded one whose deed was not properly registered an opportunity to have the same registered and thus perfect what may have otherwise been an imperfect title. The deeds under which plaintiff claims, as we have stated, had not been properly registered; but, when this act was passed, it was afforded an opportunity to have the same registered before the 1st day of January, 1886; but it failed to avail itself of the provisions of the act by not having the same registered until May, 1896. In the meantime Rosenthal, under whom the defendant claims by an unbroken chain, registered his deed in 1890, thus completely depriving the defendant of the right to perfect its title by registration in pursuance to the Connor Act.

Counsel for the plaintiff relies upon the case of *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063, to sustain its contention as respects this point, and insists that the doctrine of caveat emptor applies to the case at bar. While we recognize the principle relied upon by the plaintiff, nevertheless, in view of the law of North Carolina, as construed by the Supreme Court of that state, we are of the opinion that the rule invoked does not apply. The deed to Rosenthal having been registered prior to the registration of the deed from Olmstead to Stevens, as well as the deed from Stevens to the United States, we are clearly of the opinion that Rosenthal thereby acquired the legal title to the lands in dispute.

However, it is also contended by counsel for the plaintiff that the subsequent re-probate and re-registration of these deeds relate to the first registration, and that Stevens, after having re-registered his deed, thereby became vested with the legal title to the same. This question was expressly decided in the case of *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725, in which the court, said:

"* * * The subsequent re-probate and re-registration in 1897, since the plaintiff's title accrued, and since this action was brought, can have no effect. *Laws 1885, c. 147; Waters v. Crabtree*, 105 N. C. 394 [11 S. E. 240]."

The same principle is also announced in the cases of *Phillips v. Hodges*, 109 N. C. 248, 13 S. E. 769; *Brown v. Hutchinson*, 155 N. C. 205, 71 S. E. 302; *Phifer v. Barnhart*, 88 N. C. 333.

[3] It is also contended that the defendant did not derive title from *Olmstead* under the proceeding in the case of *Swepson v. Olmstead*, *supra*, for the reason that the certified copy of transcript of record fails to show that any summons was issued in that proceeding and served upon the defendant, and that the court, therefore, had no jurisdiction of the party defendant and that the judgment as to him is void; further, that the defendant's title is defective, in that under said proceeding there is no description of the land in question in the complaint, nor in any other part of said proceeding. While it is true that the certified copy of the proceeding in the superior court, which was used as evidence in the trial in the court below, did not contain the summons, nevertheless the decree, among other things, contained the following recital:

"This cause coming on to be heard upon the complaint, proofs, exhibits, and verdict of the jury, and it appearing to the satisfaction of the court that a writ of summons has been duly executed on defendant, and there is no defense made to this action. * * *"

Thus it will be seen that the decree authorizing the sale of this land recites the fact that a writ of summons had been duly executed on the defendant, which obviated the necessity of producing the summons as the basis for that proceeding. The court having found as a fact that the summons was duly executed and returned necessarily shows that the summons had been issued.

As to the next point, to wit, that there was no description of the lands involved in that controversy: We call attention to the fact that the decree also contains the following:

"* * * Ordered, adjudged, and decreed by the court that the plaintiff have and recover judgment of the defendant the lands mentioned in his complaint and marked 'Exhibit A' amounting to eighty-nine thousand five hundred and thirty-two acres of land."

Also the third paragraph of the complaint in that case is in the following language:

"That the defendant advanced to the plaintiff the sum of \$500.00, which sum was to be paid out of the sales of these lands when sold by plaintiff; and defendant, in pursuance of the aforesaid agreement, obtained in his own name state grants for the said lands which are described in Exhibit A, and hereto attached and made a part of this complaint."

Thus it will be seen that there was a statement in the complaint to the effect that a full and complete description of the lands involved in that controversy was contained in Exhibit A, which was attached to and made a part of the complaint filed therein. This, taken in connection with the further fact that the decree authorizing the sale of the lands, refers to them as being described in Exhibit A, is sufficient to show that there was a full and complete description of said land in the complaint and exhibit filed therewith. It also appears that the commissioner executed a deed to Olmstead in accordance with the decree, in which, among other things, is recited the authority of the decree, the sale of the land thereunder, his report and final decree confirming the same, and then proceeds to convey these lands by metes and bounds as set out in Exhibit A. It further appears that subsequent thereto Olmstead and his wife executed a quitclaim deed, which was delivered to Elias, commissioner, thus recognizing and approving the proceeding to the fullest extent. The superior court being a court of general jurisdiction, its decrees and judgments import verity, and, it appearing in the decree authorizing the sale of these lands that a summons was served upon the defendant, and it further appearing that the complaint referred to Exhibit A, attached thereto, which contained a description of the grants included in the deed from Elias, commissioner, to Rosenthal, we think it sufficiently appears that the proceeding was regular, and therefore, under the circumstances, not subject to collateral attack.

[4] But it is further contended that if there be any defect in the registration of the Olmstead and Stevens deeds, on account of failure to comply with the requirements of the law in force at that time, that the same is cured by the provisions of chapter 32, of the Laws of North Carolina of 1869-70, ratified January 28, 1870, which are in the following language:

"* * * That the probate of all deeds and other instruments required to be registered, heretofore taken under laws existing prior to the adoption of the Code of Civil Procedure, is hereby declared to be valid to all intents and purposes and shall be admitted to registration as if the probate had been taken under existing laws."

Apparently realizing that many deeds had been executed, proved, and registered in a manner not fully meeting the requirements of the law, the Legislature, by Laws 1876-77, c. 23, ratified December 12, 1876, provided as follows:

"That all deeds and other instruments of writing, allowed of (or) required to be registered, which have been heretofore proved or acknowledged, and the private examination taken of femes covert, if any, executing the same, and certified according to the then existing law, but not registered, shall, with such certificate, be registered by the register of the proper county, upon payment to the judge of probate of such county, or other officer authorized by law to admit such deed to probate for such register, the registration fees as prescribed by law, and presentation of such deeds or other instruments of writing, with such certificate to such register for registration, at any time within two (2) years, from and after the ratification of this act; and the registration of such deeds and other instruments of writing, herein provided for, as well as the registration of all deeds, and other instruments of writing, allowed or required to be registered, which have been heretofore registered, but not by or within the time required by law, shall be as valid and

effectual in law as if the same had been before duly registered in all respects according to law: Provided, that this act shall not apply to deeds of trust, mortgages, or marriage settlements."

There is nothing contained in the foregoing that could be construed to relate to the defects alleged as respects the probate of these deeds. In this instance there was no probate at all. Therefore it cannot be said that this act, which undertakes to cure defective probates, can have any relation to instruments attempted to be registered in the manner these were. For that reason we do not think this act applies to the case at bar.

We have carefully considered the various cases relied upon by counsel for the government, but are of the opinion that, for the reasons hereinbefore stated, they do not apply to the case at bar. There are various assignments of error; but, owing to the conclusion we have reached as to the crucial points in this case, we do not deem it necessary to discuss the same. After a careful consideration of the facts and the law governing this case, we are of the opinion that the rulings of the learned judge, who presided in the court below, were proper, and therefore the judgment of that court should be affirmed.

Affirmed.

ADAMS v. DECKERS VALLEY LUMBER CO. (two cases).

(Circuit Court of Appeals, Fourth Circuit. November 14, 1912.)

Nos. 1,071, 1,083.

1. BANKRUPTCY (§ 449*)—APPELLATE PROCEEDINGS—MODE OF REVIEW.

A judgment allowing a claim against the estate of a bankrupt for over \$500 is reviewable by appeal only under Bankr. Act July 1, 1898, § 25a (3) c. 541, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 449.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 309*)—PROOF OF CLAIM—PARTNERSHIP OR INDIVIDUAL DEBT —CONSTRUCTION OF CONTRACT.

A contract for the purchase of property amounting to several thousand dollars in value in which the purchasers were named individually, followed by the statement that they were partners doing business under a firm name given, and which was signed and sealed by them individually, where the purchase was, in fact, made in connection with the business of the partnership which made the cash payment and executed the notes for the deferred payments in the firm name, held a partnership contract, under which on the bankruptcy of the firm and partners the claim of the seller was provable only against the partnership estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555-564; Dec. Dig. § 309.*]

Petition for Revision of Proceedings of and Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg, in Bankruptcy; Alston G. Dayton, Judge.

In the matter of Creed Collins, bankrupt. From a judgment allowing a claim in favor of the Deckers Valley Lumber Company, Homer

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Adams, trustee, files a petition for revision, and also appeals. Petition dismissed, and reversed on appeal.

S. A. Powell and Sherman Robinson, both of Harrisville, W. Va. (Robinson & Prunty, of Harrisville, W. Va., on the brief), for petitioner and appellant.

I. Grant Lazzelle, of Morgantown, W. Va. (Edgar B. Stewart, of Morgantown, W. Va., on the brief), for respondent and appellee.

Before PRITCHARD, Circuit Judge, and WADDILL and ROSE, District Judges.

WADDILL, District Judge. [1] The parties to this controversy are the trustee in bankruptcy of the individual estate of one Creed Collins on the one hand, and the Deckers Valley Lumber Company on the other. Collins, together with Charles W. Sprinkle and Elbert M. Bonner, were partners. They called their firm the Collins Company. It and each of its members as individuals have been adjudicated bankrupts. It is admitted that the appellee is a creditor of the firm in a large amount far exceeding \$500. It says that such indebtedness is also the individual obligation of each member of the copartnership. On this theory it is seeking to participate in the distribution of the assets of Creed Collins. The referee held that it was not entitled so to do. Upon petition for revision the court below reached the opposite conclusion. The trustee in bankruptcy on behalf of the individual estate of Creed Collins thereupon brought the case here both by petition to superintend and revise in matter of law and by appeal. The petition must be dismissed. The judgment complained of was the allowance of a claim of over \$500. The trustee was entitled under section 25a of the Bankrupt Law (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) to appeal from it. He could not therefore have it reviewed by petition under section 24b. Matter of the Petition of Loving, Trustee, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725.

[2] The claim in dispute had its origin in a contract to which the appellee is the party of the first part. Such contract bore date May 1, 1907. In it the party of the second part was described as Creed Collins, C. W. Sprinkle, and E. M. Bonner, partners doing business under the firm name of the Collins Company, all of Pennsboro, W. Va. By the contract the party of the first part sold to the party of the second part all the trees on certain described tracts of land, and also much valuable machinery and other personal property. The trees were to be paid for when and as manufactured into lumber. Five thousand dollars of the purchase price of the other property was to be paid in cash, and for the balance the notes of the party of the second part for \$500 each were to be given. The first of these notes was to mature in 15 days. Thereafter one note became due on the 15th day of each succeeding month until all had matured. The agreement contained a number of provisions which need not be here mentioned. In it the phrase "party of the second part" was used some 20 times. In one place the words "parties of the second part" were employed as in

a line or two away "the party of the first part, a corporation" was referred to as the "parties of the first part." In one other place the phrase "second parties" is found. The record shows that the \$5,000 cash called for by the contract was paid by the firm, and that the firm notes were given for the deferred payments. These notes were accepted by the appellee. It never asked for or received the individual notes of the members of the firm. The testimony shows that the firm was then engaged in the business of cutting and manufacturing timber and its members as individuals were not. The appellee says that, while all this may be true, the manner in which the contract was executed shows it was the individual undertaking of the three members of the firm and not a partnership obligation. To the contract each of the parties signed his individual name and affixed his own seal. In that part of the instrument the partnership name is not used. We do not think its omission significant.

In this case the parties thought it desirable to have their contract under seal. There were obvious reasons why it was desirable, if not necessary, that the instrument should be sealed. One partner has no authority to execute a sealed instrument on behalf of his copartners unless authority to do so is given him under their seals. *Waldron v. Hughes*, 44 W. Va. 129, 29 S. E. 505; *Alexander v. Alexander*, 85 Va. 365, 7 S. E. 335, 1 L. R. A. 125. There may be various ways of executing a sealed instrument on behalf of a firm. One of the best text-books on contracts speaking of this subject says:

"Whatever be the strict law as to the various possible methods of executing a specialty by a partnership, practically the individual names of the partners should be given in the body of the instrument, with the recitation that they are partners composing a firm also named; and each partner should with his own hand subscribe his name opposite his several seal. This will certainly be right, the proof be easy, and no unpleasant questions of law or fact can follow." *Bishop on Contracts*, § 1150.

This was precisely what was done in the case at bar. The three members who composed the firm of the Collins Company in the body of the instrument gave their names, said they were partners doing business under the firm name of The Collins Company, and described the Collins Company as the party of the second part. They each then signed the instrument and affixed their individual seals. Even in executing a simple contract on behalf of a firm, a partner may, if he sees fit, instead of following the usual practice of signing the firm name, write the names of the individual partners. *Bishop on Contracts*, § 1149, and cases there cited.

Of course, whenever the individual members sign their individual names, and not the firm name, there must be something either in the agreement itself or in the nature of the transaction to which it relates which shows it to be a partnership undertaking. The parties may in the contract itself describe it as a partnership undertaking. In this case they have said so. The contract starts out by declaring that it is made by them as partners. It could not be questioned that, if after their signatures and seals they had added the words "partners doing business under the firm name of The Collins Company," it would

have been a partnership contract. If immediately before their signatures had been written "The Collins Company by," there would have been equally little room for question. It makes no difference that the same words in effect were used at the beginning of the instrument, and that the terms of the contract are found between them and the signatures. *Johnson v. Welch*, 42 W. Va. 18, 24 S. E. 585; *Sanborn v. Neal*, 4 Minn. 126 (Gil. 83), 77 Am. Dec. 502.

In this case it is unnecessary to inquire to what extent and under what limitations parol evidence is admissible to show that a contract, apparently that of individuals, was, in fact, a partnership undertaking or vice versa. In this case the same conclusion must be reached, whether we confine our attention to the words of the contract or take into account the testimony already summarized.

It follows that the decree below, by which the referee was directed to allow the claim of the appellee against the individual estate of Creed Collins, must be reversed. The claim has already been allowed against the firm estate. The propriety of this latter allowance is not questioned. If there shall be any surplus of the individual estate of Creed Collins remaining after the payment of his individual debts, this claim, like all others allowed against the partnership of which he is a member, will participate in its distribution.

Petition to review in No. 1,071 dismissed. Decree in No. 1,083 reversed.

KIRSNER v. TALIAFERRO et al. (two cases).

(Circuit Court of Appeals, Fourth Circuit. December 21, 1912.)

Nos. 1,122, 1,132.

1. BANKRUPTCY (§§ 439, 449*)—APPELLATE PROCEEDINGS—MODE OF REVIEW.

The remedy by petition for revision given by Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), and that by appeal given by section 25a, are mutually exclusive.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. §§ 439, 449.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 439*)—APPELLATE PROCEEDINGS—MODE OF REVIEW.

An order of a court of bankruptcy requiring a bankrupt to turn over property to his trustee, and committing him until he does so, made in a direct summary proceeding by the trustee, is reviewable only by petition to revise under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 439.*]

3. BANKRUPTCY (§ 136*)—ORDER REQUIRING BANKRUPT TO TURN OVER PROPERTY—EVIDENCE TO SUPPORT.

The fact that a bankrupt merchant appeared from an inventory taken some time before the adjudication to have more goods than were subsequently accounted for, while it may be made the basis of an order requiring him to account for the difference, must be used with caution, as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

the inventory itself, either from carelessness or by intention, is likely to have been unreliable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

4. BANKRUPTCY (§ 136*)—ORDER REQUIRING BANKRUPT TO TURN OVER PROPERTY—EVIDENCE TO SUPPORT.

Where it fairly appears that a bankrupt or another had property of the estate in his possession on the eve of the bankruptcy, it is presumed to remain under his control until he has satisfactorily accounted for it, and his mere denial under oath is not sufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

5. BANKRUPTCY (§ 136*)—ORDER REQUIRING BANKRUPT TO TURN OVER PROPERTY—HEARING.

An order requiring a bankrupt to turn over property to his trustee must be based on a petition therefor, which should sufficiently describe or identify the property to enable the bankrupt to know at least its general character, and such petition must be followed by notice giving the bankrupt fair and reasonable time to answer and be heard. At such hearing the bankrupt's own testimony, given on his examination, is admissible against him. If the referee makes the order, it is reviewable by the District Court either on the bankrupt's petition or on a rule against him to show cause why he should not be committed for contempt, and on such rule the court is bound to consider any new evidence offered by him, but after it has, on all the evidence before it, confirmed the order of the referee, and made an order of commitment, it is not required, except in its discretion, to again consider the evidence on a so-called petition for a rehearing.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

6. BANKRUPTCY (§ 136*)—ORDER REQUIRING BANKRUPT TO TURN OVER PROPERTY—COMMITMENT FOR CONTEMPT.

To justify an order requiring a bankrupt to turn over property to his trustee, to be enforced by imprisonment for contempt until it is complied with, the evidence should establish the fact of his present ability to comply with the order beyond a reasonable doubt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

Petition for Revision of Proceedings and Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk, in Bankruptcy; Edmund Waddill, Judge.

In the matter of Isaac Kirsner, bankrupt; W. C. D. Taliaferro, C. Vernon Spratley, and Allan D. Jones, trustees. From an order requiring bankrupt to turn over property, he appeals and also files petition for revision. Appeal dismissed, and order affirmed on petition for revision.

Thomas H. Willcox, of Norfolk, Va. (Willcox, Cooke & Willcox, of Norfolk, Va., and Dave B. Kirsner, of Baltimore, Md., on the brief), for petitioner and appellant.

L. A. McMurran and W. B. Colonna, both of Newport News, Va. (Nelms, Colonna & McMurran, of Newport News, Va., on the brief), for respondents and appellees.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. On December 27, 1911, Isaac Kirsner was adjudicated a voluntary bankrupt. Trustees were duly elected. On February 23, 1912, they filed with the referee a petition alleging that the bankrupt was in possession of property belonging to his estate, and praying that he might be required to turn it over to them. On March 8th he answered. He said that he had delivered every dollar's worth of property to his trustees. A hearing was thereupon had before the referee. The trustees relied upon the testimony given by the bankrupt at his examination by the creditors, and upon the books and papers which he had given the trustees. He was examined by his counsel on his own behalf in opposition to the granting of the trustees' petition. On May 9, 1912, the referee found that there had been traced to the possession of the bankrupt goods and merchandise of the kind and sort carried by and dealt in by him in his retail stores of an invoice or wholesale value of \$4,166.54, and that the bankrupt had failed to account for the same. He was ordered within 15 days to deliver to the trustees goods and merchandise of the character and class heretofore carried by him, being dry goods, notions, and ladies' ready-made clothing to the value of at least \$4,166.54 wholesale price.

On the day upon which the referee made the above findings and passed the order recited, both parties filed petitions for review. The trustees complained that the evidence showed that the bankrupt had withheld from them more goods than the referee had found that he had. The bankrupt said that the record did not show that he had withheld any. Both parties had their hearing before the learned judge of the District Court. He overruled both petitions for review. He approved and confirmed the order of the referee. He ordered that the bankrupt should on or before the 17th of July, 1912, comply with the referee's order, or, in the alternative, should pay to the trustees the sum of \$3,000 in cash, which the court fixed as the equivalent cash value of the goods, which the order required the bankrupt to turn over. If he did not deliver the goods or pay the money by the 17th of July, he was further ordered to show cause on that day why he should not be attached and committed for contempt until he did so. On the last-named day he filed what he called a petition for a rehearing. It would have been more accurately described as a request that the court should reconsider the conclusions to which upon the record it had come. The bankrupt did not say that he wished to offer any new testimony, nor did he in fact then or at any time offer any. He contented himself with saying that the referee, upon the testimony already in the case, had come to an erroneous conclusion. He asserted that at no time since he had been adjudicated a bankrupt had he been possessed of any property of any kind either in merchandise or money, and that he was absolutely penniless. He asked that his petition for rehearing should be treated and considered as an answer to the rule to show cause why he should not be committed for contempt.

On the 18th of July, after argument by counsel, the petition for

rehearing was denied. It was adjudged that as a response to the rule it did not show any sufficient cause why the order theretofore made should not be enforced. The court found as a matter of fact that the bankrupt had in his possession and control the goods described in the preceding order, that such goods lawfully belonged to the custody of the trustees, and that the bankrupt had present ability to comply with the order to turn them over to his trustees. He was thereupon committed to the custody of the marshal of the court to be by him held and confined in the city jail of Norfolk until he complied with the order to deliver the goods or their equivalent cash value as ascertained and declared by the court. The order of commitment further recited that as the bankrupt had expressed a desire to appeal to this court, or to seek from this court a revision of the order, he would be admitted to bail pending such appellate proceedings. The bankrupt thereupon both appealed and filed a petition for revision in matter of law.

[1] The trustees have moved to dismiss both the appeal and the petition to revise. At least one of these motions must be granted. Where an appeal may be taken, there is no right to seek revision by petition, nor does an appeal lie in any case in which the order below may be revised above upon petition. These remedies are mutually exclusive. In the Matter of the Petition of Loving, Trustee, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725; *Adams v. Deckers Valley Lumber Co.*, 202 Fed. 48, decided by this court at this term.

[2] Quite clearly no appeal will lie in this case under the provisions of section 25a. Whatever else the order below may be claimed to be, it is not a judgment adjudging or refusing to adjudge a defendant a bankrupt, nor a judgment granting or denying a discharge, nor is it a judgment allowing or rejecting a debt or claim of \$500 or over. It is not appealable under the provisions of section 24a unless it was passed in a controversy arising in bankruptcy proceedings as distinguished from a mere proceeding in bankruptcy. *Tefft, Weller & Co. v. Munsuri*, 222 U. S. 114, 32 Sup. Ct. 67, 56 L. Ed. 118. If the question determined by the order of the court below arose between the bankrupt and his creditors and was of an administrative character, it is not appealable under section 24a. *In re Mueller*, 135 Fed. 711, 68 C. C. A. 349, cited and affirmed by the Supreme Court. In the Matter of Loving; trustee, *supra*. It is a question between the bankrupt and his creditors. It is within the administrative and summary jurisdiction of the court. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

So far as our researches go, there have been at least 16 occasions upon which the propriety of an order committing or refusing to commit a bankrupt, or some one holding for the bankrupt, for contempt in failing to obey an order to turn over property to the trustee, has come before Circuit Courts of Appeal. In 13 of these cases the matter has been brought up by petition to revise. Two of these cases were in the First Circuit: *In re Cole*, 144 Fed. 392, 75 C. C. A. 330; *Id.*, 163 Fed. 180, 90 C. C. A. 50, 23 L. R. A. (N. S.) 255; *In re Goodrich*, 184 Fed. 5, 106 C. C. A. 207. Three in the Second: *In re*

Schlesinger, 102 Fed. 117, 42 C. C. A. 207; In re D. Levy & Co., 142 Fed. 442, 73 C. C. A. 558; In re Stavrahn, 174 Fed. 330, 98 C. C. A. 202, 20 Ann. Cas. 888. Two in the Fifth: In re Purvine, 96 Fed. 192, 37 C. C. A. 446; Samel v. Dodd, 142 Fed. 68, 73 C. C. A. 254. Two in the Sixth: In re Nugent, 105 Fed. 581, 44 C. C. A. 620; Sinsheimer v. Simonson, 107 Fed. 898, 47 C. C. A. 51. Four in the Eighth: In re Rosser, 101 Fed. 562, 41 C. C. A. 497; In re Baum, 169 Fed. 410, 94 C. C. A. 632; In re Frank, 182 Fed. 794, 105 C. C. A. 226; In re Meier, 182 Fed. 799, 105 C. C. A. 231. On three occasions an appeal was taken. One of these was in the Third Circuit: American Trust Co. v. Wallis, 126 Fed. 464, 61 C. C. A. 342; and two were in the Eighth: Boyd v. Glücklich, 116 Fed. 131, 53 C. C. A. 451; Schweer v. Brown, 130 Fed. 328, 64 C. C. A. 574. In no one of the three was there anything said as to the proper method of bringing such an order below to the attention of the appellate tribunal. In the case in the Third Circuit the referee and the court below had found that the bankrupt had not the present ability to turn over the fund in controversy. The Circuit Court of Appeals agreed with them. In that proceeding it made no practical difference to any one whether the appeal was dismissed or the judgment below affirmed. In the Eighth Circuit both methods have been resorted to indifferently. Until the recent decisions of the Supreme Court, the rule in that circuit was that the two remedies were not exclusive of each other, but were concurrent and cumulative. In re McKenzie, 142 Fed. 383, 73 C. C. A. 483. The question as to when in contempt proceedings an appeal will lie, and when a petition for revision is the proper proceeding, has been discussed by the Circuit Court of Appeals of the Ninth Circuit. Morehouse v. Pacific Hardware & Steel Co., 177 Fed. 337, 100 C. C. A. 647. In that case certain persons had been enjoined by the court of bankruptcy from prosecuting a suit in a state court. They had violated the injunction. It was sought to have them punished for contempt in the bankruptcy court. They brought the matter to the Circuit Court of Appeals by a petition to revise. In dismissing it, the court said that the order complained of "was not made with a view to obtain possession of the property of the bankrupt or to enforce a prior order of the court, but it is a criminal proceeding to punish by fine or imprisonment those who have been guilty of violating an injunction of the court." The opinion had previously declared that "proceedings in bankruptcy" include, among other things, "orders requiring the bankrupt to surrender property of the estate in bankruptcy and orders requiring the bankrupt's voluntary assignee to surrender property of the estate." "These are questions which with a view to the prompt administration and distribution of the assets of the bankrupt the law permits to be summarily disposed of by revision."

We are therefore of opinion, as well upon reason as upon authority, that an order of the court of bankruptcy ordering the bankrupt to turn over to his trustees property of the estate and committing him to prison until he does so is an order made in a proceeding in bankruptcy and may be brought before the Circuit Court of Appeals by a

petition to superintend and revise in matter of law under section 24b. It follows that it may not be brought up by appeal under section 24a.

The appeal of the bankrupt in No. 1,132 must therefore be dismissed.

Upon consideration of the petition to superintend and revise in matter of law, we may not go into disputed questions of fact. *Kenova Loan & Trust Co. v. Graham*, 135 Fed. 717, 68 C. C. A. 355. In his petition the bankrupt says that the order of June 22, 1912, confirming the findings of the referee and directing him to turn over goods or cash to the amount therein stated, is erroneous, because there is no sufficient evidence to justify the finding of the referee or to justify the court in confirming the same, the opinion of the referee having been based upon erroneous, improper, and insufficient testimony, and having been arrived at really by a speculation and conjecture, and is not based upon any fact or facts. If upon a petition to revise we can consider such a specification at all, it must be upon the assumption that it is in effect a demurrer to evidence, and is equivalent to the assertion that there was no evidence at all before the referee and the court below from which a rational mind could have drawn the conclusion to which they both came.

[3] The evidence was that of the bankrupt himself, which is reproduced in the record in full, and of his books and papers which have not been brought up at all. The trustees undertook to show by the testimony of the bankrupt and from his books and invoices that at a particular time preceding his bankruptcy he had on hand goods of a certain aggregate value; that between that time and the adjudication in bankruptcy he had bought and actually received into his stores additional goods to a definite minimum value; that his sales during the same period had totalled a certain sum; and that such sales had been made at an average profit of so much per cent. If these facts could all be definitely ascertained, there would be little difficulty in determining the approximate value of the goods the bankrupt in ordinary course should have had at the time of his adjudication. For illustration: If he had \$20,000 of goods on hand two months before his adjudication, had purchased \$10,000 worth in the two months, if in that time his gross sales had totalled \$12,500, and it was shown that his average gross profit was 25 per cent., the calculation would be easy.

On hand 2 months before adjudication.....		\$20,000
Purchased since.....		10,000
		<hr/> \$30,000
Less good sold.....	\$12,500	
Deduct 25% profit.....	2,500	10,000
		<hr/>
Goods which should be on hand.....		\$20,000
Now if the bankrupt actually turned over to his trustee goods of a cost value of only.....		5,000
		<hr/>
There would be a discrepancy of.....		\$15,000

In the case supposed there might well be a presumption either that the bankrupt still had a very large quantity of goods, or that, if he did

not have them, he had lost them in some way so out of the ordinary that he must have had knowledge of it. In practice the problem can very seldom be worked out with the ease and certainty of the above illustration. It is usually very difficult to find out what amount of goods were on hand at the time selected for the starting point of the calculation. Contemporaneous estimates, or even inventories of the bankrupt, cannot always be relied on. Perhaps it would be more accurate to say that in these cases they are usually unreliable. A bankrupt against whom proceedings of this kind are pressed is very likely to be either a careless and reckless person or else a tricky and morally unreliable one. If he is the latter, he may, of course, be capable of concealing goods or their proceeds from his creditors, but whether he be the former or the latter he is at least equally likely by negligence or design to have inflated his inventory or his estimate. If at the time he made it he was in need of money or credit, he would be strongly tempted to value his stock far beyond its real worth. Many men so situated cannot tell the exact truth even to themselves. They cannot face the fact that they are insolvent. If any considerable period of time elapses between the inventory and the adjudication, the difficulties of reaching an accurate result by the method under consideration increases in almost geometrical progression. When honest and solvent dealers take an inventory, they sometimes find that they have not on hand the goods which from their books and estimates they should have. For these and other reasons, which will readily occur to anyone of business experience, this method of determining what goods the bankrupt should have on hand at the time of his bankruptcy must be used with extreme caution. In some instances, however, it does yield results which closely approximate to the certainty of a mathematical demonstration. The use of it in cases of this kind, and for the purposes for which it has been here employed, has been approved by courts of the highest ability and of large experience in bankruptcy matters. In *re D. Levy & Co.*, 142 Fed. 442, 73 C. C. A. 558 (C. C. A. 2d Circuit); *Schweer v. Brown*, 130 Fed. 328, 64 C. C. A. 574 (C. C. A. 8th Circuit); In *re Baum*, 169 Fed. 410, 94 C. C. A. 632 (C. C. A. 8th Circuit), are apparently cases of this kind. The District Court cases in which this way of determining that the bankrupt had concealed assets and the amount of such assets so concealed, are very numerous. Some of them appear to have been well considered. Upon the authorities and upon principle we cannot hold that a determination made by the referee and the judge below in that way is so totally unsupported by the evidence that they erred in matter of law.

The bankrupt says that there was error because the court below undertook to decree against him for certain goods without specifying or describing in any manner the same so as to enable him to know how or in what manner to comply with said order. The goods were described as such as he had carried in his stores, namely, dry goods, notions, and ladies' ready-made wear of the cost or wholesale price of \$4,166.54. This was sufficiently definite.

The bankrupt claims that it was error for the court to give him the alternative of paying the trustee \$3,000, which he says the court arbi-

trarily fixed as the value of the goods. It was stated at the argument at this bar that this permission had been given by the court below because it was understood that such was the wish of the bankrupt. Whether that was so or not, the bankrupt cannot complain of having the option. He need not avail himself of it, if he does not wish to do so. He can be in no way injured by being allowed to pay the money if he wants to.

[4] The bankrupt further says that there was absolutely no evidence before the referee or before the court below to show that he was able to comply with the decree or that he then had said goods in his possession or proceeds derived from the sale or disposal thereof. There was evidence which satisfied the referee and the court that at or shortly before his adjudication the goods or their value were in his possession. "The settled rule is that, when property of a bankrupt estate is traced to the possession of one who receives it upon the eve of the bankruptcy of its owner, it is presumed to remain in his possession or under his control until he satisfactorily accounts to the court of bankruptcy for its disposition or disappearance; that the burden is upon him to satisfactorily so account for it; and that he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate." *In re Meier*, 182 Fed. 799, 105 C. C. A. 231. That was a decision of the Circuit Court of Appeals of the Eighth Circuit in a case in which the present Mr. Justice Van Devanter sat, together with Circuit Judge Sanborn and District Judge Reed. Many cases are cited in the opinion in support of this statement of the law and the number could be almost indefinitely augmented if there was occasion so to do.

The above are all the errors of law which are pointed out by the bankrupt as having been made in the order of June 22, 1912; that is, in the order of the court confirming the previous finding and order of the referee. He says, however, that it was error for the court in the face of his sworn denial that he was in possession of the goods or the money to adjudge him in contempt.

[5] This contention is sufficiently answered by the quotations we have already made from *In re Meier*, supra. The sole remaining error in law pointed out by the bankrupt's petition is that the court did not, after he filed his petition for rehearing and his answer to the rule to show cause, make a new and independent investigation of the fact of concealment of assets and of the bankrupt's present ability to comply with the order to turn such assets over to his trustees. Before such an order as that which was passed in this case can be lawfully made, a petition must be filed alleging that the bankrupt has assets of the estate in his possession or under his control, and praying that he be required to turn them over to his trustees. The petition should either describe or identify the assets, or so point out the source from which the petitioner claims they came, as to give the bankrupt fair notice of the charge against him so that he may be able to meet it. An order to show cause why the prayer of the petition should not be granted must then be served upon the bankrupt, and he be given what under all circumstances is a fair and reasonable time to answer.

In re Rosser, 101 Fed. 562, 41 C. C. A. 497; In re Frank, 182 Fed. 794, 105 C. C. A. 226.

All this was done in this case. After his answer has been put in, or after the time at which it should have been put in has expired, and upon reasonable notice to him, evidence in support of the allegations of the petition may be taken. One of the contentions pressed upon this court by the counsel for the bankrupt was that the testimony of the bankrupt taken at his examination at the creditors' meeting and before the filing of the petition of the trustees had been used against him. Had such evidence been that of any person other than himself, his objection might have been well taken. He would have been entitled to know that the issues made by the petition and his answer were to be litigated, and that the evidence of the witness was to be used in such litigation so that he could have cross-examined if he had been so advised. Obviously, however, there is no such reason for holding inadmissible what he himself swore, or for that matter said either before or after the filing of the trustees' petition. As an admission of a party to the cause it was receivable in evidence against him. The proceeding was not criminal within the prohibition of section 7a, cl. 9, of the act. The bankrupt's testimony at the meeting of creditors may be in it used against him. It was apparently expressly so decided in *Re Cole*, 163 Fed. 180, 90 C. C. A. 50, 23 L. R. A. (N. S.) 255. In all other cases of this character the admissibility of the bankrupt's testimony at his examination by the creditors has been assumed to be so manifest that it has so far as we know never been challenged.

After all the testimony offered by both sides has been received, the referee makes up his findings. If he is of opinion from the evidence that the allegations of the trustee's petition have been sustained in whole or in part, he so finds, and he thereupon orders the bankrupt by some certain date to turn over to his trustee the assets of the estate which he holds the bankrupt unlawfully retained and still has in his custody or under his control. The bankrupt may ask for a review of these findings and order, or he may not. If he does and the referee's order is confirmed, or if he does not, the same procedure in substance follows. Before he can be treated as in contempt, he must be notified to show cause why he should not be attached and committed for failing to comply with the order of the court. In *re Cole*, 144 Fed. 392, 75 C. C. A. 330; *Id.*, 163 Fed. 180, 90 C. C. A. 50, 23 L. R. A. (N. S.) 255. If he shows cause, the court is bound to hear any new evidence he may offer. In *re Goodrich*, 184 Fed. 5, 106 C. C. A. 207. In this case the bankrupt offered none, and in the argument here expressly stated that he had none to offer. The question before the court below was therefore whether the evidence already in was sufficient to establish the facts necessary to justify a committal for contempt. Many of the cases say that an order that the bankrupt shall turn over property to his trustee may be passed upon less conclusive evidence than that which will be required to justify an order for committal for failure to comply with the order to turn over. The reason assigned is usually that the first is a civil and the latter a criminal proceeding. It is very doubtful whether this ex-

planation is well founded in law. Most, if not all, the cases in which it is made were decided before the Supreme Court in *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, so elaborately discussed the distinctions between civil and criminal contempts.

It must be borne in mind that the form of the order in the case at bar was that the bankrupt should be imprisoned not for a definite term as a punishment, but until he complied with the order by turning over the property in question to his trustees. It is because the order is so worded that the court must be satisfied of the present ability of the bankrupt to comply with it. It is easy to conceive of cases in which a bankrupt had so dealt with his property after he had been ordered to turn it over as to make it impossible for him to do so. In such case no such order as that passed below could properly be made against him, but for all that he might well be subject to punishment for the contempt of which he had been guilty. That punishment would take the form of a fine of a definite amount or a committal to prison for a term of fixed duration. In the case of *Gompers v. Bucks Stove & Range Co.*, supra, the Supreme Court said:

"The distinction between refusing to do an act commanded—remedied by imprisonment until the party performs the required act, and doing an act forbidden—punished by imprisonment for a definite term, is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment."

The court instanced the case of a refusal to turn property over to a receiver upon the order of a court as an illustration of a civil contempt. It said that:

"Unless there were special elements of contumacy, the refusal to comply with the order is treated as being rather in resistance to the opposite party than in contempt of the court. * * * The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said in *Re Nevitt*, 117 Fed. 461 [54 C. C. A. 635], 'he carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do."

[6] If proceedings such as the one at bar were instituted to punish criminal contempts, the defendant could not be compelled to testify against himself, nor could his testimony at the creditors' meeting be used against him. It is the almost universal practice to examine the bankrupts in such cases. Whether if he refused to testify he could be compelled so to do is a question not before us and upon which we intimate no opinion. We simply refer to the ordinary practice as illustrating that the profession has not usually thought of these proceedings as essentially criminal in their nature. We have said this much in order to prevent misapprehension or confusion, nevertheless we thoroughly agree with those courts which hold that, before a bankrupt may be committed for failure to obey an order to turn over property to his trustee, the court should be satisfied that he has present ability to comply. For many reasons the conviction that he has the power should be as nearly absolute as human conclusions ordinarily

can be. We know no better way of stating the quantum of proof which should be insisted on than to say, as other courts have said, that it should be sufficient to establish the fact beyond reasonable doubt. Such a rule is required, not only for the protection of the liberty of the citizen, but for the preservation of the dignity of the court itself. It is not well that there should be many occasions in which, after sending a man to jail for refusing to obey an order, the court will feel constrained to release him without the order being obeyed. Unless the power of commitment as a means of compulsion is exercised only when there is no real question of the ability of the defendant to do what he is commanded, such an outcome will not be uncommon.

It therefore follows that, when the court is asked to commit, it should very carefully consider the case which has been made out. That does not require that the testimony which has been once taken in the proceeding should be again heard. To do so would be a useless waste of time. If new testimony is offered, the court must hear it. It will be well for the judge again to give thought to that which he has already considered in order that he may feel sure that no mistake is being made. There is nothing in the present record to suggest that the learned and experienced judge below did not do all this. We have gone so fully into this case because it is the first of this kind to come before us, and because we are profoundly impressed with the caution with which the power to commit in these cases should be exercised. Such proceedings are usually taken against bankrupts who in some or in many ways have acted badly. They frequently richly deserve some sort of punishment. Their manner on the witness stand sometimes adds to the indignation which their conduct in other respects excites. All these things may sometimes not unnaturally lead to their commitment for failure to do what after all they could not do if they would.

From what has already been said, it is apparent that we discover no error in matter of law in the action of the court below. The order in No. 1,122 will therefore be affirmed. In so doing, however, we will follow the wise precedent set by the Supreme Court in *Muel-ler v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, and will remand the case with liberty to the court below, if it shall think it expedient so to do, to take such further proceedings, if any, as it may be advised.

Affirmed.

ALLEN et ux. v. SPENSLEY et al.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1912.)

No. 1,868.

1. HOMESTEAD (§ 118*)—DEED—EXECUTION BY WIFE—PRESUMPTION OF KNOWLEDGE.

Where, in the absence of fraud or mistake, a wife, at the solicitation of her husband, executed a deed of the homestead, she would be conclusively presumed to have had knowledge of the contents thereof.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 203-209, 216, 217; Dec. Dig. § 118.*]

2. HOMESTEAD (§ 118*)—DEEDS—EXECUTION—SIGNATURE BY WIFE—DURESS.

Complainant, the principal managing officer of a bank, having been charged with responsibility for a large shortage of assets, informed his wife thereof on his return home on the day it was discovered, and on the following day, on demand of the directors, consented to turn over all his property, including his homestead, to aid in making good the shortage. A deed to the homestead was prepared, and complainant proceeded, with the bank's cashier to serve as notary, to his home, where complainant requested his wife to sign the deed, telling her that if she did not do so he would go to prison. She asked whether the signing would save him, to which he replied in the affirmative and led her to the desk. She attempted to sign, but could not do so until complainant steadied her hand, after which she turned to the notary and asked him if they would imprison her husband, to which he answered that he did not know but that all of the officers might be convicted. *Held*, that such facts indicated that the wife signed in order to mitigate complainant's criminal liabilities, and that the deed was not, therefore, obtained from her by duress.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 203-209, 216, 217; Dec. Dig. § 118.*]

Appeal from the Circuit Court of the United States for the Western District of Wisconsin; J. Otis Humphrey, Judge.

Bill by Philip Allen, Jr., and another against Calvert Spensley, as trustee, and Christopher L. Williams, as receiver, of the First National Bank of Mineral Point. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

This appeal is brought for reversal of a decree of the Circuit Court, on final hearing of the issues, whereby the appellants' bill of complaint filed therein is dismissed for want of equity. The relief sought in the suit was to set aside a conveyance of real property made by the appellants, as husband and wife, to the appellee trustee, in so far as it purported to convey thereunder their homestead in Wisconsin, alleging that the wife "did not consent" thereto, and that in signing the deed with her husband she "acted under the duress of her husband," the other appellant. The facts averred in the complaint and proven as well are substantially these:

The appellant Philip Allen, Jr., had long been principal managing officer of the First National Bank of Mineral Point, Wis., and in October, 1909, a bank examiner discovered a large shortage of assets covered by false entries and forged paper, for which Allen was considered responsible. At a meeting of the directors, Allen was confronted with this showing, and informed his wife thereof on his return home. On the following day, upon demand of the directors, Allen consented to turn over all of his property to aid in making good such shortage. The deed in question was thereupon prepared for execution, and Allen proceeded, with the cashier of the bank to serve as notary, to his home, and such conveyance was there signed by the husband and his wife,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

appellants, and bears the certificate of the notary of acknowledgment thereof. The notary died shortly thereafter, and the only witnesses available, called to prove the circumstances of the execution, were the appellants. Both admit their signatures, but deny that the entire contents of the paper was either read or explained to the wife, and that the notary was not present during the conference between the husband and wife; that a workman in the yard was called in to witness the deed, and was informed by the husband, "My wife and I have signed some papers here, and want you to witness it; these are our signatures;" and the witness thereupon appended his signature. The wife testifies that her husband said, "You must come in now and sign these papers; Mr. Hanscom is here with them;" that she asked her husband what he wanted her to do, and he said, "Sign these papers; if you do not do it, I shall go to prison;" that she said, "Will it save you?" and he said, "Yes," and led her up to the desk; that she finally attempted to sign, but could not until her husband steadied her hand. She further states that she said to the notary, "Oh, Mr. Hanscom, they won't imprison him, will they? Will this save him?" and that he answered, "I don't know; we may all have to go yet." Both testify that the wife was laboring under excitement.

The testimony was heard before Judge Humphrey, resulting in the decree of dismissal.

Rufus B. Smith and Vroman Mason, both of Madison, Wis., for appellants.

John B. Sanborn and Chauncey E. Blake, both of Madison, Wis., for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The appellants, husband and wife, joined as plaintiffs in a suit against the appellees, as trustee and receiver, respectively, of the First National Bank of Mineral Point, to set aside the conveyance of a homestead owned by the husband, under a deed purporting to be executed by both appellants in favor of the appellee trustee for the benefit of the bank. Commenced in a state court, the case was removed to the federal court, with final hearing—Judge Humphrey presiding—on the undisputed testimony of both plaintiffs, and was dismissed for want of equity. For reversal of the decree accordingly, error is assigned (in substance) for failure of the trial court to find and hold: (1) That the deed in question was signed by the plaintiff, Edith L. Allen, when "she was entirely ignorant of its contents," purport, and intention; (2) that she was not "mentally capable of understanding" her act as a consent to transfer the homestead; and (3) that the deed "was procured and obtained" from her by duress.

The conceded facts are: That the plaintiff, Philip Allen, Jr., as manager of the above-mentioned bank, had fraudulently taken and converted large amounts from the assets of the bank, and when discovery came he offered to make restitution to the extent of his ownership of real estate, inclusive of the homestead, in value far short of the conversions; that the conveyance in question was thereupon made and delivered; that it was signed by the plaintiffs, as husband and wife, at their home, with the notary and another witness in attendance for the execution; and that it was signed by the witnesses, and the acknowledgment by the grantors certified by the notary public, with seal attached, in the prescribed form. Relief is sought against

such conveyance of the homestead, as not executed within the requirements of section 2203, Wis. Stat., as amended by chapter 45, Laws 1905—3 Wis. Stat. Supp. p. 1068—providing that no “alienation by a married man of his homestead” shall be valid “without his wife’s consent, evidenced by her act of joining in the deed” or other conveyance.

[1] The contention that Mrs. Allen signed the deed in ignorance of the fact that the homestead was included therein is plainly without force for such relief—no deception appearing in obtaining the execution—either under the interpretation of this provision by the Wisconsin authorities or under the general doctrine applicable thereto, that knowledge of the contents of a written instrument must be presumed from such adoption and execution. In *German Bank v. Muth*, 96 Wis. 342, 71 N. W. 361, like defense was set up on the part of the wife, that a mortgage which included the homestead, purporting to be executed by the husband and wife, was signed by her in ignorance of the fact that the homestead was included therein, with the further averment and proof that “she could not read written English”; but it was there held:

“In the absence of fraud or mistake, she was conclusively presumed to know the contents of the mortgage, and was bound by the description therein contained”—citing a number of Wisconsin cases.

The doctrine thus stated was reaffirmed in *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 413, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705, with extended review of authorities, both state and general, in support thereof.

The alleged error, for failure to find that the wife was incapable of understanding her act in the execution of the deed, is neither pressed in the argument on her behalf, nor tenable under the testimony. While it does appear that she was in distress, both over the defalcations on the part of her husband (of which he had informed her the night before) and over his liabilities thereunder, as stated when the deed was presented for execution, there is no testimony in support of the averment that she was not “mentally capable of understanding the act” of conveyance.

[2] For relief against the conveyance, however, the ultimate contention is that the evidence establishes the charge that Mrs. Allen “did not consent to the conveyance”; that (in substance) the circumstances and urgency of the call upon her for its execution rendered her “temporarily unable to give a valid consent,” and constituted duress, as defined in Wisconsin cases and other authorities called to our attention. In other words, the issue thereunder was whether the circumstances and means used were “such as to prevent the free exercise of her will power.” *Price v. Bank of Poynette*, 144 Wis. 190, 199, 128 N. W. 895, 898, and cases cited. The trial judge heard the testimony of Mrs. Allen, and his general finding of want of equity in the complaint is plainly adverse to such contention; in effect, it amounts to a finding of ultimate fact thereupon that she was not deprived of her will power, but signed the deed voluntarily in the exercise thereof. Prepared under Mr. Allen’s offer and direction, the

deed was brought by him to their home for joint execution. His explanations to Mrs. Allen were made with no other witness present; but the testimony of both concurs in all material particulars. Each impresses us to be a simple and candid recital of the pathetic errand and its accomplishment, with the husband contrite and in no respect domineering, and no expression of dissent on the part of the wife. It may reasonably be implied that the wife would not be willing, at the outset, to surrender their homestead for the purpose alone of partial mitigation of the bank's loss in the defalcations; but her understanding of the object of the conveyance, by way of mitigation of her husband's criminal liabilities therein, is distinctly expressed in her testimony as the moving cause of her consent. Neither that inducement, nor her agitation (not unnatural) in executing the deed, furnishes just ground, in our opinion, to set aside the above-mentioned finding of fact, that her consent was voluntarily given in signing the deed.

The conveyance, therefore, was not voidable under the testimony, and the decree accordingly of the Circuit Court is affirmed.

UNITED STATES ex rel. TOY GWOK CHEE v. PRENTIS et al.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1912.)

No. 1,797.

1. HABEAS CORPUS (§ 23*)—CHINESE PERSONS—DEPORTATION—HEARING.

A Chinese person will not be released on habeas corpus from a deportation warrant, except for failure or denial of the administrative hearing provided for by the immigration act.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. § 23.*]

2. ALIENS (§ 21*)—CHINESE LABORERS—DEPORTATION—IMMIGRATION ACT.

Immigration Act Feb. 20, 1907, c. 1134, §§ 20, 21, 34 Stat. 904, 905 (U. S. Comp. St. Supp. 1911, p. 511), providing for the deportation of aliens found unlawfully in the country, is applicable to Chinese persons.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 74; Dec. Dig. § 21.*]

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis and George A. Carpenter, Judges.

Habeas corpus by the United States, on the relation of Toy Gwok Chee, to secure relator's release from the custody of P. L. Prentis and another under a deportation warrant. From an order denying the writ and remanding relator to custody, "to be dealt with in accordance with the law," relator appeals. Affirmed.

This appeal is from an order of the District Court which denies the application of the relator, Toy Gwok Chee, for a writ of habeas corpus, and remands him to the custody of the appellees, "to be dealt with in accordance with the law." The proceedings, under which the relator was in custody, were for deportation to China

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 202 F.—5

and a warrant therefore issued by the acting Secretary of Commerce and Labor, and hearing in the District Court was upon the petition (as amended), return on the part of the respondent, and exhibits therewith; no oral testimony being offered.

Benjamin C. Bachrach, of Chicago, Ill., for appellant.

James H. Wilkerson and John F. Voigt, both of Chicago, Ill., for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge. [1] The order of the District Court, denying the appellant's petition for a writ of habeas corpus, is in accord, as we believe, with the established rule in reference to like cases of application for release from deportation orders of the executive departments, issued pursuant to acts of Congress. In recent opinions of this court, the jurisdictional test thereunder has been considered and applied, with review of the leading authorities, and further discussion or citations in support of their doctrine is not needful—namely, that judicial intervention for disturbance of such orders is unauthorized, "except for failure or denial of the administrative hearing intended by the act."

[2] The fact of complete hearings in the proceedings instituted by the department is established, and the questions raised, in reference to the sufficiency and competency (at common law) of evidence there adduced, are not reviewable subject-matter. It is contended, however, that the Immigration Act of February 20, 1907—under which the proceedings and order occurred—is not applicable to Chinese persons, and the opinion of the Circuit Court of Appeals for the Second Circuit, in *Wong You v. United States*, 181 Fed. 313, 104 C. C. A. 535, is cited in support thereof. But the ruling referred to was reversed on appeal to the Supreme Court, in an opinion handed down January 22, 1912, holding such act to be applicable as well for deportation of Chinese persons.

The order appealed from is affirmed.

UNITED STATES TELEPHONE CO. v. CENTRAL UNION TELEPHONE CO. et al.

(Circuit Court of Appeals, Sixth Circuit. January 10, 1913.)

No. 2,082.

1. COURTS (§ 365*)—FEDERAL COURTS—DUTY TO FOLLOW STATE COURT DECISION.

The obligation of a federal court to follow the decisions of state courts does not arise, unless the state court is a court of last resort, particularly where the opinions of the lower courts are not unanimous or numerous and old enough to show a settled rule.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 950, 952, 955, 969-971; Dec. Dig. § 365.*

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MONOPOLIES (§ 10*)—PUBLIC POLICY—FEDERAL AND STATE POLICY.

In general, the policies of the state of Ohio and of the United States regarding monopolies and restrictions of competition are the same; the rule being that of the common law, declared for Ohio by the Valentine Act (Rev. St. 1908, § 4427—1), and for the United States by the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.*]

Monopolistic contract, validity as affected by public policy, see note to *Cravens v. Carter-Crume Co.*, 34 C. C. A. 486.]

3. MONOPOLIES (§ 20*)—COMBINATIONS PROHIBITED—TELEPHONE COMPANIES—LOCAL AND LONG-DISTANCE COMPANIES—CONNECTIONS—EXCLUSIVE RIGHTS.

A contract between a local telephone company and a long-distance company for a connection between their lines and the use of the local lines for the sending and receiving of long-distance messages, binding the local company not to permit any similar connection by any other long-distance company for a term of 99 years, thereby disabling it from giving its subscribers the benefit of competition in long-distance service and from extending its own service as authorized by its charter, was invalid, as tending to create a monopoly.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.*]

4. TELEGRAPHS AND TELEPHONES (§ 28*)—POWERS—EXTENSION OF LINES.

Under Rev. St. Ohio 1908, § 3455, conferring on telephone companies the power to extend their lines whenever and wherever the needs of the service and good business policy may dictate, the duty of a company to furnish reasonably adequate service is not confined to the date of its organization, but it is bound to keep pace with changing conditions as they may occur from year to year; and a contract disabling it from furnishing what may be adequate service is invalid.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 16, 17; Dec. Dig. § 28.*]

5. TELEGRAPHS AND TELEPHONES (§ 36*)—LONG-DISTANCE SERVICE—ADEQUACY.

Long-distance telephone service is not necessarily reasonably adequate because it reaches the city or district of residence of the person with whom communication is desired.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 26, 31; Dec. Dig. § 36.*]

6. MONOPOLIES (§ 20*)—CONSOLIDATION BETWEEN PUBLIC SERVICE CORPORATIONS.

Statutory power to consolidate with or purchase another company will not justify a general system of contracting with a great number of other companies for exclusive mutual relation.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.*]

7. MONOPOLIES (§ 20*)—RESTRAINING COMPETITION—EXCLUSIVE CONTRACTS.

A general system of exclusive contracts *prima facie* restraining competition, might be justified if they are for a term not beyond any such necessity, as a 99-year contract for exclusive interchange of telephone business.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.*]

Appeal from the Circuit Court of the United States for the Northern District of Ohio; Robert W. Tayler, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by the United States Telephone Company against the Central Union Telephone Company and another. From a decree dismissing the bill (171 Fed. 130), complainant appeals. Affirmed.

During the period prior to 1898, the Central Union Telephone Company had established a system of long-distance telephone communication extending over large parts of the states of Ohio and Indiana. It also owned and controlled local telephone exchanges in many cities and villages in this territory. The American Telephone & Telegraph Company, by license or stock ownership or otherwise, controlled the Central Union, so that the latter, with its local exchanges and long-distance lines, became allied to, and in a sense a part of, the so-called Bell System, extending throughout the United States. At the same time there also existed, in the two states named, a large number of so-called independent local telephone exchanges, often operating a local exchange in direct competition with the local exchange of the Central Union, at the same place, but not amounting to a completely competing system, because the independent local exchanges were not generally connected with each other by long-distance lines, and hence could not give to their local patrons long-distance service. It was the established practice and rule of the Central Union not to permit its long-distance lines to be used by or for the local independent exchanges, and it thus promoted its own local business by offering in connection therewith long-distance service which local competitors could not give. The bill alleges, and it is now to be taken as true, that this conduct and policy of the Central Union Company were intended for, and were effective toward, unfairly suppressing competition and oppressively establishing a monopoly in the telephone business.

In this situation the United States Telephone Company was organized as an independent long-distance company, for the purpose of furnishing long-distance service to the independent exchanges in the two states named and adjacent territory. It proceeded to, and did, expend several million dollars in the construction of such lines, and in connection with this planning and development it negotiated and made contracts with a large number of independent local exchanges in Ohio, Indiana, and Michigan, which contracts provided for an interchange of business, "so that a comprehensive and adequate independent telephone system was thereby created." This independent system thereupon entered into and carried on a general telephone business, competing with the Bell system in the territory named, and in about 1907, it had been so successful that it was furnishing long-distance service for 800 independent exchanges, 2,000 independent stations, and 700,000 telephones. Up to the time last named the Central Union Company had adhered to its policy of refusing to furnish service to independent exchanges, but at about that time it abandoned that policy, in whole or in part, and began to solicit an exchange of business with the local independent companies; in other words, the Central Union Company entered into active competition with the United States Company for the long-distance business of the independent local exchanges. The contracts above named, between these exchanges and the United States Company, provided that, for points reached by that company, they should give their long-distance business exclusively to that company and receive long-distance business from that company alone, so that this new policy of the Central Union Company amounted to soliciting the independent exchanges to break their contracts with the United States Company. Several independent exchanges accepted the offers made by the Central Union Company, and entered into interchange arrangements with it.

Against two or three of such independent local exchanges, the United States Company filed injunction complaints, and obtained injunctions in the common pleas court of Ohio. The Central Union Company continuing such solicitation, the United States Company filed this bill in the United States Circuit Court for the Northern District of Ohio, asking an injunction against the continuance of such acts. The defendants demurred, and the Circuit Court dismissed the bill. The United States Company appealed to this court. The hearing of the appeal was long delayed, awaiting the decision of the Supreme Court of Ohio; but that decision, when rendered, was not controlling, as

hereafter explained, and accordingly the appeal has been argued and submitted to this court.

W. L. Cary, of Columbus, Ohio, and Cable & Parmenter, of Lima, Ohio, for appellant.

John H. Doyle, of Toledo, Ohio, Murray Seasongood, of Cincinnati, Ohio, and W. B. Mann, of Indianapolis, Ind. (Paxton, Warrington & Seasongood, of Cincinnati, Ohio, and Doyle & Lewis, of Toledo, Ohio, of counsel), for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

DENISON, Circuit Judge (after stating the facts as above). After the decision of the present case by Judge Tayler in the court below, an appeal from the common pleas court, in one of the injunction cases, was affirmed by majority vote of the circuit court (in Ohio, an intermediate appellate court). This was carried to the Supreme Court. The Supreme Court of Ohio has six members. Five sat to hear this case, and the decree of the circuit court was affirmed by a vote of three to two, but without any opinion. It is the fixed rule of the Supreme Court in Ohio that the law, as settled by the decision, is to be found only in the syllabus. *Adelbert College v. Wabash R. R. Co.* (C. C. A. 6) 171 Fed. 805, 812, 96 C. C. A. 465, 17 Ann. Cas. 1204. Under these circumstances, it is said that we should not examine for ourselves the questions involved, but should adopt the same disposition of the matter as was reached in the Ohio Supreme Court.

[1] Counsel do not agree as to whether the action of the state courts was in such sequence of events, or whether that action so involved the construction of the state statutes or state policy only, rather than federal statutes or matters of general law, that it would be our duty to adopt the conclusion of those courts; but we see no necessity for considering that problem. It is clear that the obligation to follow the lead of the state courts does not arise, unless the court to be followed is the court of last resort in the state (*Anglo-American Co. v. Lombard* [C. C. A. 8] 132 Fed. 721, 742, 68 C. C. A. 89); and particularly so when the lower court opinions are not unanimous or numerous and old enough to show a settled rule. We think we must interpret the action of the Supreme Court of Ohio as a declaration that, lacking concurrence by a majority of the court, it was unwilling to lay down any general rules or principles as applicable to the existing situation. Under these circumstances, we feel bound to decide the issues according to our own judgment.

The court below based its conclusion largely upon the ground that the exclusive feature of the contracts between the independent locals and complainant was in itself unlawful and void, as tending to unlawful trade monopoly. If that court was right in this, all the other questions argued become immaterial, and so that question is naturally the first to be considered. This necessitates a more careful statement of this feature of the contracts.

Taking one of the contracts as typical, we find that the long-distance company (complainant) agrees to build a line to the corporate

limits of the village, and thence upon the poles of the local company to its central exchange in the village, receiving a license to use therefor the poles of the local company's village lines; that service will be given from all lines owned, controlled, or connected with the lines of either party over the lines of the other party and its connections; that neither party will enter into contract with any other person or corporation whereby any of the rights, privileges, or advantages acquired by this contract might be impaired; that the long-distance company will transmit, over the lines owned or controlled by the local company, all messages destined to points thereon, and not reached by the long-distance company's own lines; that the local company will transmit over the lines of the long-distance company all messages to points "not now reached" by the local company's own lines (as shown by the attached plat of existing local lines); that the tolls and charges shall be divided in agreed proportions; and that the contract shall remain in force for 99 years.

[2] Speaking generally, the policies of the state of Ohio, and of the United States, regarding restrictions of competition, are the same; if there are differences, they are immaterial here. The rule is that of the common law, declared for Ohio by the Valentine Act, and for the United States by the Sherman Act. *Salt Co. v. Guthrie*, 35 Ohio St. 666; section 4427—1, R. S. Ohio; *Standard Oil Case*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200); *State v. Buckeye Pipe Line Co.*, 61 Ohio St. 520, 548, 56 N. E. 464; *State v. Gage*, 72 Ohio St. 210, 73 N. E. 1078. That any particular class of business should be exempted from this prevailing policy would require clear and explicit legislative declaration to that effect. The courts cannot make such exemptions, merely because forceful reasons can be stated why such particular business is a "natural monopoly." If it is, this only means that the Legislature might well have made an exemption, or, at most, that in a judicial determination of what amounts to a substantial and direct restraint, rather than an incidental or indirect restraint, the courts will give due regard to the character of the business under consideration. Of the present situation, it is enough to say that we are cited to no Ohio statute in force when this controversy arose expressly exempting telephone companies from the general policy adopted by the state for other kinds of business; nor is there any such exemption in the federal statutes.

It also seems clear, and is not denied, that the carrying on of telephone business is trade and commerce within the proper meaning of those terms, and one of the kinds of business in which it is the general purpose of the law that all citizens should be at liberty to engage on equal terms.

[3] With these premises, the prima facie restrictive character and monopolistic tendency of the contracts in question can hardly be denied. The local company has tied up its long-distance business. It cannot take general advantage of competition from time to time arising, no matter how advantageous to it or its patrons, and it cannot

expand its own business and extend its own lines beyond its then existing limits into competition with the long-distance company, no matter how advisable such extension and competition might prove to be. This is from the standpoint of the local exchange, but similar results are apparent from the other standpoint. The long-distance company not only forestalls competition likely to arise through the extension of the local company's lines, but by its system of these contracts there was a direct plan and effort to monopolize in the long-distance business so much of the field as it could cover. A general system of contracts may be obnoxious to an anti-trust law, though the individual contract would not be. *United States v. Reading Ry.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. —. These contracts, therefore, must be condemned because "adopted for and adapted to" ¹ restraint of trade and monopoly, unless they escape that condemnation for the reasons hereafter to be considered.

[4] Another consideration leads to the same result: These local exchanges, organized under the Ohio statutes, were public service corporations bound to give reasonably adequate service. *Cumberland, etc., Co. v. Kelly* (C. C. A. 6) 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210; *Postal Co. v. Cumberland Co.* (C. C.) 177 Fed. 726. It is true that they were not charged with an express duty to give long-distance telephone service, but neither were they confined to strictly local service. They had power to extend their lines whenever and wherever the needs of the service and good business policy might dictate (section 3455, R. S. Ohio), and their obligation to furnish reasonably adequate service is not confined to such exact definition of that term as might have been given at the time of the organization. Every such charter contemplates that conditions will change from year to year and from decade to decade, and that the obligation of the company shall be to give that service, which, at the future time when the question arises, is then, and in view of the conditions then existing, reasonably adequate. It is now a matter of common knowledge that long-distance communication is a practical necessity to the perfection of the service rendered by a local exchange to its subscriber, and this situation, while not as clear and certain in 1900 as it is in 1912, must be deemed to have been then within the contemplation of the parties and of the law.

[5] A long-distance telephone service is not necessarily reasonably adequate just because it reaches the city or district of residence of the person with whom communication is desired. A railroad service may be beyond criticism if all passengers and freight are delivered at one station in a city, from which station the passengers go their several ways, and to which station consignees come for their freight; a telegraph service may be complete if the messages reach over the wire only one central office, from which they are distributed by other means; but in telephone communication the ultimate thing sought is personal conversation, and a long-distance telephone service has not reached its full usefulness until the user, in one place, can talk directly with the

¹ Judge Knappen's phrase in *Bigelow v. Calumet & Hecla Co.* (C. C.) 155 Fed. 809, 875.

residence or place of business of the telephone users in another place. It is not now important where the line will be drawn in determining what is reasonably adequate service. That will depend upon many conditions, some of which cannot be foreseen. It is enough to say that where a local telephone company contracts that it will not send or receive *any* long-distance messages, excepting in co-operation with one specified long-distance company, it thereby abdicates its power to give a service which may turn out to be clearly within any proper definition of "reasonably adequate."

Nor are we concerned with the question whether the local exchange could, in 1900, have been compelled, or might now be compelled, to give this long-distance service against its will. We consider only the fact that by these contracts the local companies partially disabled themselves from performing what might become a portion of their public duties, and hence, for that reason also—and unless the controlling justification appears—the contracts are invalid.

[6] We come, then, to the inquiry whether there is sufficient reason for exempting these contracts from their *prima facie* invalidity; and the first point urged to this effect is that, by statute, the long-distance company and the local company each had power to purchase and consolidate with the other, and that, as the greater includes the less, this power of consolidation necessarily implies the power to contract for exclusive, mutual relations. The statutes did give this power of purchase or consolidation (section 3455, *supra*); but such general powers must be construed as subordinate, not paramount, to specific prohibitions of monopolistic combination (*Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679). Nor does the power to consolidate or combine with another company reach to a system of identical or similar contracts with hundreds of other companies, resulting in a general combination. The essential evil may be in the system, but not in the single contract.

Further, on the subject, as Judge Tayer said below:

"The fallacy of this particular contention is to be found in the fact that the lessee or consolidated company is not by the act of lease or consolidation disabled to perform any of its duties which by law may have rested on the lessor or constituent company. There still remains in either case—lease or consolidation—a company operating the local telephone system, and upon it rests, as formerly rested on the constituent local company, the duty which the law laid upon it. Whatever may be the temper or the policy of the successor company, respecting the matter of continuing to monopolize the local and long-distance business of the community, it will not by such lease or consolidation have parted with the power to give competitive service. Thus it will continue to have power to satisfy the legal necessities springing out of the fact that it is a corporation."

It will be noticed that these exclusive contracts have the effect, not only to require the local company to give its long-distance business to the United States Company as against any long-distance competitor like the Central Union, but also to prohibit the local company from extending its own lines in competition with the United States Company. As will be seen from the statute cited, it had the charter power to extend its own lines wherever the good of its stockholders and the

benefit to the public might, from time to time, dictate. So far as such extensions might compete with the lines of the United States Company, then or thereafter established, this power of extension was, by the contracts, abrogated. This consideration adds force to the extract just quoted from Judge Tayler's opinion.

[7] It is next urged that these contracts should be approved because, in spite of their restrictive and monopolistic tendencies, their net character tended in the contrary direction, so that they really promoted, instead of restraining, competition. This is because, in 1900, the long-distance field, so far as occupied at all, was exclusively held by the Central Union Company, which (the demurrer admits) was a monopoly maintaining its position by unlawful means, and because it was impossible to promote and establish a competing long-distance system unless that system was in advance assured of business from independent exchanges, which assurance could be had only by exclusive contracts. We consider this argument as depending upon the principles which have been most recently discussed by Mr. Justice Lurton, in the Reading Case (*supra*) with reference to the 65 per cent. contracts, and it amounts to saying that the restraint and monopoly found in these telephone contracts were not their main and characterizing purpose and effect, but were the indirect and necessary incidents of contracts which operated primarily for promoting competition—hence, they cannot be condemned. It may well be that if a system of monopoly is found so entrenched that competition cannot get a start, except by providing itself in advance with a system of exclusive contracts, then, in such case and in so far as this is necessary to get competition, the exclusive contracts may become a mere incident of the generally lawful enterprise. However, it is clear that this exemption cannot go beyond the necessity of the case, and the bill in this case indicates no necessity requiring or justifying 99-year contracts. These are practically perpetual contracts. Within that period, the entire subject-matter might, and very likely would, change its essential character over and over again. We cannot undertake to suggest the term of exclusive contract which would be reasonable, so as to permit the use of such a means for getting a rival company into the field. The term of a patent may furnish some analogy. Different circumstances may justify different terms. The term might be such as to make it very difficult to decide upon which side of the line it lay. We need not speculate about these things, because we are clear that the 99-year restriction found in these contracts goes far beyond any inherent necessity for the purpose suggested, and so cannot be justified as properly incidental to a lawful purpose.

Several other reasons are urged for sustaining the validity of these contracts in spite of what we have called their *prima facie* invalidity, but we find none of these reasons as forceful as the two which we have discussed; nor does any one of the decisions which have been pressed upon us seem persuasive in opposition to the conclusions we have expressed. A review of these cases would be unprofitable. No one of them has reference to a system of hundreds of identical or similar contracts covering large parts of three states, running for a period of time which is practically perpetual, and operating to abrogate a

part of the powers of public service corporations, and covenanting that the powers not wholly abrogated shall not be exercised as they might otherwise have been and as may prove to be essential to giving good service and to avoiding monopoly. For example, in *Chicago, etc., Co. v. Pullman, etc., Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97, a contract by the railroad to give to the Pullman Company the exclusive right to furnish sleeping cars to the railroad was sustained; but the contract was for a period of only 15 years, and contained an option by which, if unsatisfactory, it might be terminated in 5 years. Such a contract was, essentially, of a different character from those now involved, because of the entire practicability of exchanging long-distance telephone business with more than one company, contrasted with the practical difficulties which might attend the attempted use of the same railroad track for sleeping cars of different systems; but, aside from this practical distinction, the opinion does not indicate to us that the exclusive sleeping car contract would have been sustained if it had been for the period of 99 years, and if it had been one of a system of similar contracts covering or attempting to cover all the railroads in a large territory. The Supreme Court has also sustained exclusive contracts for hauling express cars (*St. Louis, etc., Co. v. Southern Exp. Co.*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791); but this is less analogous than the Pullman Case. On the other hand, the view we take is supported, more or less perfectly, by *Beasley v. Texas Pac. Ry. Co.*, 191 U. S. 492, 497, 24 Sup. Ct. 164, 48 L. Ed. 274; *State v. Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 583; *South Chicago, etc., Co. v. Calumet, etc., Co.*, 171 Ill. 391, 49 N. E. 576; *Central, etc., Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, 139 Am. St. Rep. 878; *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

We are not unmindful that the result of affirming the decree below is to compel what is said to be the weaker of the two companies to defend itself against commercial aggression from the stronger by some other means than merely standing upon these contracts which it had provided for such defense; but, in applying rules of this kind, we must look to the future as well as to the present. Sustaining these contracts might, for the time being, aid the weaker and so help to maintain competition; but it would at the same time point the way by which, in case of the voluntary or involuntary combination of these two companies, all competition or possibility of competition would be, for 99 years, excluded. This entire phase of the question is so well stated by Judge Tayler that we quote with approval this part of his opinion:

"The position which counsel for complainant take comes to this when we analyze it: The Bell Telephone Company is a wicked monopoly. Some years ago the United States Company concluded to fight it. The only way to fight the devil was with fire. The only way to fight the monopoly was to monopolize all unoccupied territory. The way to monopolize this unoccupied territory was to go to a local telephone company which had no long-distance connection and offer to give it such a long-distance connection, provided a perpetual monopoly of it was given in return.

"This purpose to destroy the Bell monopoly may be admitted to be virtuous. The method resorted to was vicious. It was a mere repetition and imitation

of the methods which, when followed by the Bell Company, are so bitterly denounced. The philosophy that the end justifies the means, when the end is virtuous and the means vicious, has long since been discarded, if it ever had any avowed supporters. But even that philosophy cannot apply to a mere business undertaking. The purpose to destroy the telephone monopoly was not a virtuous purpose; it was a business proposition, which incidentally led, we may assume, to a righteous result. What becomes of the righteous result when the means to accomplish it are the means of unrighteousness? The ultimate result of which may be that we discover we have exchanged one master for another, or if not, that we have emphasized the strength of the former master. Counsel, of course, will not deny that if the Bell Company should acquire control of the complainant, these contracts would be just as valid and the shield of our defense would be turned into a weapon with which to destroy us.

"Are the courts to turn themselves into inquisitors of the minds of men and say: 'Here is a man who wants to do the world some good? The ultimate result promises to be beneficial, but, in order to accomplish it, he must monopolize the business of some community and must violate the law. May he do so?' These questions were long ago answered, and yet they come up again and again.

"The sum of all this is that it does no good to destroy one monopoly by creating another. Monopolies all look alike to the law. When they use their power unlawfully, it is for the law to take suitable steps to punish the offender and prevent recurrence of the offense."

The decree below is affirmed, with costs.

HIGGINS v. EATON.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 125.

1. COURTS (§ 511*)—COMITY—DISPOSITION OF PERSONAL PROPERTY BY WILL—WHAT LAW GOVERNS.

In general, the law of the domicile of the owner governs his capacity to bequeath personal property. But the recognition of such rule depends on comity, since the state or country of the domicile has no right to extend its laws beyond its borders, and every state, as an incident to sovereignty, has power to establish and regulate the succession of all property, real and personal, movable and immovable, within its territory; the only limit on its authority being its capacity to make its laws effective.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1432; Dec. Dig. § 511.*]

2. WILLS (§ 434*)—EXECUTION—PROBATE—PERSONAL PROPERTY.

Under Decedent Estate Law N. Y. (Consol. Laws 1909, c. 13) § 23, providing that a will of real or personal property, executed as prescribed by the laws of the state, may be proved as prescribed in the article, a decree of the Surrogate's Court of the county in New York in which a nonresident testator left personal property, admitting the will and codicil to probate, was conclusive as to the devolution of such personal property, notwithstanding the court of the testator's domicile refused to admit the codicil to probate for alleged want of testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 937-945; Dec. Dig. § 434.*]

Appeal from the Circuit Court of the United States for the Northern District of New York; George W. Ray, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit by Susan S. C. Higgins against Hervey E. Eaton, as executor of the will of Elizabeth S. Eaton, deceased. Decree for complainant (188 Fed. 938), and defendant appeals. Reversed and remanded, with instructions to dismiss.

Elizabeth S. Eaton was domiciled in Ann Arbor, Mich., and died there in 1906 leaving two instruments purporting to be a will and its codicil. Her principal estate consisted of personal property in the physical possession of the defendant, her brother, in Madison county, N. Y. The defendant was named as executor in the will. After regular probate proceedings according to the statutes of New York both the will and codicil were admitted to probate by the Surrogate's Court for Madison county and letters testamentary were issued to the defendant who continued to hold possession of said property. Subsequently the probate court of Washtenaw county, Mich., the place of domicile, after due proceedings according to the laws of Michigan admitted the will to probate but rejected the codicil upon the ground of want of testamentary capacity at the time of its execution.

A suit was brought by the administrator with the will annexed appointed by the Michigan court against the New York executor to compel the transfer of the New York assets. This suit was dismissed upon demurrer by the Circuit Court (Watkins v. Eaton, 173 Fed. 133) and its decree was affirmed by this court (183 Fed. 384, 105 C. C. A. 604).

The present suit was brought by the complainant against the defendant as the New York executor for the recovery of a legacy payable under said will but which the defendant claims was revoked by the codicil. A demurrer to the bill was sustained by the Circuit Court (178 Fed. 153) but its action was reversed by this court (183 Fed. 388, 105 C. C. A. 608). The opinion upon the merits by the court below is reported in 188 Fed. 938, and as it contains a very full statement of the facts in the case it is unnecessary to repeat them here.

C. J. Coleman, of Hamilton, N. Y., and E. H. Risley, of Utica, N. Y., for appellant.

Martin & Jones, of Utica, N. Y. (A. F. & F. M. Freeman and B. M. Thompson, all of Ann Arbor, Mich., Ralph Phelps, Jr., and Orla B. Taylor, both of Detroit, Mich., of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The will gave the complainant a legacy upon condition that she support the testatrix's unfortunate brother. The codicil gives a legacy to another person for the same purpose. The provisions of the codicil are quite inconsistent with those of the will. It is impossible to believe that the testatrix intended to make two distinct provisions for her brother's support and, in effect, to charge her estate with the same thing twice. We think that if the codicil be in force it revokes the bequest to the complainant in the will. So we come at once to the substantial question in the case: In this suit against the New York executor is the codicil to be regarded as in force?

[1] The maxim *mobilia sequuntur personam* found early a place in the common law and, broadly speaking, is still true. As a general rule personal property is sold, transmitted, bequeathed and succeeded to according to the law of the domicile of the owner. And as that which controls the disposition must necessarily determine the capacity to make the disposition it is included in the general rule that the capacity to make a will is determined by the law of the domicile.

The general rule exists between states and is international. But its recognition depends altogether upon comity. The country of the domicile has no right to extend its laws beyond its borders. Every state has, as an incident to sovereignty, the power to establish and to regulate the succession of all property, real or personal, movable or immovable, within its territory. The only limit upon its authority is the capacity to make its laws effective. State laws conferring upon state courts power to admit to probate wills of non-residents as affecting local personal property are well within the power of the state. As said by Mr. Justice Holmes in *Blackstone v. Miller*, 188 U. S. 189, 204, 23 Sup. Ct. 277, 278 (47 L. Ed. 439):

"To a considerable, although more or less varying extent the succession determined by the law of the domicile is recognized in other jurisdictions. But it hardly needs illustration to show that the recognition is limited by the policy of the local law."

The underlying principles are also clearly stated in the early case of *Jones v. Marable*, 6 Humph. (Tenn.) 116, 118:

"Although it is a rule of international law that the succession to personal property is controlled by the law of the domicile, yet it is in the power of any state to change the law in this respect; for unquestionably every state has a right to regulate persons and things within its own territory according to its sovereign will and pleasure. Story's Conf. L. 23. Nor is it bound to give effect to any general principle recognized among nations upon this subject."

See, also, *Mahorner v. Hooe*, 9 Smedes & M. (Miss.) 247, 48 Am. Dec. 706; *Minor v. Cardwell*, 37 Mo. 350, 90 Am. Dec. 390.

The question then in any case when a demand is made under the law of the domicile is whether the state recognizes that law or has adopted its own regulations upon the subject. If the state has enacted statutes governing the transmission of property within its territory and prescribing the procedure incident thereto, no rule of comity has place. That the local law providing for the probate of wills of local personal property and the proceedings thereunder may differ from the law of domicile is immaterial. To the extent that it differs the state declines to be bound by the general principle. And it necessarily follows that where the state provides for the independent proof of wills in its courts, it provides for a determination of the capacity to make them. The grant of authority to probate a will involves, of necessity, power to determine testamentary capacity for only when such capacity is found does a paper become a will. When such statutory grant appears the question of capacity is one of local law and the law of the domicile is no longer controlling.

We have, then, in the present case to ascertain whether the state of New York in which the personal property of the decedent was at the time of her decease has enacted legislation controlling the situation and the effect of proceedings thereunder.

[2] The relevant statute is section 23 of the Decedent Estate Law (Consol. Laws 1909, c. 13), formerly section 2611 of the Code of Civil Procedure, which reads as follows:

"A will of real or personal property, executed as prescribed by the laws of the state, * * * may be proved as prescribed in this article."

This statute has been construed by the New York courts in *Matter of Rubens*, 128 App. Div. 626, 112 N. Y. Supp. 941, affirmed on the opinion of the court below, 195 N. Y. 527, 88 N. E. 1130. In this case a decedent who was domiciled in France left property in the state of New York and a will which was executed according to New York laws but not according to the laws of France. It was contended that the law of the decedent's domicile governed but it was held that the provision in the statute above quoted controlled and that as the will had been executed according to such provision it was properly established as a disposition of the personal property within the state notwithstanding that it had not been executed according to the law of the domicile. Mr. Justice Clarke in discussing the proof required said:

"First and in any event, we will accept it if executed according to our laws which we have determined sufficiently safeguard the authenticity of the instrument."

This decision determines authoritatively many of the questions presented here. The state of New York with respect to personal property within its territory declines to be bound by the rule of comity and permits the independent proof of a testamentary disposition of such property notwithstanding that such disposition may be void according to the law of the decedent's domicile. It also necessarily follows that the probate of wills disposing of personal property establishes them as instruments transmitting the title to such property. A will is a disposition of property to take effect upon the death of the owner. The probate of a will is necessary to establish it as an instrument of title but when probated that is its very essence. To say that the New York statutes authorize the establishment of wills of personal property within the jurisdiction and then to say that a will when probated does not, on account of something relating to its execution, operate to pass the title to such property is to assert and deny the same real thing. Similarly the statutory authority in the New York courts to admit wills to probate as dispositions of property within the state necessarily includes authority to determine the testamentary capacity of the decedent. As already pointed out, a court cannot independently admit a will to probate without making such determination.

The decree of the New York Surrogate's Court in this case was rendered after due notice and hearing according to the New York statutes and is still in full force and effect. It is in the nature of a decree in rem and as such is binding upon the complainant. It settled that the decedent has testamentary capacity to make the codicil as well as the will; that the property within the jurisdiction should be distributed in accordance with the provisions of both testamentary instruments, and that the duty of the defendant as executor was to carry out the provisions of the one as affected by the other.¹

¹ The question does not arise in this case as to what kinds of personal property come within the purview of the New York statutes as personal property within the state. As already stated a state has the right to determine the testamentary disposition of property so within its territory that its enactments

This court as a court of equity is now asked to undo that which was accomplished by the New York decree and, in the face of it to hold that the New York executor is not bound by the codicil and must pay a legacy in the will which is revoked by the codicil. The complainant seeks to obtain a decree for such legacy against such executor which will be paid by him out of the New York assets; no other fund is available. She asks this court to hold that the obligations of the New York executor are not measured by the decree under which he acts and in effect to declare that the in rem decree so far as it relates to the codicil is of no effect. True she does not ask the formal setting aside of that decree but what she does ask accomplishes the same thing. What does the New York decree amount to if the decision of the court below be affirmed? A court which enforces an obligation in the face of and in spite of a probate decree annuls it quite as much as does the superior tribunal which formally sets it aside. If this court have power to grant the complainant that which she asks, it has power tantamount to that required to set aside the probate of the will.²

Now if anything is well settled by the decisions of the Supreme Court of the United States from the case of *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599, down to *Farrell v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101, it is that the federal courts as courts of equity will not (with an exception which will be noted) entertain jurisdiction of suits to set aside the probate of wills. In the former case Mr. Justice Bradley said (21 Wall. 509, 22 L. Ed. 599):

"As to the first point, it is undoubtedly the general rule, established both in England and this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. The case of *Ker-*

can be enforced. How far its enactments go is a question of their interpretation. With respect to chattels and movables a question would hardly arise. With respect to choses in action questions might arise and indeed have arisen in the courts. Thus in *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61, it was held that while the Illinois statute relating to descents change the common-law rule that personal property follows the person of the owner as to "property in this state," yet that that phrase did not include debts although the evidences of indebtedness were within the state. See, also, *Channel v. Capen*, 46 Ill. App. 244. A somewhat different interpretation was, however, placed upon the Mississippi statute in *Jahier v. Rascoe*, 62 Miss. 699. See, also, *Speed v. Kelly*, 59 Miss. 47.

In the present case, however, as pointed out in the text, the defendant is sued only as the New York executor and with respect to the property in his hands. It would not help the complainant's cause to show that, in contemplation of law, some of the assets could not be regarded as in his hands.

² Suppose that the decedent had left a will bequeathing all her estate, consisting of personal property situated in New York, to A and that such will had been admitted to probate by the New York courts as affecting such property. Suppose that the Michigan courts had subsequently rejected said will for want of capacity and had probated an earlier will bequeathing all of said property to B and that B sued here for his bequest. It seems entirely clear that we could not grant relief because as to the executor which we could reach and as to the property which our decision could affect it was settled by the decree of a court of competent jurisdiction that the later will controlled. And this supposititious case is in principle precisely the same as the case at bar.

rick v. Bransby, decided by the House of Lords in 1727, is considered as having definitely settled the question. Whatever may have been the original ground of this rule (perhaps something in the peculiar constitution of the English courts) the most satisfactory ground for its continued prevalence is, that the constitution of a succession to a deceased person's estate partakes in some degree of the nature of a proceeding in rem, in which all persons in the world who have any interest are deemed parties, and are concluded as upon res judicata by the decision of the court having jurisdiction."

These reasons lead equally to the conclusion that the federal courts will not grant relief which will in effect set aside the probate of a will or codicil. If probate proceedings are in the nature of proceedings in rem to which all persons interested are deemed parties and by which they are concluded, they are concluded just as much from bringing suits in the face of such proceedings as they are from suing to set them aside. The thing adjudicated is the valid execution of the will or codicil and the adjudication has the same effect upon the one kind of suit as upon the other.

The exception which has been made by the Supreme Court to the rule that the federal courts will not entertain suits to set aside the probate of wills is that when a state law gives a person interested in an estate the right in a suit inter partes to assail probate proceedings, a similar right will be accorded in the federal courts where the requisite diversity of citizenship exists. See *Farrell v. O'Brien*, supra. This, however, merely gives a suitor in the federal courts the same rights as a suitor in the state courts and really constitutes no exception to the underlying principle involved. The exception, moreover, has no application in the present case. The action inter partes which the New York statutes permit is of a purely probate character and in no way analogous to the present suit.

A confusion which arises in considering the decisions of the Supreme Court upon the general subject arises from failing to distinguish between suits which relate to the execution of a will or codicil and those which relate to its interpretation. The validity of a will as a testamentary instrument is a very different thing from the validity of the testamentary disposition. In the one case that which is involved is the execution of the will—the factum—including the question of testamentary capacity. In the other the question is as to the construction to be placed upon the provisions of the will. An instrument may be a valid will and yet contain invalid provisions.

The Supreme Court has repeatedly entertained suits involving the construction of wills but we think that no substantial departure will be found from the rule that that court will not pass upon the validity of their execution. When the court speaks in many cases of "adjudicating concerning rights against the estates of decedents" it means, in cases where testamentary instruments have been established by courts of competent jurisdiction, rights consistent with such establishment. Legatees may sue in the federal courts for their legacies; devisees may obtain their lands; trusts may be established; testamentary provisions may be interpreted, but the courts proceed only upon the foundation of the proved will. Indeed we think that the Master of the Rolls, Lord Langdale, correctly stated the present posi-

tion of the Supreme Court when he said in *Ryves v. Duke of Wellington*, 9 Beav. 579, concerning his court:

"It is not denied that in ordinary cases this court has no jurisdiction to determine upon the validity of a will of personal estate, and that in all cases in which parties apply for the construction of a will or for payment of legacies under a will, this court proceeds only on the foundation of a will proved in a court of competent jurisdiction."³

The present case, in itself, illustrates the distinction between the matters which can be and which cannot be properly considered by the federal courts. This suit could well be maintained up to the point where the court is required to go behind the New York decree. There is no doubt about the power to determine whether the provision in the will for the complainant's benefit was revoked by the terms of the codicil and the interpretation to be placed upon such provisions if unrevoked. But upon finding that the provision was revoked the case ends unless we can go further and treat the codicil and the decree establishing it as of no effect—unless we can ignore the decree of a competent court touching parties and property within its jurisdiction.

There is no question in the case about the Michigan decree. So far as there may be property in Michigan that decree determined its disposition. So far as there may be property in other states which recognize the law of the domicile, that decree will likewise control. But so far as the New York assets are concerned, the New York decree controls and in this suit against the New York executor that decree determines his duties.

For these reasons a majority of the court are of the opinion that our prior decision in this case should not be followed and that the decree appealed from should be reversed and the cause remanded with instructions to dismiss the bill. In view of all the circumstances no costs will be awarded in either court.⁴

³ Of course in the case of either testate or intestate estates the federal courts are open to creditors to establish their demands against the estate and in the case of intestate estates they are likewise open to heirs or distributees to establish their shares, although the possession of the property by the state court will not be disturbed. But cases of this kind furnish no authority for the proposition that the federal courts will establish in a state against a state executor a legacy revoked by a codicil duly proved in the state court as a disposition of assets within the state.

⁴ The motion by the appellee to dismiss the appeal is denied. If the bond were defective in form another one might be ordered. But in view of the disposition of the case upon the merits it is unnecessary to pass upon that question.

SPERRY & HUTCHINSON CO. v. BLUE, State Tax Com'r.

(Circuit Court of Appeals, Fourth Circuit. November 13, 1912.)

No. 1,094.

1. JUDGMENT (§ 828*)—JUDGMENTS OPERATIVE AS BAR—STATE AND FEDERAL COURTS.

A final judgment on the merits in the courts of a state is conclusive in the federal courts between the parties or their privies whether the question determined was one of federal, general, or local law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

2. JUDGMENT (§ 572*)—JUDGMENTS OPERATIVE AS BAR—JUDGMENT ON DEMURRER.

A judgment sustaining a demurrer to a bill to enjoin enforcement of a state statute on the ground of its unconstitutionality is as conclusive as one rendered on proof, and is a bar to a subsequent suit to have the statute declared invalid upon any ground which might have been litigated in the prior suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1047-1049; Dec. Dig. § 572.*]

3. LICENSES (§ 7*)—TAX ON OCCUPATIONS—VALIDITY.

Where a license tax on an occupation or a business is imposed by one provision of an act comprising a complete tax code for a state, an intention to prohibit such particular business cannot properly be imputed to the Legislature because of the amount of the tax.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.*]

4. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL POWER—VALIDITY OF STATUTES.

It is not within the province of the federal courts to declare an act of a state Legislature, passed in the exercise of its lawful taxing power, invalid on the ground that the power was in the particular case exercised for an unlawful purpose, so long as there is no discrimination against citizens of other states nor interference with interstate commerce.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-130, 137; Dec. Dig. § 70.*]

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston; J. C. Pritchard, Benj. F. Keller, and Alston G. Dayton, Judges.

Suit in equity by the Sperry & Hutchinson Company against Fred. O. Blue, Tax Commissioner of West Virginia. Decree for defendant, and complainant appeals. Affirmed.

John Hall Jones, of New York City (T. C. Townsend, of Charleston, W. Va., on the brief), for appellant.

William G. Conley, of Charleston, W. Va. (Fred. O. Blue, of Phillippi, W. Va., on the brief), for appellee.

Before GOFF, Circuit Judge, and BOYD and ROSE, District Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ROSE, District Judge. The complainant is a New Jersey corporation. It is engaged in the trading stamp business. It will be referred to as the Stamp Company. The respondent is the State Tax Commissioner of West Virginia. He will be called the Commissioner.

In the court below the Stamp Company sought to have the Commissioner enjoined from enforcing against it a state law imposing a license tax upon persons or corporations engaged in the trading stamp business. The amount of this tax is \$500 for each county in which the business is carried on. In any case in which the state imposes an occupation tax, the city of Charleston is authorized by law to levy for municipal purposes a like amount on any one following such occupation within the corporate limits. Charleston has availed itself of this permission. In consequence state and city together exact of the Stamp Company \$1,000 per annum for the privilege of carrying on business in that place.

In its bill of complaint the Stamp Company says that these exactions, though made in the guise of taxes, are not intended to raise revenue, but to prevent the carrying on of the trading stamp business. It alleges that such business is a legitimate one; that the Legislature cannot directly forbid it; that what the Legislature cannot do directly it may not accomplish by indirection. To the Stamp Company's bill the Commissioner demurred. The demurrer was argued before Circuit Judge Pritchard and District Judges Keller and Dayton. It was sustained. The Stamp Company elected to stand on the bill without seeking to amend it. It was thereupon dismissed. The appeal to this court followed.

The eleventh paragraph of the bill of complaint reads as follows:

"Complainant further alleges that the State Tax Commissioner of West Virginia on or about the 20th day of April, 1908, notified complainant that it would have to pay the state license tax of \$500 for conducting its business in said county of Kanawha, and thereafter, by agreement with said State Tax Commissioner, complainant filed in the circuit court of Kanawha county a bill in equity praying that the sheriff of Kanawha county be restrained and enjoined from taking any action to enforce said state license tax for said county on the ground that said license tax law was unconstitutional. To this bill a demurrer was filed. The judge of said court sustained the demurrer, and complainant appealed to the Supreme Court of Appeals of West Virginia, which affirmed the decision."

The Commissioner says that this allegation shows that in a proceeding to which both the Stamp Company and himself were parties the issue here raised had been previously adjudged against it by a court of competent jurisdiction, whose judgment in the premises still stands unreversed and unmodified.

[1] The Stamp Company does not question that in contemplation of law the parties to this case and to that in the state court are identical. Its counsel, however, contended that the Constitution and the legislation of Congress recognize the possibility that state courts may not always hold the scales of justice even between a citizen of their own state and a citizen of another state. The Commissioner is a citizen of West Virginia. It is a corporation of an-

other state. It claims that it has a right to its day in the federal court. In its view it is immaterial that it has already had a day upon the same issue in the state court, and that in that court judgment has gone against it. It says that this court must hear its complaint no matter what the state court did with that complaint when previously made to it. That we may not do. The same contention here made was set up in the case of *Mitchell v. First National Bank of Chicago*, 180 U. S. 481, 21 Sup. Ct. 421, 45 L. Ed. 627. The Supreme Court there answered it by saying:

"It is said that the question here presented was one of general jurisprudence involving the rights of citizens of different states, and that the Circuit Court was not bound to accept the views of the state court, but was at liberty, indeed, under a duty, to follow its own independent judgment as to the legal rights of the parties. *Burgess v. Seligman*, 107 U. S. 20 [2 Sup. Ct. 10, 27 L. Ed. 359]. If it were true that the question was in whole or in part one of general law, the thing adjudged by the state court when properly brought to the attention of the Circuit Court would still be conclusive between the same parties or their privies. Whatever may be the nature of a question presented for judicial determination—whether depending on federal, general, or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified or unreversed."

[2] The Stamp Company says that the judgment in the state court is not binding here because it was upon a demurrer, and not after hearing upon the merits. "A judgment on demurrer is as conclusive as one rendered upon proof." *Northern Pacific Ry. Co. v. Slaght*, 205 U. S. 130, 27 Sup. Ct. 445, 51 L. Ed. 738. The bill of complaint in this case says that the bill in the state court expressly alleged that the act here attacked was unconstitutional. Whether the act was constitutional upon any state of facts which the Stamp Company could truthfully allege could be as accurately determined upon a demurrer to a well-drawn bill as at a hearing upon the proofs. That being the case, "the same legal consequences followed from" the judgment upon it. *Northern Pacific Ry. Co. v. Slaght*, *supra*.

In the argument at this bar the Stamp Company said that the demurrer was sustained in the state court because the bill therein did not show some of the facts set forth in the bill now before this court. Even so, "the general rule of the extent of the bar is not only what was pleaded or litigated, but what could have been pleaded or litigated." *Northern Pacific Ry. Co. v. Slaght*, *supra*. The Stamp Company in argument claims that it could not have pleaded in the state court many of the facts set forth in the bill in the case at bar because those facts were not then known to it. Moreover, it says that it could not then have had knowledge of them because they happened since the beginning of the proceedings in the state court. When it filed its bill in the state tribunal, it had been in business in West Virginia but a short while. It could not, it contends, then have alleged the relation borne by the tax to the profits realized from its business or realizable therefrom. In strictness it is unnecessary to consider whether, if such contention were well founded, the decree in the state court would

be a bar to the proceeding here. This case is being heard on demurrer. No such explanation of the insufficiency of the state court bill is made in that in this court. The record before us tells us nothing more than that in the state court the Stamp Company alleged that the act imposing the license tax was unconstitutional; that the bill was demurred to; that the court of first instance sustained the demurrer and dismissed the bill; and that the Supreme Court of the state affirmed its decree. No clearer instance of *res adjudicata* as to the constitutionality of the act could be easily stated than that which appears on the face of the bill in this case. The opinion of the Supreme Court of West Virginia will be found reported under the title of *Sperry & Hutchinson Co. v. Melton*, 69 W. Va. 124, 71 S. E. 19, 34 L. R. A. (N. S.) 433. It is said that it there appears that the action of the lower court in sustaining the demurrer to the bill was affirmed merely because that bill did not contain allegations found in the pending one. The record does not contain the pleading which the highest court of West Virginia said disclosed no sufficient ground for relief. It is therefore not before us. The Commissioner in an appendix to his brief has, however, reproduced it. If we are free to consider it at all, it appears that there are allegations found in it which are not in the bill in the present case. For the most part, however, whatever is charged in one and not in the other might have been stated in either.

The Supreme Court of Appeals understood the bill before it as alleging that the Stamp Company if it was required to pay the tax could not carry on its business in Charleston, Kanawha county, at a profit. What that bill said was that the Stamp Company's total receipts from its business in that county was or would be \$7,500. If it paid the tax, its expenditures would be \$7,665. With the bill in the pending case were filed certain exhibits. From them it appears that in a period of a little over three years the Stamp Company's receipts in Charleston aggregated \$19,800.54, its expenditures \$21,291.40. Of these expenditures \$1,500 were on account of the tax now assailed, and an additional \$1,000 on account of the municipal tax levied by an ordinance of the city of Charleston. These figures do not differ widely enough from those before the state court to justify us in assuming that had they been before that court its conclusion would have been different from that at which it in fact arrived. The figures in the exhibits when analyzed do not show that the tax is prohibitory. During the part of the calendar year 1908 in which it was carrying on business in Charleston, and during the whole year of 1909, its receipts footed up \$8,064.97. Its expenditures, exclusive of either the state or municipal license tax, were \$8,913.64. That is to say, if it had paid no such tax, it would still have lost \$848.67. In 1911 its receipts were \$5,481.65. Its expenditures, other than those for license taxes, \$3,881.95. That is to say, but for the tax it would have made a profit of \$1,599.70. The state tax which is here assailed is \$500 per year. The municipal tax is of a like amount. The Stamp Company could during the year 1911 have paid both these taxes, and still have cleared \$599.70, which is about 10 per cent. of its gross receipts. So far as these figures show

anything, they strongly suggest that in the first months and years of the business in a particular locality money is lost. This is not a phenomenon peculiar to trading stamp companies. After the business has once been well established, it becomes profitable. Possibly it may become so profitable that it will be able to pay the license tax or taxes and still make money. In the bill before us it is alleged that the Stamp Company, in spite of the tax, had begun business in two additional places, viz., at Clarksburg and Grafton. Its stores in these towns were opened four and two months, respectively, before the filing of the bill in this case. In each instance the exhibits annexed to the bill show that the Stamp Company had lost money. Such statement does not aid us in reaching any conclusion as to whether the business was likely ultimately to prove profitable or not.

In short, none of the figures contained in the exhibits present the situation in any different aspect from that depicted by the state court bill. Indeed, they weaken, rather than strengthen, the contention there and here made that the Stamp Company will be unable to pay the tax. The allegations contained in this bill to the effect that the license taxes were not equal and uniform, but were discriminative, especially with regard to persons engaged in the advertising business and with regard to general merchants selling merchandise, and others, and were excessive, unreasonable, unjust, oppressive, and prohibitory, were distinctly made in the bill in the state court. The Supreme Court of Appeals, in the course of its opinion, said that the Stamp Company did not say that other persons might not be able to carry on the business at a profit. It merely alleged that it could not. In the present bill the Stamp Company says that other trading stamp concerns had tried to pay the tax and do business in West Virginia, and that they had, one and all, given it up as unprofitable. It asserts that none could succeed where it failed, and that it would be successful when many or most others would go to the wall. It explains that it feels justified in so stating because it has had a wider experience and has abler management and larger capital than any other person or corporation in the same business. These facts, if they be such, were all known to the Stamp Company when it filed its bill in the state court.

The final judgment on the demurrer, so long as it stands unreversed, forecloses here not only what was litigated in the other case, but what might have been. In the litigation in the state courts the Stamp Company had expressly charged that the license tax deprived it of rights secured to it by the Constitution of the United States. The highest court of West Virginia decided against this claim. The Stamp Company could, if it had seen fit, have taken the case to the Supreme Court of the United States. It did not do so. Instead, it went into a lower federal court, and asked that court, in effect, to reverse the judgment of the Supreme Court of Appeals of the state.

The reasons why a lower federal court should not do what the Circuit Court for the Southern District of West Virginia is asked to do in this case are so obvious that such action never should be taken if it can be avoided without denying to the parties before the court the rights to which they are clearly entitled. If the litigants in the federal

courts had been neither nominal nor actual parties to the state litigation, the federal court must, on questions involving the construction and application of the Constitution of the United States, exercise its own judgment. It will be compelled to do so even if the result of such exercise should unfortunately reveal that its views were not in accord with those previously expressed by the state tribunals. Different principles, however, apply where the parties, in the federal courts have first taken their grievances to the state tribunal, and have there litigated them. They have had their day in court, and in this case a day in a court of their own choosing. They must abide the outcome.

The court below could not for these reasons have granted any of the relief for which the Stamp Company asked even had it supposed that the Stamp Company would have been entitled to such relief had it not been for the adverse decision of the state court. If, however, that judgment were out of the way, it would nevertheless be difficult to sustain the Stamp Company's contention. The tax, of which the Stamp Company complains, was not imposed by a special act aimed at the trading-stamp business exclusively. On the other hand, the provision imposing it is a part of one section of a lengthy act dealing with some 23 different occupations and businesses. The act was itself a part of a series of measures which together apparently recast a large part, if not the entire, tax code of the state. They were all passed at a single special session of the state Legislature held in August, 1904. This revision of the taxing system of the state was seemingly the principal purpose of the Legislature coming together at all at that time. So far as form and manner go, the presumption that this was in truth and in fact intended as a taxing measure is strong. It is true that of the other 23 occupations dealt with, some, such as the business of dealing in intoxicating liquors, may be lawfully prohibited altogether because of the dangers to which it is supposed that they may subject public morality and order; others, such as that of hawkers and peddlers, may require regulation and restriction. That of stock and merchandise brokers would not ordinarily be classed in such a category. Their business would appear to be as legitimate and at least as necessary as that of vendors of trading stamps. This same act imposes the franchise taxes which are levied on corporations doing business in the state. There can be no question that this last-named provision is a revenue measure pure and simple.

The bill states that this act had been on the statute books of West Virginia for more than three years before the Stamp Company first sought to do business in the state. It is a foreign corporation. The business which it undertook to do was purely intrastate. The state had the right to say that it should not do business in West Virginia at all. It could have said so without assigning any reason for so saying, nor would the motive which led the Legislature so to say have been material. *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317.

According to the contention of the Stamp Company, the Legislature by imposing the license tax intended to prohibit the trading stamp business in West Virginia. If that business is one which the Legislature

may not prohibit generally, such an act of Assembly avowedly passed as a prohibitory measure would be invalid as against citizens of the state. It would be equally invalid as regards citizens of other states to whom the Constitution of the United States secures the rights, privileges, and immunities of citizens of the several states. Would the same principle apply in favor of corporations? Could not the Legislature say it would not permit any corporation, foreign or domestic, to engage in a particular kind of business, however legitimate that business might be? If such prohibition did not in any way directly restrain, limit, or attempt to regulate interstate commerce, might it not be perfectly valid? A corporation already engaged in the business in the state might possibly under some circumstances be able to claim protection against what would amount to a deprivation of its property, but in the face of such legislation could a foreign corporation come into the state and seek for the first time to engage in a business forbidden by the policy of the state as expressed by its Legislature? Would the fact that the legislation in question attempted to subject individuals to the same restraint and as against them was unconstitutional be any reason why it might not be applied to corporations? It is not necessary to answer these questions. It is sufficient to point out how many and how doubtful are the inquiries which must be made before we could say that the Supreme Court of Appeals of West Virginia was in error, assuming for the purposes of the argument, and for those purposes only, that we would have a right to say so at all.

[3] But there is still another difficulty in the way of holding this tax invalid. Has this court, or any court, the right to say that a tax may not be levied because in the judgment of the court the amount is so large that it could not reasonably have been intended to produce revenue? The Legislature of Georgia imposed upon each immigrant agent, or employer or employé of such agent, doing business in that state, the sum of \$500 for each county in which such business was conducted. As in the case at bar, the tax complained of was one of many imposed on different occupations. The amount of the tax varied with the character of the occupation. The Supreme Court said:

"The general legislative purpose is plain, and the intention to prohibit this particular business cannot properly be imputed from the amount of tax payable by those embarked in it even if we were at liberty on this record to go into that subject." *Williams v. Fears*, 179 U. S. 275, 21 Sup. Ct. 130, 45 L. Ed. 186.

[4] Another Georgia statute levied a tax of \$200 in each county upon all agents of packing houses doing business in the state. The Supreme Court said:

"What the necessity is for such tax and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state Legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here." *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663.

In *Postal Telegraph Co. v. Charleston*, 153 U. S. 699, 14 Sup. Ct. 1097, 38 L. Ed. 671, a license fee of \$500 was exacted of the complainant by the city of Charleston, S. C. The company said that, if li-

cense exactions were allowed to and made by the various cities in the state, great injury and wrong would be done to the telegraph company. The Supreme Court said:

"This is a hardship, if such exists, that is not within our province to redress. If business done wholly within the state is within the taxing power of the state, the courts of the United States cannot review or correct the action of the state in the exercise of that power."

A still more thorough examination of the philosophy of the whole question was made by the Supreme Court of the United States in *McCray v. United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561. There the validity of the 10 cents a pound tax on colored oleomargarine was assailed. It was said there, as it is said here, that the purpose of the measure was not to raise revenue, but to prohibit the manufacture and sale of oleomargarine. The article, the dealing in which was said to be prohibited, was one which the states had a perfect right to permit to be sold. In that case it was held that Congress had the right to levy excise taxes, just as here it must be held that West Virginia had the right to levy occupation taxes. The court said:

"It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: That, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department."

The court went on to say:

"It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."

The court cited with approval *Austin v. Aldermen*, 7 Wall, 694, 19 L. Ed. 224, to the effect that:

"The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."

The Constitution of the United States effectively prevents many forms of injustice, even when perpetrated under the guise of legislative acts. It does not prevent all of them. It cannot, without substituting the judicial for the legislative judgment and discretion in some matters in which the public weal requires that the legislative, rather than the judicial, decision shall be conclusive.

All that has been said has been said upon the supposition that the

trading stamp business is one which is so legitimate that the Legislature may not interfere with it, and may not prohibit it or unnecessarily hamper it. There are many decisions which hold that it is as legitimate a business as any other and may not be subject to restraints, prohibitions, and restrictions which might not lawfully be placed upon any of the ordinary occupations of mankind. Not all the cases go to this extent. The great majority of them do. There are very many of them in very many different states. Indeed, there are so many of them as to show that there is a difference of opinion between the courts and the Legislatures as to whether the trading stamp business is a business which does not in the public interest require regulation or prohibition. A large number of legislative bodies apparently have thought that it was; the courts that it was not. Whether the fact that so many Legislatures have held that it ought to be restrained raises a presumption that there is a real difference between it and many other occupations is a question which we need not here consider.

Assuming, but not deciding, that the Legislature has no power to prohibit such a business, it still follows from what has been heretofore said that the decree of the court below sustaining the demurrer and dismissing the bill was right, and must be affirmed.

NATIONAL BANK OF SAVANNAH v. KERSHAW OIL MILL et al.

(Circuit Court of Appeals, Fourth Circuit. November 7, 1912.)

No. 1,101.

1. FRAUD (§ 21*)—FALSE REPRESENTATIONS—LIABILITY—PRIVITY OF CONTRACT.

Privity of contract is not essential to entitle a plaintiff to recover in an action of deceit for false representations.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 9, 10, 23; Dec. Dig. § 21.*]

2. FRAUD (§ 21*)—ACTION OF DECEIT—FALSE REPRESENTATIONS—LIABILITY TO THIRD PERSONS.

Defendants shipped to a dealer in cotton a large number of bales of linters, which are the product of a second ginning of cotton seed and worth in the market about one-third the price of cotton. At the request of the purchaser, they caused the shipment to be designated in the bills of lading as cotton, and indorsed such bills in blank and forwarded them to the purchaser, attached to drafts, which were paid. On obtaining them the purchaser pledged them with plaintiff bank as collateral for a loan, at an agreed value, as representing cotton, and by reason of the smaller value of the linters plaintiff suffered a loss. *Held*, on the evidence, that defendants were chargeable with knowledge that the purchaser desired the false statement made in the bills of lading for some fraudulent purpose, and that, also knowing that such bills were ordinarily used as negotiable instruments, they were liable to any one injured thereby in an action of deceit; also that they were liable on the principle that where one of two innocent persons must suffer on account

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the fraud of another the loss must fall on him whose conduct enabled such third person to commit the fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 9, 10, 23; Dec. Dig. § 21.*]

Keller, District Judge, dissenting on the facts.

In Error to the District Court of the United States for the District of South Carolina, at Columbia; Henry A. M. Smith, Judge.

Actions at law by the National Bank of Savannah against the Kershaw Oil Mill and against the Lancaster Cotton Oil Company, respectively. Consolidated and tried together. Judgments for defendants, and plaintiff brings error. Reversed.

Benjamin F. Martin, of Greenville, S. C., and William Garrard, of Savannah, Ga. (Garrard & Gazan, of Savannah, Ga., and McCullough, Martin & Blythe, of Greenville, S. C., on the briefs), for plaintiff in error.

E. D. Blakeney, of Kershaw, S. C., and Thomas J. Kirkland, of Camden, S. C., for defendants in error.

Before GOFF and PRITCHARD, Circuit Judges, and KELLER, District Judge.

PRITCHARD, Circuit Judge. These suits were instituted in the United States District Court for the District of South Carolina by the plaintiff in error (hereinafter referred to as plaintiff) against the defendants in error (hereinafter referred to as defendants) to recover against the Kershaw Oil Mill the sum of \$13,094.04, besides interest thereon at the rate of 7 per cent. per annum from January 6, 1911, and against the Lancaster Oil Mill the sum of \$11,664.12, besides interest thereon at the rate of 7 per cent. per annum from January 6, 1911. The two cases were tried together. The learned judge who tried these cases in the court below, in referring to the facts, said:

"The concern of J. H. C. All & Son carried on business in the city of Savannah. They were purchasers and dealers in cotton, and had large financial transactions with the plaintiff, the National Bank of Savannah. In the course of these transactions they borrowed large amounts of money from that bank, which were secured by deposits with the bank, as collateral, of cotton, represented largely at different times by the bills of lading, or by other evidences of existence and ownership of that article by All & Son.

"During the year 1910 large amounts were borrowed in this way in the course of their business, and secured in the manner stated, and on the 28th of June, 1910, they made a loan from the bank, as of that date (although in continuance of previous loans), of \$60,000. Whether it was in continuance of previous loans or not, it was an extension, as valid for all purposes of the transaction between the two parties as if it were a new loan of that date. This loan was secured by the deposit of bills of lading for cotton aggregating 1,171 bales, 662 bales of which were the bales represented by the bills of lading involved in the actions now before the court. It turned out afterwards that these 662 bales, although represented on the bills of lading as cotton, were in fact what are known as linters; that is, cotton ginned from the cotton seed after the ordinary article known as cotton had been first ginned off, and the seed sold, or turned over to the cotton seed oil mills, who, by a further and closer ginning, denude the seed more thoroughly of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its attached lint, and which product, when so derived, is known as linters. There is a well-known difference in commercial recognition and language between cotton and linters, and the difference in value between the two, as a rule, is very great, although it has been testified that the very lowest grades of the article known as cotton nearly approximate the value of the highest grade of the article known as linters. In making this loan the bank accepted these bills of lading as and for the representatives of so many bales of cotton, lending money upon the valuation based upon the acceptance of a bale of cotton, by an arbitrary average value, according to the market rates of price prevailing that year, less certain margins retained by the bank for security, so as that these bales in the case of this loan were actually hypothecated in the bank at the value, upon an average, of between \$50 and \$51 per bale; whereas, had they been accepted as linters, according to the prices then prevailing, they would have been of a value not exceeding one-third of their value as cotton. These linters had been shipped to the firm of J. H. C. All & Son by the defendants in these particular cases. They had been purchased by All & Son, and were shipped to them according to the usual methods, on draft for the purchase price with the bills of lading attached. The drafts were upon All & Son, and were for the price of the articles as linters at an average of $4\frac{1}{2}$ cents a pound, or thereabouts, and not for the price of them as articles of cotton.

"Upon the presentation of the draft All & Son paid the drafts, but not apparently through the Savannah National Bank. That bank, the plaintiff in this case, had no knowledge of the amount or character of the drafts. Having paid the drafts and so acquired possession of the bills of lading, and thereby the ownership of the articles specified in the bills of lading, All & Son hypothecated the bills of lading with the plaintiff bank for this loan in the manner stated. In so doing All & Son secured from the bank a credit by the way of cash or its equivalent on these bills of lading, on the basis of their representing cotton, of about three times what they would have been entitled to upon the basis of their representing linters, and in so doing All & Son perpetrated upon the National Bank of Savannah an unquestioned fraud. The position of the plaintiff, the National Bank of Savannah, now is that, it having in good faith advanced to All & Son an amount based upon these bills of lading as representing cotton, they were justified in so doing on the ground that the bill of lading was a quasi negotiable instrument, well known in commercial use for the purpose of either sale or hypothecation, and they had a right to rely upon the statement of the shippers and consignees in those bills named, to wit, the defendants in these actions, that the articles named in the bills of lading were truly described to the extent that they were described; that is to say, that they had a right to rely upon the bills of lading as containing the representation of the shippers and consignees that this article was cotton, no matter what grade it may have been classed as cotton, yet to the extent of its description, however brief, in this bill of lading, they had a right to rely upon it."

At the conclusion of the testimony the court below directed a verdict in favor of the defendants, upon the ground that, notwithstanding the fact that defendants had caused to be issued bills of lading which were false and so known by them, yet, inasmuch as it could not have been reasonably foreseen that J. H. C. All & Son would negotiate these bills of lading with or hypothecate them to a third party, the damage which the plaintiff sustained was not a proximate result of fraud on the part of the defendants; and that they were therefore not liable.

This is an action of deceit, and the principal question for our consideration is as to whether, under the facts, the plaintiff is entitled to recover the amounts alleged to be due in the bills of complaint.

That in both of these cases the oil mills, acting upon the suggestions and request of J. H. C. All & Son, procured the carrier to issue bills of lading for "cotton," notwithstanding the fact that such mills had full knowledge of the fact that the bales in question contained what is known as "linters," is well established by the evidence and found as a fact by the court. The fact that at the time the bills of lading were issued cotton was worth 14 or 15 cents per pound, and linters were only worth from 3½ to 4 cents per pound, among other things, strongly tends to prove that such representation was false and fraudulent. Such action on the part of the mills constitutes a fraudulent representation of a subsisting fact. Therefore, does the conduct of the defendants in procuring bills of lading of a commodity to be placed upon the market in the manner aforesaid bring this case within the rule where one who places an article upon the market, accompanied by a false and fraudulent representation of facts, with knowledge of their falsity, thereby commits an act from which it may be inferred that it was the intention of such party that the same should be acted upon, thus rendering the party making such false and fraudulent representation liable to the one who is injured thereby?

However, it is insisted by counsel that there was no intent on the part of the defendants, at the time the bills of lading were secured, that the misrepresented facts should be acted upon by the plaintiff, inasmuch as at the time the bills of lading were procured the defendants had no knowledge that the bills of lading were to be hypothecated with the plaintiff.

In the case of *Clafin v. Commonwealth Insurance Company*, 110 U. S. 95, 3 Sup. Ct. 515, 28 L. Ed. 76, Mr. Justice Matthews, in speaking for the court, among other things, said:

"No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false and willfully made the fact that they are material is proof of an attempted fraud, because their materiality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed. * * *"

Also, in the case of *Munroe v. Gairdner*, 3 Brev. (S. C.) 31, 5 Am. Dec. 532, the court said:

"An intention to deceive is material; but if the falsehood asserted or imposed is, in its nature or character, calculated directly to defraud and injure some one in particular, or all persons generally, an intention to deceive and injure any one who may be thereby deceived and defrauded may be implied."

In 14 *American and English Encyclopedia of Law* (2d Ed.) 2122, the rule is stated as follows:

"The action [of deceit] will lie against any person who makes a false representation of fact, with knowledge of its falsity, and with the intent that it shall be acted upon, when the person to whom it is made acts upon it, and by so doing suffers injury. For the purpose of this remedy fraud or deceit may be defined generally as consisting in leading a person into damage by *willfully* or *recklessly* causing him to believe and act upon a falsehood."

It is further insisted by counsel for defendants that there is no privity between the plaintiff and the defendants in this action; that it was not the purpose or intent of the defendants to defraud the plaintiff at the time they procured the bills of lading to be made out in the manner aforesaid; that by mere indorsement of a bill of lading the shipper does not, as by signing or indorsing a negotiable instrument, undertake to pay out any money or furnish goods, but he merely transfers whatever title he may have in the goods; and that the transferee of the bill of lading cannot hold the shipper upon any contract to furnish the goods therein mentioned, inasmuch as it contained no contractual stipulation on the part of the shipper.

As we have stated, there is no question as to the fact that the defendants made false and fraudulent representations as to the commodity described in the bills of lading; and this naturally suggests the inquiry as to whether, under the circumstances, they ought not to have anticipated that the same were likely to fall into the hands of a third party.

While bills of lading may not be technically termed negotiable instruments, yet they are recognized as quasi negotiable instruments; and it is a well-known fact that in the commercial world they are used in transactions as collateral security upon which large sums of money are borrowed from various banking institutions. In the case of *The Kirkhill*, 99 Fed. 578, 39 C. C. A. 661, Judge Brawley, in referring to bills of lading, said:

"Bills of lading are documents which pass from hand to hand. They enter largely into the commercial business of the world, and the strict rights of the holders must be absolutely maintained, or they will lose a material part of their value as instruments of commerce."

Also in 2 Cook on Corps. (6th Ed.) § 413, note 1 contains the following:

"The phrase 'quasi negotiable' has been termed an unhappy one, and certainly it is far from satisfactory, as it conveys no accurate, well-defined meaning. But still it describes better than any other shorthand expression the nature of those instruments which, while not negotiable, in the sense of the law merchant, are so framed and so dealt with as frequently to convey as good a title to the transferee as if they were negotiable."

In the case of *Pollard v. Reardon*, 65 Fed. 848, 13 C. C. A. 171, the court, in discussing bills of lading, said:

"In the developments of commerce and commercial credits the bill of lading has come to represent the property, but with greater facility of negotiation, transfer, and delivery than the property itself. It is a negotiable instrument, even though not in the same sense as promissory notes or bills of exchange. It carries on its face in the words 'and assigns' an authority to dispose of it, and, as we have seen, a like authority, when indorsed in blank, by which the person who voluntarily puts it out, or permits it to be put out, ought to be estopped. And it has become so universal and necessary a factor in mercantile credits that *the law should make good what the bill of lading thus holds out*. There is every reason found in the law of equitable estoppel and in sound public policy for holding, and no injustice is involved in holding, that, if one of two must suffer, it should be he who voluntarily puts out of his hands an assignable bill of lading, rather than he who innocently advances value thereon."

The learned judge in charging the jury, among other things, made the following statement:

"It further appears from the testimony that the defendants, when they shipped the articles referred to in the bills of lading, knew that they were linters and not cotton, under the pretensive excuse that they desired them shipped as cotton, and not as linters, in order that, in case of destruction while in transit, they should be entitled to recover from the carrier their full value and not be limited to an arbitrary value of 2 cents per pound, as, in consideration of accepting that as the value, the railroads undertook to transport linters at a cheaper rate than cotton. * * * I find from the testimony, therefore, for the purposes of this ruling, that the defendants knew that the description of the articles as inserted in these bills of lading was cotton, when in fact the articles were linters; and they knowingly accepted, and took the bills of lading containing that misstatement."

The court also, in its charge, called attention to the fact that this excuse was pretensive, and that the defendants could, by the exercise of ordinary intelligence and through the ordinary avenues of information at their command, have ascertained that it was pretensive, and that the articles could have been shipped describing them as linters without detriment to the right of either the shipper or consignee or transferee to recover the value in case of loss from the carrier; the only difference being that in such case the rate of freight upon them would have been of a higher rate than if shipped as linters at the reduced valuation of two cents per pound.

When we consider the conduct of the defendants, we are forced to the conclusion that it was either their purpose to aid All & Son in an attempt to practice a fraud upon the railroad company, in the event the goods were destroyed in transit, or that they fully understood the pretensive excuse offered by All & Son in procuring the bills of lading containing the false and fraudulent statements. In either case they were fully aware of the fraudulent intent of All & Son; and by lending their aid in the manner described they thereby evinced a willingness to engage in what they knew to be a fraudulent transaction, and one which must necessarily have resulted in injury to the carrier or some one else. Therefore there is no viewpoint from which we may consider this matter without being forced to the conclusion that the defendants had full knowledge of the fact that, in procuring the bills of lading in question, it was the purpose of All & Son to defraud the railroad or some one else.

It is significant that the learned judge who heard the case and observed the conduct of the witnesses while upon the witness stand, and carefully considered all the testimony, was of the opinion that the defendants must have known that the excuse which they offered was pretensive.

Under the circumstances surrounding this case, the conclusion is irresistible that the defendants were aware of the fact that these bills of lading would be used by All & Son for the very purpose for which they were used, and that the use of the same by All & Son would necessarily result in injury to the party with whom they were to be hypothecated.

[1] It should be borne in mind that we are dealing with the law of fraud, and not with an action on a contract for breach of warranty or for simple negligence. If this were an action for breach of warranty or for simple negligence, the term "privity" would be applicable, and in order to enable the plaintiff to recover it would have to be shown that there was a breach of contract duty owing to the plaintiff, as was stated in the case of *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621, wherein the court, among other things, said:

"Every imputation of fraud is disclaimed, and it is clear that the transaction is not one immediately dangerous to the lives of others. Where there is fraud or collusion, the party will be held liable, even though there is no privity of contract; but where there is neither fraud or collusion nor privity of contract, the party will not be held liable, unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty."

[2] The rule announced in that case does not apply to the case at bar. In this case the question as to whether there was a contractual relation between the plaintiff and the defendants does not arise. The true test is as to whether the defendants, with full knowledge of the facts, procured the bills of lading in question knowing that the statements contained therein, to the effect that they were issued for cotton, were false and fraudulent, and with the further knowledge that the same were to pass through the channels of commerce, and would, in all probability, fall into the hands of a third party.

In this case the defendants, by their fraudulent conduct, gave All & Son the power to defraud the plaintiff or some one else; and it necessarily follows that they must answer to the party injured for their fraudulent conduct. It is also well settled that, where one of two innocent parties must suffer on account of the fraud of another, the loss must fall upon him whose conduct enables such third person to commit the fraud. This principle is clearly announced in the case of *Bowers v. Lumber Company*, 152 N. C. 604, 68 S. E. 19. There the court, in referring to this phase of the question, said:

"We further said that, as the certificates had been signed by the president and delivered to the cashier, the bank had given to the latter the power to commit the fraud, and must answer for its negligent act, upon the principle that, 'whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it.' *Lickbarrow v. Mason*, 2 T. R. 70. It was said by Lord Holt in *Hearn v. Nichols*, 1 Salk. 289: 'For, as somebody must be a loser by this deceit, it is more reasonable that he who employs and puts a trust and confidence in the deceiver should be the loser than a stranger.' In *Railroad v. Kitchin*, 91 N. C. 39, we held that, 'where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposed a confidence, or by his negligent act made it possible for the loss to occur, must bear the loss.' The principle is well stated in the case of *Railroad v. Bank*, 60 Md. 36, as follows: 'It may be conceded, and was doubtless the case, that the agent had no authority in fact to issue such certificate. He had no real authority, as between himself and his principal, or other parties cognizant of the facts, for doing the particular acts complained of; but the company by its own act and, as it turned out, misplaced confidence placed the agent

in the position to do, and procure to be done, that class of acts to which the particular act in question belongs; and in such case, where the particular act in question is done in the name of and apparently in behalf of the principal, the latter must be answerable to innocent parties for the manner in which the agent has conducted himself in doing the business confided to him. Upon no other principle could the public venture to deal with an agent. In such case the apparent authority must stand as and for real authority.' And again: 'Where he issued such a certificate and delivered it to a third party, who acted without knowledge and in good faith, paying value for it, such party had the right to act upon the presumption that the representations of such certificates were truthful, and not false and fraudulent. Having confided to him the said trust of executing the business, the agent was held out to the public as competent, faithful, and worthy of confidence; and, though he deceived both his principal and the public by forging and issuing "false certificates," it is but reasonable that the principal, who placed him in the position to perpetrate the wrong, should bear the loss.' We think the principle is also well supported by the reasoning of the court in *McNeil v. Bank*, 46 N. Y. 325 [7 Am. Rep. 341]."

In view of the rule announced in the foregoing case (and there are many others, both state and federal, of similar import), we are impelled to the conclusion that the defendants, by their conduct, have placed themselves in a position where they cannot be heard to say that they did not intend the consequences of their acts.

However, it is insisted by counsel that the descriptions, representations, and recitals in the bills of lading are to be regarded as made by the carrier and not by the shipper, and create a contractual liability of the carrier only, and that, therefore, the railroad company is liable to the plaintiff, and that this suit should have been instituted against it rather than the defendants. That question is not before this court, inasmuch as the railroad company is not a party to this action. Even if it were a party to this suit, and it should be shown that it was liable, that would not exonerate the defendants from any liability that they may have incurred on account of their conduct as respects this transaction.

In view of the authorities upon which we rely and the principle which we think controls in this case, we are of the opinion that the court below erred in directing a verdict in favor of the defendants. For the reasons herein stated, the judgment of the lower court is reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

Reversed.

KELLER, District Judge (dissenting). While I agree with the general proposition asserted in the opinion of the majority of the court, that the defendants in these two cases may be held liable for any actual loss occasioned to the plaintiff by reason of any misrepresentations made by them as to character of the merchandise consigned by them to J. H. C. All & Son, I desire to say that, in my judgment, such recovery must be limited and qualified by two important matters which, in my judgment, would prevent any recovery upon such a record as the one before the court.

First. The recovery must not and cannot be had upon the basis of the value of "fully low middling" cotton, which is what All &

Son represented the bales to contain, but upon "cotton" as billed by defendants, which billing, in my judgment, amounts to no more than a representation that the contents of the bales were correctly designated as "cotton," and hence would be a fit term for any product customarily billed as "cotton"; and, if I understand the testimony of Mr. Bloodworth (a witness for the plaintiff) aright, "cotton," properly billed as such, may be worth as little as five cents a pound. See page 83 of record.

It is certainly not fair to say that because the plaintiffs billed these "linters" as "cotton" that they thereby represented them to be "fully low middling" cotton. Suppose All & Son had represented the contents of these bales to be of the very highest grade, and thereby more greatly deceived the plaintiffs. Could it be said that such fact would increase the liability of defendants? Surely not, and their responsibility must be limited by the designation they themselves gave to the shipment, to wit, "cotton."

Second. It must not be forgotten that J. H. C. All & Son were the original debtors, and that these shipments were put up, along with other collaterals, as security for the debt. It seems to me that, before there can be any recovery against the defendants, all the other securities put up by All & Son must be exhausted, or shown to have no value, as otherwise a grave injustice might be done to them, not capable of being repaired. It would seem from the record (pages 76, 77, etc.) that the plaintiff has in its possession certain policies of insurance and a mortgage that may have value, and, if so, the defendants are entitled to have credit for such value against the indebtedness of All & Son.

BRUCE et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 28, 1912.)

No. 3,805.

1. CRIMINAL LAW (§ 304*)—EVIDENCE—JUDICIAL NOTICE—STATUTES—POSTAL REGULATION.

Federal courts will take judicial notice of the statutes conferring on the Postmaster General authority to promulgate regulations, and of the regulations adopted and promulgated pursuant thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 295½, 700-717; Dec. Dig. § 304.*]

2. POST OFFICE (§ 14*)—REGULATIONS—POSTMASTER GENERAL—AUTHORITY—MAILABLE MATTER—MEDICINES CONTAINING POISONS.

Cr. Code, § 217 (Act March 4, 1909, c. 321, 35 Stat. 1131 [U. S. Comp. St. Supp. 1911, p. 1654]), provides that all poisons and compositions containing poison are nonmailable, but that the Postmaster General may permit mailing under such rules and regulations as he may prescribe "as to preparation and packing" of any articles previously declared nonmailable, which are not outwardly or of their own force dangerous or injurious to life, health, or property. *Held*, that the authority of the Postmaster General to prescribe regulations for the mailing of poisons or compositions containing poison not outwardly or of their own force

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dangerous or injurious to life, health, or property was limited to regulations as to the "preparation and packing" thereof, so that Post Office Department Order No. 2,923, promulgated February 23, 1910, prohibiting the mailing of medicines containing poison except for transmission in the domestic mails from the manufacturer or dealer to licensed physicians, surgeons, pharmacists, and dentists when inclosed in packages conforming to conditions prescribed, was outside the jurisdiction of the Postmaster General, and invalid.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 21; Dec. Dig. § 14.*]

3. POST OFFICE (§ 48*)—POSTAL REGULATION—VIOLATION—STATUTES.

Where an indictment charged a violation of the postal regulations in the transmission of a composition containing poison, but was insufficient because the regulation was beyond the jurisdiction of the Postmaster General, the indictment could not be sustained as charging a violation of Cr. Code, § 217 (Act March 4, 1909, c. 321, 35 Stat. 1131 [U. S. Comp. St. Supp. 1911, p. 1654]), prohibiting the transmission of poisons or compositions containing poison except in accordance with regulations prescribed by the Postmaster General.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. § 48.*]

4. POST OFFICE (§ 50*)—MISUSE OF MAIL—SCHEME TO DEFRAUD.

Where, in a prosecution for misuse of the mails in furtherance of a scheme to defraud in mailing matter intended to advertise the sale of a compound containing morphine for the cure of the morphine habit, there was evidence that morphinism might be treated by gradually reducing the quantity of morphine taken by the patient until no morphine was required, but that one addicted to the use of morphine would not be expected to cure himself because he had not sufficient will power to gradually reduce the amount taken, and that the substance in the hands of an unrestrained habitué, unassisted by a physician, would not tend to cure and could not possibly cure the habit, it was error to refuse to charge that the fraud was not in the fact that morphine was employed in the treatment of the habit, but in the fact that the substance was falsely represented to be curative in itself.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. § 50.*]

5. POST OFFICE (§ 50*)—MISUSE OF MAIL—SCHEME TO DEFRAUD—INSTRUCTIONS.

It was also error to refuse to charge that the fact that the substance was labeled "Poison" in unmistakable characters, and gave public notice of the fact that the substance contained morphine, was evidence to be considered in behalf of the defendants on the question as to their purpose in selling it to habitual consumers of morphine, that the purchasers were not deceived with reference to the fact that the substance contained morphine, and that defendants' conviction should not depend on the opinion of medical men that the substance was not curative of the habit, but that, if the jury found that whether the substance was remedial in character when exhibited as part of the treatment of morphinism was merely a matter of opinion among medical men, defendants must be acquitted.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. § 50.*]

Nonmailable matter, see notes to *Timmons v. United States*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Ryland C. Bruce and R. C. Prewitt were convicted of mailing non-mailable matter, and they bring error. Reversed, and new trial ordered.

Chester H. Krum and P. H. Cullen, both of St. Louis, Mo. (Barclay, Fauntleroy & Cullen, of St. Louis, Mo., on the brief), for plaintiffs in error.

Homer Hall, Asst. U. S. Atty., of Trenton, Mo. (Charles A. Houts, U. S. Atty., and Charles H. Daues, Asst. U. S. Atty., both of St. Louis, Mo., on the brief).

Before SANBORN and CARLAND, Circuit Judges, and W. H. MUNGER, District Judge.

CARLAND, Circuit Judge. Plaintiffs in error were tried, convicted, and sentenced upon an indictment, the first count of which reads as follows:

"The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath present: That Ryland C. Bruce and R. C. Prewitt, whose Christian name is to the grand jurors aforesaid unknown, heretofore, to wit, on or about the 12th day of June, 1911, within the division and district aforesaid, and within the jurisdiction of the court aforesaid, under the name of the Delta Chemical Company, did then and there unlawfully, knowingly, and feloniously deposit, and cause to be deposited, for mailing and delivery, in the mails of the United States, to wit, in the post office of the United States at St. Louis, in the state of Missouri, certain nonmailable matter, to wit, an article and composition containing poison—that it so say, containing large quantities of a drug known as morphine—which poisonous compound is known as 'Habitina,' which said article and composition so containing said morphine was contained in a package then and there addressed to H. W. Duckworth, Bloomfield, Iowa, and which said package was postmarked St. Louis, Mo., bearing return card as follows, to wit: 'Suite 1105-8 Holland Bldg., St. Louis, Mo., U. S. A.'—and which said matter then and there mailed as aforesaid was not then and there addressed to and intended for a licensed physician, surgeon, pharmacist, or dentist, as prescribed and permitted under the rules and regulations promulgated by authority of law by the Postmaster General of the United States, all of which they, the said Ryland C. Bruce and R. C. Prewitt, whose Christian name is to the grand jurors aforesaid unknown, then and there well knew: Contrary to the form of the rules and regulations prescribed by the Postmaster General of the United States, and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The second count, in substance, charged Ryland C. Bruce and R. C. Prewitt with having unlawfully, knowingly, and feloniously devised a scheme and artifice to defraud for the purpose of obtaining from divers persons money and property by false and fraudulent representations and pretenses sent through the post office establishment of the United States. The scheme as set forth in the indictment was that the above-named persons, in the name of the Delta Chemical Company, would, by advertisements, pamphlets, and letters sent through the mails of the United States, claim to have a drug and preparation called, "Habitina" which would effect a cure of the morphine habit; that by taking said medicine as directed, and without further assistance, such person would become free of the habit of using morphine, whereas, in truth, said "Habitina" was in fact and almost entirely the drug called morphine and that the use of said drug would not cure

said drug habit, and contained no curative properties for said habit; that in furtherance of said scheme and artifice to defraud, and as a part thereof, said Ryland C. Bruce and R. C. Prewitt, under the name above mentioned, unlawfully, willfully, knowingly, and feloniously on or about the 8th day of January, 1910, did deposit and cause to be deposited in the mails of the United States, to wit, in the post office of the United States at St. Louis, in the state of Missouri, for mailing and delivery, a certain letter and envelope, which letter is set forth in the indictment.

The indictment contained a third count, but, as there was no evidence offered in support of it, it may be dismissed from consideration.

Counts 1 and 2 of the indictment are attacked in the briefs of counsel for plaintiffs in error as insufficient in respect to some of the allegations therein, but, as no objection was made to the indictment in the trial court, no assignments of error are before us which would allow us to consider the sufficiency of the indictment as a pleading. The first count of the indictment, however, as appears from its language, charges a violation simply of a regulation of the Postmaster General. It was claimed in the trial court that the regulation upon which the first count of the indictment is based was promulgated without authority of law, and the point is again urged in this court.

[1] A certified copy of the regulation in question was offered at the trial, and its admission as evidence was objected to by counsel for plaintiffs in error, for the reason that it was unauthorized. It is true that the court would have had the right to take judicial notice of the regulation when called to its attention, without its being offered in evidence. *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415. We simply state the fact of its offer to show that the point regarding the validity of the regulation was properly saved. Indeed, as we must take judicial notice of the laws of Congress which would confer upon the Postmaster General the authority to promulgate the regulation, the point would be open at any time upon the record without a bill of exceptions, as the indictment would not support the judgment rendered on the first count if the regulation claimed to have been violated was unauthorized. We therefore proceed to discuss the validity of this regulation.

[2] The authority of the Postmaster General to make the regulation, if it exists at all, must be found in the following part of section 217 of "An act to codify, revise and amend the penal laws of the United States" (35 Stat. 1131):

"All kinds of poison, and all articles and compositions containing poison, and all poisonous animals, insects, and reptiles, and explosives of all kinds, and inflammable materials, and infernal machines, and mechanical, chemical, or other devices or compositions which may ignite or explode, and all disease germs or scabs, and all other natural or artificial articles, compositions, or materials of whatever kind which may kill, or in any wise hurt, harm, or injure another, or damage, deface, or otherwise injure the mails or other property, whether sealed as first-class matter or not, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails or delivered from any post office or station thereof, nor by any letter carrier; but the Postmaster General may permit the transmission in the mails, under such rules and regulations as he shall prescribe as to preparation and packing, of any articles

hereinbefore described which are not outwardly or of their own force dangerous or injurious to life, health, or property. * * * Whoever shall knowingly deposit or cause to be deposited for mailing or delivery, or shall knowingly cause to be delivered by mail according to the direction thereon, or at any place at which it is directed to be delivered by the person to whom it is addressed, anything declared by this section to be nonmailable, unless in accordance with the rules and regulations hereby authorized to be prescribed by the Postmaster General, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both."

Taking the language of said section, so far as it is material to the point now under consideration, it would read as follows:

"All kinds of poison, and all articles and compositions containing poison * * * are hereby declared to be nonmailable matter, and shall not be conveyed in the mails or delivered from any post office or station thereof, nor by any letter carrier; but the Postmaster General may permit the transmission in the mails, under such rules and regulations as he shall prescribe as to *preparation and packing*, of any articles hereinbefore described which are not outwardly or of their own force dangerous or injurious to life, health, or property."

Under the above statute the Postmaster General on February 23, 1910, by order No. 2,923, established, among others, the following regulation:

"Medicines composed in part or wholly of poison or poisons, and anesthetic agents, which are not outwardly or of their own force dangerous or injurious to life, health, or property, and not in themselves unmailable, may be admitted to the mails for transmission in the domestic mails from the manufacturer thereof or dealer therein to *licensed physicians, surgeons, pharmacists, and dentists, and not otherwise*, when inclosed in packages in conformity with the conditions prescribed in section 496: Provided, that the package bears the label or superscription of the manufacturer of or dealer in the article mailed."

Section 496, referred to in the above regulation, provided how such articles should be prepared and packed for mailing. In a few words it may be said that Congress, by section 217 of the Criminal Code above quoted, declared all kinds of poisons and articles and compositions containing poison nonmailable, with authority, however, to the Postmaster General to permit such poisons and articles and compositions containing poison, which were not outwardly or of their own force dangerous or injurious to life, health, or property, to be transmitted in the mails when prepared and packed in accordance with such rules and regulations as he should prescribe. "Habitina" contained poison, but was not an article outwardly or of its own force dangerous or injurious to life, health, or property; hence, the Postmaster General could permit its transmission through the mails when prepared and packed for mailing as he should prescribe. In the regulation, however, which plaintiffs in error are charged with violating, the Postmaster General restricted the right to transmit poisons or articles and compositions containing poison to cases where the manufacturer thereof or dealer therein should transmit such articles to licensed physicians, surgeons, pharmacists, and dentists, and not otherwise. The power conferred by section 217 of the Criminal Code, upon the Postmaster General, was to make rules and regulations as to preparation and packing, and it was the depositing for mailing and delivery in the United States post office of the above-named articles, in violation of

the rules and regulations which the Postmaster General should prescribe as to preparation and packing which Congress intended to punish when it provided the penalty for a violation of said section, the language used being:

"Unless in accordance with the rules and regulations hereby authorized to be prescribed by the Postmaster General shall be fined, etc."

The Postmaster General was not authorized to permit the transmission through the mails of poisons and articles and compositions containing poison not outwardly or of their own force dangerous or injurious to life, health, or property under such rules and regulations as he should prescribe, but the power to prescribe rules and regulations was restricted to the preparation and packing of such articles. Therefore the general power to permit the transmission through the mails of poisons and articles and compositions containing poison, under such rules and regulations as to preparation and packing, did not carry with it the power to prescribe that such articles could only be mailed by the manufacturer thereof or dealer therein to licensed physicians, surgeons, pharmacists, and dentists. We are not called upon to decide as to the constitutionality of that part of section 217 of the Criminal Code which authorizes the Postmaster General to permit the transmission through the mails of poisons and articles and compositions containing poison not outwardly or of their own force dangerous or injurious to life, health, or property as being a delegation of legislative power, for, conceding the provision to be valid, it limits the power to make rules and regulations to the matter of preparation and packing, and no rule or regulation of such a character is alleged to have been violated.


[3] It is alleged, however, in support of the first count of the indictment, conceding the regulation charged to have been violated to have been unauthorized, that the count is sufficient to sustain a conviction under the statute itself, in that it charges the depositing for mailing and delivery in the mails of the United States of nonmailable matter, to wit, "Habitina," containing morphine, a poisonous article. This would require us to reject as meaningless all the language of the indictment in reference to a violation of the regulation, which we certainly would not be authorized to do after the jury has returned a verdict of guilty of the crime charged in the first count. We take judicial knowledge of the statute itself, and from that we learn that the Postmaster General may permit such an article as "Habitina" to be transmitted through the mails under such rules and regulations as he may prescribe as to preparation and packing. Therefore, when the pleader pleaded a violation of a regulation of the Postmaster General, we must presume that permission had been granted by him to transmit through the mails the article in question, and that a violation of the regulation was all that was intended to be charged. Plaintiffs in error were entitled to presume the same thing.

The regulation which plaintiffs in error were charged with violating exceeded the power conferred by the statute upon the Postmaster General, and therefore is void. *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267; *Teall v. Felton*, 1 N. Y. 537, 49 Am. Dec. 352;

Noble v. Logging Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123; United States v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; Teal v. Felton, 12 How. 284, 13 L. Ed. 990.

In so deciding we are not unmindful that Congress may, after it has legislated and indicated its will, give those administrative officers who are to act under such laws power to fill up the details by the establishment of administrative rules and regulations, the violation of which can be punished by fine and imprisonment fixed by Congress. United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563. But the facts in this record present no such case.

[4, 5] In support of the second count of the indictment, bottles containing "Habitina" were introduced in evidence, the larger size bearing the following label:

	<h1>HABITINA</h1>	PRICE TWO DOLLARS
<p style="text-align: center;"> CONTAINS 1% ALCOHOL. ONE FLUID OUNCE CONTAINS: 16 GRAINS MORPHINE SULPHATE 8 GRAINS DIACETYL MORPHINE HYDROCHLORIDE (MORPHINE DERIVATIVE) with other ingredients. </p>		
<p style="text-align: center;"> Ten (10) Minims of this Solution contains: Morphine Sulphate $\frac{1}{2}$ grain. Diacetyl Morphine Hydrochloride 1-6 grain, (MORPHINE DERIVATIVE) with other ingredients. </p>		
<p style="text-align: center;"> For Hypodermic or Internal Use. When used internally it can be diluted with water. DISTRIBUTED BY </p>		
<p style="text-align: center;"> DELTA CHEMICAL CO., St. Louis, Mo., U. S. A. <small>Guaranteed under the Food and Drugs Act, June 30, 1906. Serial No. 2536.</small> </p>		

It was prescribed in printed pamphlets that those who were to use "Habitina" should begin active treatment by taking it 4 to 8 times per day for the first 24 hours in sufficient quantity to keep patient perfectly comfortable. After the patient should find the amount necessary to sustain him, he should continue this dosage for 6 days, at which time a small reduction should be made, and thereafter a small reduction should be made every 4 or 5 days, decreasing the amount taken until the patient should be off the preparation entirely. There was evidence given by medical men that morphinism may be treated by gradually reducing the quantity of morphine taken by the patient; that morphine may be employed to cure a victim of morphinism—that is to say, where a person addicted to the use of the drug morphine can be controlled by nurse or physician as to the amount of morphine which he should take, morphine may be administered in gradually decreasing doses until no morphine is required, the patient, as the morphine is reduced in quantity, being given other medicine to sustain the nervous system until the desire for morphine is gone. The evidence was to the effect, however, that it is not expected that one addicted to the use of morphine can cure himself, for the reason that he has not sufficient will power to gradually reduce the amount of morphine taken. Instances have occurred, however, where persons have cured themselves of the habit. Several medical men testified on the part of the

prosecution that "Habitina" in the hands of an habitué unrestrained and unassisted by a physician would not tend to cure, and could not possibly cure the habit of taking morphine. In view of the above evidence, counsel for plaintiffs in error requested the trial court to charge the jury as follows:

"(1) It is a fact, as shown by the evidence, that morphinism, whether a disease or a condition of chronic poisoning, may be treated by gradually reducing the quantity of morphine taken by the patient. In other words, morphine may be employed to cure the victim of morphinism. Therefore, there is and can be nothing fraudulent merely in the employment of morphine as a part of the treatment of morphinism. The fraud here charged is that the preparation called 'Habitina' was falsely represented to be in itself curative of the habit without reference to its being part of a treatment in which other agencies might be employed or in which additional steps might be taken for the betterment of the patient.

"(2) The court charges the jury that the fact that the bottles containing 'Habitina' were labeled 'Poison' in unmistakable characters, and gave public notice of the fact that the contents contained morphine, is evidence properly to be considered in behalf of the defendants upon the question as to their purpose in selling it to habitual consumers of morphine. Not only is this the fact, but the fraud which the statute seeks to punish is one which arises out of pretenses calculated to deceive, and where an habitual user of morphine is notified that a preparation furnished him for his treatment in the cure of the habit contains morphine, it cannot be said that to sell him such a preparation with notice that it contained morphine kept him in the dark as to the fact that such was at least one of its component parts.

"(3) The court charges the jury that whether the defendants are to be convicted upon the second count does not depend upon the opinion of medical men that 'Habitina' is not curative of morphinism; on the contrary, if the jury find from the evidence that whether 'Habitina' is remedial in character when exhibited as part of the treatment of morphinism is merely a matter of opinion among medical men, the defendants must be acquitted. No conviction of fraudulent purpose can lawfully be based upon matters merely of opinion."

In regard to fraudulent purposes being based upon matters of opinion, the case of the *American School v. McAnnulty*, 187 U. S. 104, 23 Sup. Ct. 33, 47 L. Ed. 90, is in point. We think the above requests to charge were pertinent to the evidence as it stood before the jury, and that plaintiffs in error were entitled to have the same given. It does not appear that similar instructions were given by the court in any part of its charge delivered on its own motion.

For the error in holding that the regulation referred to in count 1 was valid, and the error in refusing to charge as requested upon the second count of the indictment, the judgment below must be reversed and a new trial granted. And it is so ordered.

SMITH et al. v. GUFFEY et al. (two cases).

(Circuit Court of Appeals, Seventh Circuit. October 1, 1912.)

Nos. 1,856, 1,857.

1. MINES AND MINERALS (§ 58*)—SPECIFIC PERFORMANCE (§ 32*)—OIL AND GAS LEASES—ENFORCEMENT IN EQUITY BY LESSEE—WANT OF MUTUALITY.

On the authority of *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428, which, although involving an Indiana lease, cannot be distinguished, it is *held* that an Illinois oil and gas lease providing for the payment of a royalty to the lessor on the production, and which, although it contains a covenant by the lessee to complete a well within a stated time or pay a stipulated sum quarterly thereafter during the time of any delay in completion, also gives him an option to cancel it at any time on payment of \$1, will not protect the first lessee, or be enforced in equity, as against the lessor or his subsequent lessees in possession, at suit of the lessee, who has not commenced any development thereunder.

169; Dec. Dig. § 58;* Specific Performance, Cent. Dig. §§ 89-99; Dec. Dig. § 32.*]

2. COURTS (§ 365*)—DECISION OF STATE COURTS.

The federal court will follow the construction given by the state court to an oil and gas lease, because it involves a question of local law. It will not be bound by the views of the state court on the question of granting or denying equitable relief thereon.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969-971; Dec. Dig. § 365.*]

3. COURTS (§ 96*)—STARE DECISIS.

A Circuit Court of Appeals will follow an earlier decision of the same court on the question of equitable relief, if the earlier cases, although involving an oil and gas lease of a different state, cannot fairly be distinguished.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 327, 328, 334; Dec. Dig. § 96.*]

4. MINES AND MINERALS (§ 78*)—MINING LEASES—CONSTRUCTION.

Inasmuch as in the omission of a fixed prospecting period it is deemed to be for a reasonable time, and inasmuch as during such reasonable time the lessee is accorded in Indiana the same protection at law and in equity as is given to one whose prospecting period is definitely fixed, *Fed. Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428, cannot be distinguished on this ground.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205-207; Dec. Dig. § 78.*]

5. MINES AND MINERALS (§ 78*)—LEASES—SURRENDER CLAUSE—CONSTRUCTION AND EFFECT.

A lease under which the lessee is absolutely bound either to dig a well within nine months or to pay a specified sum quarterly in advance for at least four years, unless in the meantime he shall have dug a well, would be clearly distinguishable from one containing no similar obligation. But, if the obligation can be ended at any time by the payment of a nominal consideration of \$1, a court of equity will not regard the leases as distinguishable in this respect.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205-207; Dec. Dig. § 78.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. MINES AND MINERALS (§ 78*)—LEASES—SURRENDER CLAUSES.

A document filed after a second lessee had discovered oil and gas and after suit was begun, waiving the right to surrender the optional objection to dig a well or to pay rent, cannot retroactively perfect the lease.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 205-207; Dec. Dig. § 78.*]

Appeals from the Circuit Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Suits in equity by Joseph F. Guffey and others against James A. Smith and others and against Susannah Smith and others. Decrees for complainants, and defendants appeal. Reversed.

Jay A. Hindman, of Hartford City, Ind., and Abram Simmons and Frank C. Dailey, both of Bluffton, Ind., for appellants.

James H. Beal, of Pittsburgh, Pa., A. L. Lowe, of Robinson, Ill., Charles Troup, of Danville, Ill., and Arthur E. Young, of Pittsburgh, Pa., for appellees.

Before KOHLSAAT and MACK, Circuit Judges, and SANBORN, District Judge.

MACK, Circuit Judge. [1] The question presented in these cases is whether or not lessees under such oil and gas leases as those under which appellees (complainants in the Circuit Court) claim, will be given the aid of a court of equity, prior to the discovery by them of any oil or gas, for the protection and enforcement of the rights thereby conferred upon them to enter the property and to prospect for oil and gas, as against their lessors and the latter's grantees (under subsequent leases taken with notice of the prior leases), who have entered upon the premises, dug wells and are barring out the first lessees.

This exact question has been decided against the first lessees under a form of lease identical with those before us by the Supreme Court of Illinois in *Ulrey v. Keith*, 237 Ill. 284, 86 N. E. 696. In this case, the court, notwithstanding the conceded validity of the lease at law, and its refusal in *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46, at the suit of the lessor, to cancel and annul it in equity, nevertheless denied the lessee the aid of a court of equity in the affirmative enforcement of his legal rights thereunder and remitted him to his admittedly inadequate remedy at law. The only decision, brought to our attention, in which the lessee under such a lease has been aided in equity, is *Pyle v. Henderson*, 65 W. Va. 39, 63 S. E. 762. The views of the Illinois court are strongly criticised in 3 Ill. Law Rev. 43, 601, 608.

[2] While the construction given by the Supreme Court of Illinois to such a lease would be followed by this court, involving as it does a question of local law, its decision as to giving or denying equitable remedies for the protection of the legal rights thereby granted would not be binding upon us. [3] We should therefore be free to consider the question on its merits, unless we are concluded by the decision of this court in *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428, affirming the decision rendered by Judge Baker in the Circuit Court for the District of Indiana, 112 Fed. 373, dismissing a bill brought by a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lessee under similar circumstances, and thereby denying to him the aid of a court of equity. That the one is an Indiana while the other is an Illinois lease is not material, inasmuch as the Indiana courts likewise regard the lease as valid at law, and likewise refuse, at the suit of the lessor, to annul it in equity. *New American Oil & Mining Co. v. Troyer*, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739.

The terms and provisions of the two leases must therefore be compared, in order to determine whether or not the Federal Oil Co. Case is distinguishable. They differ in two respects:

First. The Indiana lease contains no counterpart to the following clause found in the Illinois lease:

"It is agreed that this lease shall remain in force for the term of five years from this date, and as long thereafter as oil or gas, or either of them, is produced therefrom by the" lessee.

Second. Each lease recites a consideration for the grant. In the Indiana lease it is \$1; in the Illinois lease it is \$1 "and the covenants and agreements hereinafter contained on the part of the" lessee.

The Indiana lease contains no express covenant of any kind to be performed by the lessee, prior to the discovery of oil or gas, but the grant is recited to be made on certain conditions. Among others, is the following:

"In case no well is commenced within one day from this date, then this grant shall become null and void unless second party shall thereafter pay at the rate of \$8.75 for each month such commencement is delayed in advance."

The Illinois lease contains the following express covenant:

"Second party covenants * * * to complete a well on said premises within nine months from the date hereof, or pay at the rate of 25 cents per year quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed."

We shall assume that 25 cents per acre was intended by the parties. The Indiana lease further provides that "the second party may cancel and annul this contract or any part thereof at any time," while under the Illinois lease "the second party, upon the payment of one dollar (\$1) at any time by the party of the second part, heirs or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine and this lease become absolutely null and void."

Are these differences in the two leases real, and therefore controlling, or only apparent and therefore negligible?

[4] First. The omission of a fixed minimum period in the Indiana lease does not render it void. The only effect is to make the period for prospecting a reasonable, instead of a fixed minimum time. While a "reasonable time" to enter the premises and prospect thereon is in a sense uncertain, vague, and indefinite, and in these cases dependent upon all of the surrounding circumstances, nevertheless the lessee under such a lease acquires substantial rights, rights which, while they endure, will receive the same consideration and protection, at law and in equity, as will those of a lessee whose period for entry and prospecting is

definitely fixed. This has been expressly held in *New American Oil & Mining Co. v. Troyer*, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739, and in other cases therein cited.

[5] Second. A nominal consideration is sufficient at law; equity requires a substantial consideration. In both cases, the purpose of the grant is to secure for the lessor not the one dollar, but the oil and gas. In both, the lessee covenants to pay over a percentage of any oil produced and to make substantial annual payments for any gas marketed.

As a consideration, however, for the right to enter and prospect until oil or gas shall be found, the Indiana lessee has paid only the nominal sum of \$1; he has not entered into any covenants as an additional consideration for this right. True, he may lose his rights unless he performs the condition of digging a well or of making the specified monthly payments; but the lessor cannot compel him by suit either to make the payments or to dig a well. The option is with the lessee. This results, moreover, not only from his failure to make any such promise, and from the substitution of a condition for a covenant, but also from the express provision whereby the lessee could annul the contract at any time.

The Illinois lessee, on the other hand, must, apparently at least, either dig a well within nine months or pay the specified sum quarterly in advance for at least five years, unless in the meantime he shall have dug a well. And if this apparent obligation were actually enforceable, there would be no difficulty in distinguishing the Indiana lease case and in protecting the prior lessee in equity, as was done in *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188, 86 N. E. 219, decided less than two months before *Ulrey v. Keith*, *supra*.

Is this obligation of these Illinois lessees, however, really or only apparently enforceable? The surrender clause gives them the right at any time, before or after the expiration of the nine months, to absolve themselves from any further liability. If they exercise this right, if they surrender the lease as, at their absolute option, they are empowered to do, they are thereafter just as free from any obligation enforceable by the lessor, as is the Indiana lessee. True, they must pay \$1 and perhaps make an actual surrender; but this purely nominal obligation cannot change the rights of the parties in a court of equity. [6] That the complainants, long after defendants had discovered oil and gas on the premises, in fact, after the testimony in the case had been taken, filed a so-called stipulation, waiving this right to surrender, a right no longer of the slightest value, cannot retroactively perfect the lease or the bill of complaint.

Inasmuch, therefore, as there is no substantial distinction between the present cases and the *Federal Oil Co. Case*, the decree of the Circuit Court must be reversed, and the causes remanded to the District Court for the Eastern District of Illinois, with direction to dismiss the bills of complaint for want of equity.

BARNETT & RECORD CO. v. WINEMAN.

(Circuit Court of Appeals, Seventh Circuit. November 15, 1912.)

No. 1,907.

SALVAGE (§ 39*)—SUBJECT-MATTER—SALVAGE SERVICE UNDER CONTRACT.

The agent for a stranded barge called upon the manager of a towing company, with which the owner had a general contract for towage, to send a lighter to the assistance of the barge, and on being told that the towing company had none available requested that one be procured, and the manager procured one with a tug, to be sent by libellant to report to the master of the barge. Libellant afterward sent another tug and barge on like request, and both rendered service in lightering and rescuing the barge, under direction of her master. Libellant had no knowledge of the contract with the towing company, but made out its account against the barge. *Held*, that the service was in effect rendered at request of the owner or master, and was a salvage service under contract, for the reasonable value of which libellant was entitled to a maritime lien.

[Ed. Note.—For other cases, see *Salvage*, Cent. Dig. §§ 103, 104, 108; Dec. Dig. § 39.*]

Appeal from the District Court of the United States for the Western District of Wisconsin; A. L. Sanborn, Judge.

Suit in admiralty by the Barnett & Record Company against the barge *Aurora*; Henry Wineman, Jr., owner. Decree for respondent, and libellant appeals. Reversed.

For opinion below, see 194 Fed. 559.

This appeal is from a decree in admiralty, on final hearing of the issues, dismissing the appellant's libel in rem filed against the barge *Aurora*, for quantum meruit recovery for the services of two tugs and two lighters, engaged in lightering of cargo for release of the *Aurora*, which was stranded on the north shore of Lake Superior, with her towing steamer. The facts involved are stated in the opinion.

H. R. Spencer and Alexander Marshall, both of Duluth, Minn., for appellant.

Holding, Masten, Duncan, & Leckie, of Cleveland, Ohio, for appellee.

Before SEAMAN and KOHLSAAT, Circuit Judges, and CARPENTER, District Judge.

SEAMAN, Circuit Judge. The libel filed by the appellant, the Barnett & Record Company, against the barge *Aurora* avers performance of salvage services, requested on behalf of the barge to aid in her release from stranding. On final hearing of the testimony under the issues, the trial court dismissed the libel, pursuant to an opinion or finding filed therein "that the maritime law gives no lien" under the circumstances in evidence; and this ruling presents the primary question for review.

The material facts upon which the libel rests are undisputed. About midnight, on May 28–29, 1910, the steamer *City of Berlin*, with the barge *Aurora* in tow, both wooden vessels laden with coal and bound

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for Duluth or Superior, stranded in a fog on the north shore of Lake Superior, in the vicinity of Split Rock, about 47 miles from the port of Duluth. Both vessels were owned by the claimant, who resided at Detroit, and the masters sent a messenger to Two Harbors to telephone the owner for instructions. Communication was obtained, and pursuant to direction of the owner the messenger notified the owner's agent at Duluth, G. A. Tomlinson, that they "wanted the assistance of the Great Lakes Towing Company to wreck her." Tomlinson called up Vroman, manager of Union Towing & Wrecking Company, the Duluth branch of the above-mentioned company, and arranged to have a wrecking tug and pump sent immediately. Subsequently Tomlinson notified Vroman that "they wanted a lighter." Vroman replied:

"We didn't have any, but I thought I could get one."

Tomlinson then said "they wanted one," and Vroman called up the libellant's manager, explained the service required, and requested dispatch of tug and lighter to the stranded vessels, to report to their masters for directions. In response to this information and request, the one equipment of tug and lighter was promptly sent out, and another tug and lighter were dispatched later on like request. Each reported to the master of the Aurora and served under his directions in lightering of the cargo. Confusion appears in the testimony in reference to the particular time when Tomlinson ordered the lighter; but the facts are uncontroverted, both in respect of his direction to Vroman, as above stated, and of the need of the service performed by the libellant.

Thus the service in controversy was strictly maritime in its nature, rendered to "save the vessel and cargo from the perils of the seas," presumptively upon the credit of the ship, if called for on its behalf, with or without the intervention of the owner in the employment. The *Kalorama*, 10 Wall. 204, 214, 19 L. Ed. 941. If so rendered, upon request, express or implied, of the master or owner, it was salvage service of the well-recognized class for which compensation is "payable at all events" for the reasonable value of the service (The *Elfrida*, 172 U. S. 186, 192, 19 Sup. Ct. 146, 43 L. Ed. 413), and enforceable in rem as a maritime lien. It is unquestionable, however, that the libel presents no case of pure salvage, to authorize recovery for the services of a mere volunteer in the release of the stranded barge, so that contractual obligation on the part of the vessel is the final test of right to a lien.

The contentions in support of the decree against the libellant are, in substance: (a) That the lighterage equipment and service were engaged by Vroman, as manager of Union Towing & Wrecking Company, and were employed thereby throughout the service and not on behalf of the barge; (b) that Vroman's company was bound by contract with the vessel owner to furnish such lighterage service; and (c) that no lien was created in favor of such subcontractor. We believe neither of these propositions to be tenable under the evidence for denial of the lien. Were the question involved whether a subcontractor may or may not have the benefit of a lien for maritime service performed, at the instance alone of a contractor with the master or

owner, when timely notice of the claim is given to the owner (see *The Roanoke*, 189 U. S. 185, 195, 23 Sup. Ct. 491, 47 L. Ed. 770), it may be that the solution would not be free from difficulty; but we are of opinion that no such relations in the service appear between the parties respectively.

The testimony, as above mentioned, shows that the requisition for lighters to be sent to the stranded vessels came from Tomlinson, agent for the vessels at Duluth, who directed Vroman to procure them elsewhere, when informed that Vroman's company had no such equipment. It does not appear how Tomlinson was notified of the need of such service, but without proof it may well be presumed that he was so instructed by his principal, either the master or owner; and their order, accordingly, was merely communicated to the libelant by Vroman, as their mouthpiece. Not only was the entire lighterage service thereupon performed under the directions of the master of the *Aurora*, after the tugs and lighters reported to him for service, but the master knew that they were owned and operated by the libelant and not by Vroman's company. Furthermore, the libelant entered upon and performed the service in the belief that it was requested on behalf of the vessel, with no understanding of the alleged contract relation between the owner and Vroman's company; promptly rendered to the owner its account for such services against the *Aurora*, followed up by monthly statements, with no question as to liability therefor raised or intimated up to the filing of the libel, which was delayed nearly a year; and letters in evidence from the owner contain repeated promises of attention to the claim, excusing the postponements through difficulty in adjustment of "the general average claim."

We are of opinion that the above-mentioned circumstances are, to say the least, presumptive of liability for the services, even under the contention on behalf of the appellee that the master accepted the services, at the outset, without knowledge that they were independent of the services rendered by the Union Towing & Wrecking Company. The fact that the vessel agent ordered Vroman to obtain lighters elsewhere, when informed that Vroman's company had none, is sufficient *prima facie* proof of their employment by the master or owner on the credit of the vessel; and no rebuttal of this presumption appears in the testimony. The defense relied upon is a contract (introduced under objection) between the vessel owner and the Great Lakes Towing Company for services during the season, together with the above-mentioned fact that Vroman communicated the order for the lighters after the employment of his company as the alleged representative of the Great Lakes Towing Company at Duluth. Laying aside the objection raised to the contract referred to, as made with a stranger to the controversy, no provision thereof appears in the record which can affect the issue as to the employment of the libelant. It does not purport to require the contracting party to furnish lighters or lighterage service at Duluth, nor at any port where it had no lighters; nor is there evidence either of express contract on the part of Vroman's company to furnish lighterage service, or of claim on its behalf, directly or indirectly, for the service performed by the libelant. Error, therefore,

is well assigned for dismissal of the libel, and the decree must be reversed.

The reasonable value of the services in suit is established by the evidence at the sum of \$2,561.25, and the libelant is entitled to a decree for recovery of that amount, with interest.

The decree of the District Court is reversed accordingly, and the cause is remanded, with direction to enter decree therein as above stated, together with costs in favor of the libelant.

MUTUAL LIFE INS. CO. OF NEW YORK v. HILTON-GREEN et al.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1913.)

No. 2,427.

1. TRIAL (§ 141*)—PLACE OF CONTRACT—QUESTION FOR COURT OR JURY.

Where the facts are undisputed, the place where a contract was made is for the determination of the court as a question of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

2. INSURANCE (§ 130*)—CONTRACT—WHAT CONSTITUTES—APPLICATION.

Where an application for a life policy provided that the application was the basis and part of the contract subject to the company's charter and that the applicant agreed that the statements and answers and all answers made to the insurer's medical examiners in connection with the application were warranted to be true and were offered to the company as a consideration of the contract, the medical examiners' report was a part of the application which was not complete until signed by insured after the medical examiner had made his report and the application with such report was delivered to the insurer's agent for transmission to the home office.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 195-202; Dec. Dig. § 130.*]

3. INSURANCE (§ 125*)—CONTRACTS—EXECUTION—PLACE.

Decedent signed an application for additional insurance in Alabama. He then proceeded to his home in Florida, where the medical examination took place, and where he signed the final agreement that the statements made in the application and examiners' report were correct. The completed report was then delivered to the soliciting agent in Florida, who took it to Alabama, from which place it was forwarded to defendant's home office, and later policies were issued thereon and sent to insurer's Florida agent, who caused the policies to be delivered to insured in Florida. *Held*, that the mere signing of the application in Alabama did not make a contract subject to the laws of that state, but that the policies were Florida contracts and subject to Florida laws.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 173-175; Dec. Dig. § 125.*]

What law governs insurance policies, see notes to *Corley v. Travelers' Protective Ass'n*, 46 C. C. A. 287; *Globe & Rutgers Fire Ins. Co. v. David Moffat Co.*, 83 C. C. A. 100.]

In Error to the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

Action by L. Hilton-Green and another, as executors of the estate of C. L. Wiggins, deceased, against the Mutual Life Insurance Com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 202 F.—8

pany of New York. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

This cause comes to this court upon a writ of error to review the judgment of the District Court of the United States for the Northern District of Florida in favor of the defendants in error, who were the plaintiffs in the District Court. The plaintiffs sued the defendant insurance company upon four policies of life insurance, aggregating about \$30,000, issued at one and the same time to the plaintiffs' intestate and constituting one transaction. The defendant in defense of the action relied upon certain alleged misrepresentations made by the insured to defendant as to the condition of his health at the time he applied for insurance, as to previous illnesses and previous consultations with physicians, as to the statement that he had in fact been examined by the medical examiners of the insurance company, and also as to previous applications made to other insurance companies, upon which no policies were issued to him. The alleged misrepresentations were contained in his application for the policies sued upon, and also in the medical examiners' report, certified to as correct by the applicant. The defendant interposed these defenses by separate and appropriate pleas. The plaintiffs replied to the pleas, among other things, that the application for the policies had been taken in Alabama, and that under the law of that state the policies became incontestable for any cause after the payment of two premiums, and that two premiums had in fact been paid. By the terms of the policies themselves, they became incontestable only after the lapse of two years from the date of their issue, which period had not expired at the time of the death of the insured. The court below submitted to the jury in its oral charge the issues arising under this replication, leaving it for the jury to determine whether or not the application was taken in Alabama, and directed the jury, in the event they found the application was taken in Alabama, to disregard the issues presented by the defendant's pleas, for the reason that the policy would then be incontestable; it being conceded that two premiums had been paid thereon during the lifetime of the insured. The defendant excepted to this part of the court's oral charge, and also to the refusal of the court to give written charges requested by it, asserting in effect that the application was to be construed as having been taken in Florida, and that the Alabama statute relied on by the plaintiffs was not applicable as the law of the case. If the exception of the defendant to the oral charge was too general, the question is properly presented by the exceptions to the action of the court below in refusing requested charges asserting the principle and upon which error is assigned. As we view the case, the rulings of the court on this issue are determinative of this appeal, and it is unnecessary to notice the other assignments of error.

The insured was a resident of Pine Barren, Fla. While upon an occasional business trip to Alabama, he was solicited by one J. C. Hogue, an insurance broker, to take out additional insurance. Hogue had previously attempted to write intestate in another company which had declined the risk. He then persuaded him to make application to the defendant, while he was traveling with him on a railroad train; the insured being on his way from Alabama to his home in Florida. The answers to the questions contained in the application were written out by Hogue at Flomaton, Ala., from information furnished him by the insured, and the insured at the same time and place signed the application and delivered it to Hogue, who was to complete it by having the blank reports of the medical examiners, which was attached, properly filled out, and then certified to by the insured as correct, before it was turned into the defendant to be acted upon. The insured then resumed his journey to his home in Florida, and Hogue his interrupted journey to Greenville, Ala. After Hogue had returned from that place, he went to Pine Barren, Fla., with the application signed by the insured, and caused two physicians to fill out and sign the medical reports, one at Pine Barren and one at Century, Fla. He then had the insured certify on the medical reports under his signature to the fact of the examination and the correctness of the answers. This was done by the insured at Pine Barren, Fla., and the application, thus completed, was turned over to Hogue, the insurance solicitor, by the insured at Pine Barren, Fla.

The insurance solicitor then took it to Mobile, Ala., from which place it was forwarded to the home office of the defendant. Thereupon the policies in suit were issued and sent from the defendant's home office to its agent at Jacksonville, Fla., who caused the policies to be delivered to the insured at his home at Pine Barren, Fla. This is the history of the transaction, as shown by the record.

Emmett Wilson, of Pensacola, Fla., for plaintiff in error.

W. A. Blount, A. C. Blount, Jr., and F. B. Carter, all of Pensacola, Fla., for defendants in error.

Before PARDEE, Circuit Judge, and FOSTER and GRUBB, District Judges.

GRUBB, District Judge (after stating the facts as above). It is conceded by the defendants in error that the contract of insurance was not an Alabama contract. The contention is that the application of the insured was taken in Alabama, and it is upon this that the applicability of the Alabama statute is conditioned. The material facts bearing upon this question are practically without dispute, and are as stated. If the mere signing of the application by the insured and its delivery in incomplete form to the insurance agent constitutes the taking of the application, it is clear that the application was taken in Alabama. If, on the other hand, the application cannot be said to be taken until its delivery to the defendant's agents in a completed form, according to the usual requirements of the company, to be forwarded to it for its acceptance or rejection, then the application was taken not in Alabama but in Florida. [1] Nor do we think that the determination of this question is a matter for the jury aided by the testimony of insurance experts. If the facts of the transaction are not in conflict, the place of the taking of the application in this case under its language became a question of law to be determined by the court. The application by its very terms becomes a part of the policies issued upon it, and it is therefore to be construed by the court as are all written contracts. In no other way is uniformity of construction obtainable.

[2] To properly construe the policies, it is essential to first determine what the application consists of, since, whatever that is, it becomes a part of the contract to be construed. The defendants in error contend that the medical examiners' report forms no part of the application, and that it was therefore complete when signed by the insured and turned over to the insurance solicitor at Flomaton. The language of the application is:

"This application made to the Mutual Life Insurance Company of New York is the basis and part of a proposed contract of insurance, subject to the charter of the company, and the laws of the state of New York. I hereby agree that all the following statements and answers, and all those that I make to the company's medical examiners, in continuation of this application, are by me warranted to be true and are offered to the company as a consideration of the contract which I hereby agree to accept, etc."

This language is inconsistent with the contention of defendants in error. The medical examiners' report is stated to be a continuation of the application, and is therefore a part of it. The statements made

by the applicant to the company's medical examiners and contained in their report are as much warranted by the applicant as are the statements made in the application signed by the applicant only. By the very terms of the application, applicant's statements made to the medical examiners and embodied in their report to the company "are offered to the company as a consideration" of the proposed contract of insurance by the applicant, just as are the statements made by the applicant without the intervention of the examiners. The application and medical examiners' report are physically attached to each other. The applicant is required to certify under his signature that his answers, as the medical examiners' report states them, are correctly recorded by the examiners. In view of the language of this application, we have no difficulty in reaching the conclusion that no application could be considered as having been taken until the medical examiners' report was filled out and certified as correct by the applicant.

It is said that the examiners are the agents of the insurance company, and that their report is for the exclusive benefit of the insurance company, and that the applicant's duties are at an end when he signs the application. The information furnished in the application itself is for the exclusive benefit of the company, as much so as is that contained in the examiners' report. In each case the applicant largely supplies the information furnished. So far as the family and personal history of the applicant is concerned, the medical examiner's function is that of an amanuensis only. Nor is it correct to say that the applicant, having signed the application, has no further duty to perform. On the contrary, after the examiner completes his report, the applicant is expressly required to certify that his answers, as incorporated in it by the examiner, are correct. The application is not complete even as to the applicant until he has done this. If it be conceded that the medical examiners solely represent the company in what they do, it still remains true that, after their task has been finished, the applicant is called upon to take the final step by certifying under his hand to the correctness of at least a part of what the examiners have done. Until this certificate has been affixed to the examiners' report, there is no application, such as is required by the company for submission to it for acceptance or rejection.

[3] Applying this principle to the facts of this case, the application, though signed in Alabama and there turned over by the applicant to the agent, was not then completed, nor was its delivery to the agent final, and for the purpose of transmission to the company for its action. It was understood between the insured and Hogue that it was incomplete and not ready for submission to the company. It was turned over to Hogue to give him the opportunity to complete it by taking the medical examiners' report, and, after having accomplished that, it was understood that it was to go back to the insured for his certificate. Hogue after receiving the application procured the examiners' report and then turned the application back to the insured for his certificate, which was thereupon given by him. All this was done in Florida, as appears without conflict from the record. The application consisted of two parts: (1) A request for insurance; and (2) the

furnishing of the information necessary to enable the company to pass upon the request. The request in this case was made in Alabama, but the other essential part of the application was completed in Florida. The application first became effective when both essentials were completed. One was as necessary as the other. The evidence shows that the application first became effective when delivered completed by the assured to Hogue at Pine Barren, Fla., after the examiners' report and applicant's certificate had been attached to it. The delivery at Flomaton was tentative, and not final, and in no proper sense can it be said, in view of the undisputed facts in the record, that the application was there taken.

The transmission of the application through the Mobile agent of the defendant to its home office becomes immaterial in view of the admitted fact that Hogue received the application for the company from the insured in Florida. The parties also contemplated that the policies should be delivered to the insured at his home in Florida, and this was afterwards done through the defendant's agent at Jacksonville, Fla. We think the court erred in submitting to the jury the determination of the place of the taking of the application.

We cannot say that the verdict of the jury for the defendants in error was not based on the incontestability of the policies, due to the conceded fact that two premiums had been paid on them by the insured, and a finding that the application was taken in Alabama, and that the Alabama statute ruled the case.

We need not consider whether it was competent for the Alabama Legislature to control by its enactment the construction of a New York or Florida contract against its express terms, when the contract was sought to be enforced in the federal court of a jurisdiction other than that of the state of Alabama, merely because a preliminary step to the making of a contract occurred in that state. *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832.

The judgment of the District Court is reversed, and the cause remanded for further proceedings.

FIRST NAT. BANK OF LAKE CHARLES v. LANZ.

In re WILCOX.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1913.)

No. 2,333.

1. BANKRUPTCY (§ 161*)—"PREFERENCE"—VALIDITY OF PLEDGE.

A pledge of corporate stock by an insolvent debtor more than four months prior to his bankruptcy to secure an antecedent debt does not constitute a preference, although the stock is sold by the creditor within the four-months period, and is valid where by the law of the state a transfer on the books of the corporation is not necessary to perfect the pledge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5498, 5499; vol. 8, p. 7759.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKS AND BANKING (§ 260*)—NATIONAL BANKS—LOANS ON SECURITY OF BANK'S OWN STOCK—VALIDITY.

The acceptance by a national bank of a pledge of its own stock to secure a loan, although in violation of Rev. St. § 5201 (U. S. Comp. St. 1901, p. 3494), is valid, except as against the United States, after the pledge has been executed by a sale.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 977-978, 983, 984, 986½-990; Dec. Dig. § 260.*]

3. BANKRUPTCY (§ 163*)—VOIDABLE PREFERENCE—MORTGAGE OF HOMESTEAD.

Under Const. L. a. arts. 244, 246, which give a debtor a homestead exemption of not exceeding \$2,000 in value, but provide that it may be waived in favor of a privileged creditor, a mortgage given by an insolvent debtor within four months prior to his bankruptcy on his homestead to secure an antecedent debt, although accepted by the creditor with reason to believe that it was intended as a preference, could only operate as a preference as to the excess in value of the property over \$2,000, but as to such excess it was voidable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 163.*]

Appeal from the District Court of the United States for 'the Western District of Louisiana; Aleck Boorman, Judge.

In the matter of C. B. Wilcox, bankrupt; 'H. W. Lanz, trustee. From an order disallowing its claim as a secured claim, the First National Bank of Lake Charles appeals. Reversed.

This is an appeal from the order of the District Court, affirming an order of the referee in bankruptcy, disallowing the claim of the appellant bank as a secured claim against the estate of the bankrupt, and directing the cancellation of a mortgage and notes given the bank by the bankrupt on which the claim was based, and directing the bank to pay to the trustee the proceeds of the sale of certain shares of its capital stock, received by it in pledge from the bankrupt, to secure its claim, and which it had sold and applied the proceeds in part payment of its claim. The claim of the bank was allowed as an unsecured claim against the bankrupt estate.

The bankrupt, C. B. Wilcox, was engaged in the export lumber business. In the course of this business it had been his custom for some time prior to the bankruptcy to borrow money from the appellant and other banks on the security of trust receipts or certificates, reciting that he held certain lumber therein described, which was in his possession and under his control, and subject to such disposition as he saw fit to make of it, in trust for the benefit of the holder and to secure its claim. This course of business had prevailed between the bankrupt and the appellant for about two years before the date of the filing of the petition, which was the 22d of June, 1909. At the time of the filing of the petition in bankruptcy, the bankrupt was indebted to the appellant in the sum of \$4,382.66. On January 1, 1909, the indebtedness was \$7,727.21. Up to January of the same year the appellant had held as its only security for this indebtedness trust receipts in the amount of \$7,500. Becoming dissatisfied with this class of security, it then requested the bankrupt to reduce his loan and to give other or additional security. A payment of \$1,500 was thereupon made by the bankrupt. On February 1, 1909, the bankrupt pledged with the bank a certificate covering 10 shares of its own capital stock to secure his indebtedness to the bank, and on March 12, 1909, authorized the bank to sell this stock at \$190 a share and apply the proceeds on the note, which was done. On March 12, 1909, within four months of the date of bankruptcy, the appellant took from the bankrupt, to secure the balance of his indebtedness to it, a mortgage, with waiver of exemption, on the bankrupt's homestead in the town of Lake Charles, which was recorded by it.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

The questions presented by the record involve the validity of the pledge of bank stock and of the mortgage of the bankrupt's homestead. The referee determined the mortgage to be a preference, and disallowed it entirely as a secured claim, and directed its cancellation and that of the notes secured by it, and also determined the pledge of the bank stock to be invalid, because of want of authority to the bank to accept a pledge of its own capital stock, and directed it to pay the proceeds of the sale of the stock to the trustee; and the District Court confirmed the order.

J. D. Cline and A. M. Barbe, both of Lake Charles, La., for appellant.

C. N. Young, of Lake Charles, La., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge (after stating the facts as above). [1, 2] The pledge of bank stock having been given to and received by the bank more than four months before bankruptcy, it cannot be held to be a preference, though given to secure a pre-existing unsecured debt. The sale within four months, pursuant to the pledge, would not affect this result. *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136. The delivery of the certificate, under Louisiana law, is effectual to perfect the pledge, without transfer on the books of the corporation. *Crescent City Mineral Water Co. v. Deblieux*, 40 La. Ann. 155, 3 South. 726; *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945. Delivery of the certificate occurred February 1, 1909. Section 5201, Revised Statutes (U. S. Comp. St. 1901, p. 3494), does not prohibit a national bank from accepting a pledge of its own capital stock, when to do so is necessary to secure the payment of an unsecured pre-existing debt, and so prevent loss to the bank. The record clearly shows that the taking of this stock in pledge was for the purpose of, and did in fact, prevent loss to the bank in this way. It is also well settled that the United States alone can complain of a violation of this section by a national bank, at least after the contract of pledge has been executed by foreclosure. *National Bank of Xenia v. Stewart*, 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 592. For these reasons we think the appellant was entitled to the proceeds of the sale of the pledged stock, and the order directing it to be paid to the trustee was erroneous.

[3] The order of the court below also sets aside the mortgage on the bankrupt's homestead as an illegal preference under section 60 of the Bankrupt Act, in its entirety. The Constitution of the state of Louisiana confers on a debtor a homestead exemption of not exceeding \$2,000 in value, and provides, in case of excess, that amount shall be returned to him out of the proceeds of any sale under execution, and also provides a method of waiver. Constitution of Louisiana, articles 244 and 246. Construing this section, the Supreme Court of Louisiana has held that in case there is a creditor as to whom the exemption does not apply, upon forced sale of the homestead, the creditor, with such privilege, is first paid from the proceeds, the debtor then receives his exemption of \$2,000, and the creditors, without such privilege, take the surplus if any remains. *In re Penn*, 130 La. 742,

58 South. 554. In this case the appellant was a creditor with a privilege, having a mortgage on the bankrupt's homestead, accompanied by a duly executed and recorded waiver. To the extent of the homestead exemption of the bankrupt the mortgage could not operate as a preference, since the general creditors were not entitled to the exempt property in any event. *Mills v. Fisher*, 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656; *In re Tollett*, 106 Fed. 866, 46 C. C. A. 11, 54 L. R. A. 222. Ordinarily, when a preferential transfer is set aside, the exempt property is restored to the bankrupt's estate, and then becomes subject to his exemptions (*Collier* [9th Ed.] p. 204), and should be set aside as exempt to him by the trustee. In this case the property exceeds in value the bankrupt's exemption, and for that reason it is necessary that it be administered through the bankrupt court, in order that the estate may profit by the excess. Upon sale of the property either the appellant or the bankrupt would, as against the trustee in bankruptcy, be entitled to the amount of the homestead exemption out of the proceeds of the sale. As between the appellant and the bankrupt, if controversy arises, their respective rights to the amount of the exemption would have to be worked out in the state court. *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. If either consents to the payment by the trustee to the other, it would be proper for the trustee to make payment to such other. In the absence of such consent, it will be the duty of the trustee to hold the amount of the exemption to abide the decision of the state court, and then pay it to the appellant or to the bankrupt according to the award of the state court. The mortgage and the notes, after being credited with whatever amount the appellant receives in bankruptcy, should be surrendered to appellant.

The inquiry remains whether the mortgage, as to the excess over the bankrupt's homestead exemption, was an illegal preference and properly set aside at the instance of the trustee. The mortgage was given on March 12, 1909, within four months of bankruptcy and to secure a pre-existing debt. The appellant contends (1) that it was given in substitution of other securities, which were surrendered contemporaneously to the bankrupt, and (2) that, when accepted, appellant had no reasonable ground for believing that a preference was intended or would be effected by it. The bankrupt's insolvency was not seriously controverted.

The securities which appellant contended were surrendered by it were trust receipts for lumber of the face value of about \$7,500. These trust receipts were mere declarations by the bankrupt that he was holding the lumber described in them for the use of the appellant. According to the course of business between the appellant and the bankrupt, possession of the lumber was retained by the bankrupt, with full control over the lumber and the right to dispose of it at his will, and without liability to account for the specific proceeds of the sale to the appellant. Such a transaction does not effect a pledge or any other valid security known to the general law, nor does any statute of Louisiana cover it. The security of the trust certificates being void in law, their surrender afforded no new consideration for the giving of the mortgage on the homestead.

Did the appellant have reasonable ground for believing that a preference was intended and would be effected by the taking of the mortgage? The referee so found from the facts, and the court sustained his findings. The evidence shows that in January of 1909 the appellant became dissatisfied with the condition of the bankrupt's account and insisted upon the reduction of his loans and a change of security from that afforded by the trust receipts. The bankrupt made a payment and gave appellant his bank stock as collateral early in February. On March 12th he executed to appellant a mortgage on his homestead, with a waiver. At the time he did so he informed appellant's cashier that the bank stock already pledged and his homestead were all of his assets, other than the lumber covered by the trust receipts. The cashier knew that he was also indebted to other banks and that they held similar security. The lumber did not sell for enough, when sold by the trustee, to pay the costs of administration. In view of these undisputed facts, we are not disposed to disturb the finding of the referee—approved by the District Judge—that the appellant, at the time it accepted the mortgage on the bankrupt's homestead, had reasonable grounds for believing that the bankrupt was insolvent when he gave the mortgage, and that a preference was thereby intended and effected; and the order of the court below, so far as its effect is to set aside the mortgage as a preference, is approved.

The order of the District Court, confirming the order of the referee from which the appeal is taken, is reversed, and the cause remanded to the District Court for further proceedings in conformity to the opinion of this court.

FIRST NAT. BANK OF LAKE CHARLES v. LANZ.

In re WILCOX.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1913.)

No. 2,340.

Petition to Superintend and Revise an Order of the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

In the matter of C. B. Wilcox, bankrupt; H. W. Lanz, trustee. The First National Bank of Lake Charles petitions to revise an order of the District Court. Petition denied.

A. M. Barbe and Jerry D. Cline, both of Lake Charles, La., for appellant.
S. N. Young, of Lake Charles, La., for appellee.

Before PARDEE and SHELBLY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. The merits of this case having been disposed of in No. 2,333 between the same parties (202 Fed. 117), the petition to revise is denied, with costs.

MISSISSIPPI VALLEY FUEL CO. et al. v. WATSON COAL CO.

(Circuit Court of Appeals, Seventh Circuit. June 28, 1912.)

No. 1,873.

1. COURTS (§ 281*)—FEDERAL COURTS—ANCILLARY JURISDICTION.

Where a federal court had granted a mandatory injunction in a pending equity suit, requiring the defendant to comply with a contract to make deliveries of coal to the complainant expressly conditioned on prompt payment by complainant, to secure which a bond was required, the court had ancillary jurisdiction of a proceeding to enforce payments on such bond, whether in the same or a separate action, and regardless of the residence of the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 826-825; Dec. Dig. § 281.*]

2. ABATEMENT AND REVIVAL (§ 8*)—ANOTHER ACTION PENDING—IDENTITY OF ISSUES.

The pendency of the equity suit was not ground for abatement of an action at law on the bond, brought against both principal and surety.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 39-56, 58-63, 68, 72; Dec. Dig. § 8.*]

In Error to the Circuit Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Action at law by the Watson Coal Company against the Mississippi Valley Fuel Company and the American Surety Company of New York. Judgment for plaintiff, and defendants bring error. Affirmed.

The plaintiffs in error were defendants below in a suit at law, brought by the defendant in error for recovery upon a bond, executed by the plaintiffs in error in its favor; and this writ of error is prosecuted from a judgment entered, pursuant to the verdict of a jury "impaneled to hear the evidence and assess the damages sustained by the plaintiff." For brevity in naming the parties, the defendants below are referred to respectively as Fuel Company and Surety Company, and the plaintiff below as Coal Company. The suit was commenced in a state court and removed to the trial court, on petition showing diversity of citizenship.

The declaration of the Coal Company upon the bond avers in substance: The Fuel Company had theretofore filed its bill for relief against the Coal Company for enforcement of an alleged contract to furnish coal to the Fuel Company; and had obtained therein a preliminary writ of mandatory injunction wherein the order required the Fuel Company to furnish the bond in question, conditioned for the payment of coal delivered by the Coal Company pursuant to the order, and such bond was executed accordingly. Deliveries of coal were made, pursuant to the order, of the value of \$15,000, and the Fuel Company had refused payment thereof.

The Fuel Company entered a special appearance, and thereupon interposed its plea to the jurisdiction of the court, averring in substance that the Fuel Company is a corporation aggregate, organized under the laws of Missouri and a citizen and resident of that state and a nonresident of Illinois, at the date of the commencement of suit "and from thence hitherto"; that the pretended service upon it was by delivery of summons therein to its president, Kreikemeier, who was also a resident of St. Louis, Mo., where the principal office of the corporation was and still is located, "and this action is not a local action"; that there was then pending in the trial court on the equity side thereof "a suit or proceeding involving the same identical subject-matter in controversy in this suit," wherein the Fuel Company was complainant and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Coal Company was defendant, referred to as "case No. 526"; that on the day of the pretended service herein a hearing in said court "was being had in said case," and said president of the Fuel Company "was present at said hearing" as such president, necessarily assisting therein; that "while said hearing was in progress in the courtroom of said court" the pretended service was made by the sheriff delivering to said president a copy of the summons, "and was not made at any other time or place"; and that the Fuel Company has not been served otherwise than above mentioned. It further avers that the defendant "was exempt or privileged from the service of process in this cause, and the said service upon it is and was a nullity." The plea was overruled by the trial court on demurrer interposed by the Coal Company, and the Fuel Company "stood by this plea, asked no leave to amend or file additional pleas, and has assigned the sustaining of this demurrer as error."

The Surety Company also interposed several pleas to the declaration, two of which were overruled on demurrer, and the third was subsequently withdrawn. The first plea thereof is the only one relied upon for reversal. It alleges in substance the pendency in the trial court of the above-mentioned equity suit, No. 526, and proceedings thereunder upon issues joined, including a reference to a master to take testimony and report thereon; that the master had taken testimony and had reported in respect of deliveries of coal to the amount of \$12,282.43, for which the Coal Company was entitled to payment, but that the Fuel Company had sustained damages for breaches of the contract for an amount stated, which should be deducted therefrom; that the declaration herein is filed by the Coal Company "in a plea of debt on the same identical subject-matter, promises, and undertakings involved in the said equity suit, as by the record and proceedings thereof remaining in this court more fully appear"; that the real parties in interest are the same in both suits, and that said prior suit in equity is still pending, "and no final determination, judgment, or decree has been entered therein"; that when decree is entered therein it will "settle and determine all of the questions involved in this suit."

The Fuel Company entered no formal appearance, other than the above-mentioned special appearance for the pleas, although the bill of exceptions shows cross-examination of the witnesses by its counsel, and that the value of the coal delivered and fact of delivery and nonpayment therefor, as found by the jury, appear from such cross-examination to be conceded facts.

R. P. & C. B. Williams, of St. Louis, Mo., and H. M. Steely, of Danville, Ill., for plaintiffs in error.

William M. Acton, of Danville, Ill., W. O. Potter, of Marion, Ill., and Blevins & Jamison, of St. Louis, Mo., for defendant in error.

Before SEAMAN and KOHLSAAT, Circuit Judges, and SANBORN, District Judge.

SEAMAN, Circuit Judge (after stating the facts as above). Under the writ of error no question is presented whether a meritorious controversy arose between the parties over liability upon the bond in suit, and it goes without saying that tender of defense thereto was not needful, if reversible error appears in overruling both of the pleas interposed, respectively by one and the other defendant below. Whether want of jurisdiction over the defendant Mississippi Valley Fuel Company (hereinafter mentioned as the Fuel Company), principal in the joint and several bond, if well pleaded, would require disturbance of the verdict as against the surety defendant, American Surety Company (hereinafter referred to as the Surety Company), as contended, may not rightly be assumed. See *Minor v. Mechanics' Bank*, 1 Pet. 46, 73, 7 L. Ed. 47; 1 Freeman

on Judgments, § 136, and cases cited. The sufficiency, however, of both pleas is involved for determination under the assignments of error, and the questions for solution are: (1) Was personal jurisdiction over the defendant Fuel Company vested in the trial court? and (2) Was reversible error committed in overruling the plea in abatement, founded on the pendency of the equity suit described therein?

[1] 1. The contentions under the plea of want of jurisdiction over the Fuel Company are twofold: (a) That it was a foreign corporation, not located nor doing business in the state of Illinois and not subject to suit therein, under the settled rule in the federal jurisdiction, whatever may be the rule in respect thereof governing the state courts in Illinois; and (b) that the alleged service of process in the suit (commenced in the state court), was made upon its nonresident president, while he was attending the federal court (which became the trial court through removal of the suit), as the necessary representative of the Fuel Company, in a hearing of its bill in equity pending therein as described in the plea, was not within the jurisdiction for any other purpose, and was entitled to immunity from such service, as ruled by various authorities cited, federal and general. Each of these propositions set forth in the plea and argument as to the tests of valid service for federal jurisdiction is predicated on two assumptions, without which neither becomes material, namely: First, that the jurisdiction of the trial court over the Fuel Company, for the purpose of the suit, rested alone on the sufficiency of such service; and, second, that the validity of the service in the state court must be ascertained through the rules referred to, applicable to service of process in federal courts, irrespective of any rule thereupon which may have been controlling in the jurisdiction from which the suit was removed. The first premise thus assumed involves the paramount inquiry to be considered, and the second may be dismissed with this remark: That upon each proposition of the plea decisions of the Supreme Court of Illinois are brought to our attention wherein rules appear to be adopted in reference to amenability to service of civil process, which may be at variance, respectively, with one and the other rule invoked for the plea, so that the effect thereof would necessarily enter into determination of the issue, were jurisdiction otherwise well challenged under the averments.

We are of opinion, however, that the trial court possessed jurisdiction over the Fuel Company, for all purposes of the suit, irrespective of either question raised by its plea. It was plainly within such jurisdiction for complete relief between the parties, under its bill filed and pending therein (on the equity side of the court) against the Watson Coal Company for specific performance of an alleged contract for deliveries of coal, inclusive of the deliveries involved in the present suit. It had obtained therein a mandatory injunctive order for such deliveries, under an express requirement to make payments promptly as provided in terms, and to furnish the bond (in suit) to secure performance thereof on its part. For

such cases the doctrine is well settled, as upheld in the leading authority (*Russell v. Farley*, 105 U. S. 433, 26 L. Ed. 1060), that federal courts in equity are vested, not only with complete jurisdiction over the parties for all issues arising under the bill, but that jurisdiction thus acquired extends as well for enforcement, in favor of a defendant therein, of any bond which may have been required of and executed by the complainant under an injunctive order for his benefit, and that such jurisdiction for needful relief, if not directly exercisable under the issues, may be exercised by ancillary proceedings, either in equity or on the law side of the court, against both principal and sureties in a bond so executed. *Meyers v. Block*, 120 U. S. 206, 7 Sup. Ct. 525, 30 L. Ed. 642; *Leslie v. Brown*, 90 Fed. 171, 32 C. C. A. 556; *Empire State, etc., Co. v. Hanley*, 136 Fed. 99, 69 C. C. A. 87. Thus, had application been made therein by the Coal Company for enforcement of such liability under the bond against principal and surety, it is unquestionable that proceedings to that end would have been authorized, either in the equity suit or at law, as advised.

Whether the course adopted of instituting the suit in the state court, for enforcement as well against the surety was well advised, may have been treated by the trial court as beside the inquiry of jurisdiction over the Fuel Company for all the purposes thereof. However regarded, we believe such procedure could not disturb the existing jurisdiction over its person through the equity suit. So, when the suit at law was removed to the trial court, on petition of the Fuel Company, such jurisdiction rightly extended for entertainment thereof, with the parties present in fact, irrespective of the issues tendered by the plea as to valid service; and we believe error is not well assigned for overruling such plea.

[2] 2. The plea setting up the equity suit by way of abatement was interposed by the Surety Company, and we are at loss to understand the theory upon which error is assigned for denial of abatement on its behalf. It is not averred that proceedings were then pending or tendered in any form for enforcement of the bond, and whatever may have been assumed as the groundwork of the plea we are impressed with no view thereof which would authorize disturbance of the judgment. As above mentioned, the prior proceedings in equity were within the jurisdiction of Judge Wright, and thus within his judicial knowledge for administration. His ruling upon the plea is presumptive, therefore, of an understanding that enforcement of the bond, in the proceedings at law, was neither inconsistent therewith, nor would be permitted to disturb equities arising therein; and no doubt is entertainable that the paramount jurisdiction in equity extends to that end and will be so exercised.

The several assignments of error are overruled accordingly, and the judgment of the court below is affirmed.

In re NEVADA-UTAH MINES & SMELTERS CORPORATION.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 108.

1. BANKRUPTCY (§ 262*)—ASSETS—"PRIVATE SALE."

Where an advertisement of notice of sale of a bankrupt's assets was addressed only to "creditors, stockholders, and other parties in interest," and the meeting at which the sale was ordered was stated to be a meeting of such persons, and the public was at no time invited to attend and bid, a sale conducted pursuant to such notice was a private sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 363-365; Dec. Dig. § 262.*]

For other definitions, see Words and Phrases, vol. 6, p. 5580.]

2. BANKRUPTCY (§ 262*)—SALE OF ASSETS—PRIVATE SALE—AUTHORITY.

Bankruptcy Act July 1, 1898, c. 541, § 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421) invests the District Court with jurisdiction (7) to cause the estate of bankrupts to be collected, reduced to money, and distributed, and (15) to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of the act. Section 70(b) provides that sales, when practicable, shall be subject to the approval of the court; and section 30 gives the Supreme Court power to prescribe all necessary orders as to the procedure. *Held*, that where, after six months had been spent without accomplishing a sale of the bankrupt's assets, the trustee petitioned for an order of sale, and proper notice was given, the court was authorized to order a private sale of specific portions of the bankrupt's property, which together covered all the assets under General Order 18 (89 Fed. viii, 32 C. C. A. xx), providing that on an application to the court and for good cause shown the trustee may sell any specific portion of the bankrupt's estate at private sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 363-365; Dec. Dig. § 262.*]

Petition to Revise Order of the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

In the matter of bankruptcy proceedings of Nevada-Utah Mines & Smelters Corporation. Petition by Francis P. McManus to revise an order (198 Fed. 497) directing and confirming a sale of the bankrupt's assets. Affirmed.

Liebmann & Tanzer, of New York City (L. A. Tanzer, of New York City, of counsel), for petitioner.

R. S. Rounds, Winthrop & Stinson, J. N. Rosenberg, and Frank D. Pavey, all of New York City (Bronson Winthrop and Charles T. Payne, of New York City, of counsel), for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. This is a petition to revise an order of the District Court affirming an order of the referee directing and confirming a sale of the bankrupt's assets.

January 15, 1912, the Nevada-Utah Mines & Smelters Corporation, organized under the laws of the state of Maine with 1,498,500 shares outstanding, of the par value of \$10 each, was adjudicated

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a bankrupt in an involuntary proceeding. May 31st the trustee filed a petition stating that he was without funds, and that the property of the bankrupt consisted largely of stock in other mining companies, much of which had been pledged to secure loans, one of which pledges was about to be sold under a judgment, and asking authority at a meeting of creditors to be called to call for funds to protect the assets of the estate, and if none were forthcoming to call for bids for any or all of the property of the estate, and at "such meeting generally to ask for such action of any nature whatsoever in respect to any or all of the assets of the estate as may be deemed necessary or proper." May 29th the court, upon this petition, entered the following order:

"Upon the annexed petition of Henry Melville, trustee herein, verified the 28th day of May, 1912, and upon motion of Rosenberg & Levis, attorneys for the trustee, it is ordered that a hearing be held before Peter B. Olney, referee in bankruptcy herein, in the above-entitled matter, at his office, 68 William street, borough of Manhattan, New York City, on the 10th day of June, 1912, at three o'clock in the afternoon, to consider and act upon and make such orders in reference to any and all of the matters referred to in the annexed petition as may be deemed just and proper; and it is further ordered that at such meeting any and all bids for any and all of the assets may be considered and acted upon, and said referee may make such order as may by him be deemed proper, including any order for the sale or other disposition of any or all of the assets of this estate, in whole or in part, for cash or on credit, or otherwise as may then be deemed advisable.

"Due, timely, and complete notice of the said meeting shall be given in the following manner: By advertising the said meeting by notice, which notice shall be printed in the New York Times, once on or before May 31st and once on June 10th, and by like advertisement in the Daily Trade Record, and which said notice shall be in language as follows:

"United States District Court, for the Southern District of New York. In the Matter of the Nevada-Utah Mines & Smelters Corporation, Bankrupt. To the Creditors, Stockholders and Other Parties in Interest: Notice is hereby given that a meeting of creditors and other parties in interest will be held at the office of the Hon. Peter B. Olney, referee in bankruptcy herein, at his office, 68 William street, borough of Manhattan, New York City, on the 10th day of June, 1912, at three o'clock in the afternoon, to consider any and all such matters in reference to the administration of this estate as are referred to in a petition of the undersigned, verified May 28, 1912, and filed with the clerk of the United States District Court for the Southern District of New York, to consider any or all matters in reference to the administration of the assets of this estate or the sale of any portion thereof. At said meeting any and all offers for the sale of any or all of the assets of this estate, for cash or on credit, may be made, and such offers will then and there be submitted to creditors and other parties in interest, and such orders for the sale of any or all of such assets as may be deemed proper will be applied for, and such orders for any other disposition of any or all of the assets of this estate as may be deemed advisable will further be applied for. Such orders as to compromise or litigation with disputed claims, if any, will be asked for as may be deemed proper. The undersigned will request the creditors and other parties in interest to furnish funds to the undersigned for the protection and conservation of the assets of this estate and to redeem various properties pledged by the bankrupt corporation.

"Henry Melville, Trustee in Bankruptcy,

"45 Cedar Street, New York City.

"Rosenberg & Levis, Attorneys for Trustee,

"170 Broadway, New York City."

"A copy of the foregoing notice shall also be mailed to all of the creditors of this estate to their addresses as the same appear in the schedules in

bankruptcy or in their proofs of claim, if filed. And it is further ordered that if the said Peter B. Olney, Esq., is unable to preside at said hearing on June 10th, herein ordered, that the said hearing may be before such other referee as may then be ordered by this court."

May 31st the company's property was appraised at \$455,180.34. June 10th the meeting was held, and various stockholders and creditors were represented by counsel. The referee called upon those present to furnish funds to protect the stock pledged to secure a loan of \$25,000 which was advertised to be sold on June 12th, and none was forthcoming. Thereupon he called for any bids for the company's assets, and a bid in writing was submitted, offering to purchase certain specified assets for \$100,000 and certain other specified assets for \$2,000; the two bids together covering all of the assets. The creditors present unanimously voted to accept the offer, and no stockholder objected. Thereupon the trustee accepted it. June 11th the referee entered an order confirming the sale, although the amount bid was not equal to 75 per cent. of the appraised value of the property sold. July 18th the District Court confirmed the order of the referee, and it is this order which the petitioner asks to be now revised.

McManus, the petitioner, is the holder of 2,500 shares, of a par value of \$25,000, out of the shares outstanding, aggregating a par value of \$14,985,500. He was represented by counsel at the meeting of June 10th when this sale was made, and offered no objection; but at the meeting of the 11th he did object to the confirmation of the sale on various grounds, which the referee overruled. His counsel now contends that no sale at all was authorized by the order of May 29th, that the sale made was a private one, without proper notice to the stockholders, creditors, or prospective bidders, that only a public sale should have been made, and that no opportunity was given to the parties in interest to object to confirmation.

[1] The District Court confirmed the order of the referee, on the ground that the sale was a public one, to which all bidders were invited by sufficient advertising. We cannot agree with this conclusion, because the advertisement was addressed only to "creditors, stockholders, and other parties in interest," and the meeting to be held was stated to be a meeting of such persons. It seems to us quite clear that many strangers, reading the advertisement, would conclude that they were not entitled to be present at the meeting. The essential feature of a public sale was lacking, viz., that the public be invited to attend and bid.

[2] Bankruptcy Act, § 2 (7) invests the District Court with jurisdiction to "cause the estate of bankrupts to be collected, reduced to money and distributed, * * *" and (15) "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." Section 70 (b) provides that sales shall when practicable be subject to the approval of the court. Section 30 gives the Supreme Court power to prescribe all necessary orders as to procedure and for carrying the act into force and effect. Of course, it was not intended that the Supreme Court by such orders should

control or alter the law. General Order 18 (89 Fed. viii, 32 C. C. A. xx) provides that "upon application to the court, and for good cause shown, the trustee may be authorized to sell any specific portion of a bankrupt's estate at private sale." The two bids which were accepted by the trustee did cover specific portions of the estate and together covered all the assets. Therefore there was a technical compliance with the literal language of the act. However, we do not think that the Supreme Court could have intended or was authorized by section 30 of the act to cut down the statutory power of the District Court to collect the estate by selling the whole of it at private sale if it thought it best to do so.

In this case the petition of the trustee made after six months had been spent without accomplishing anything did show good cause for private sale. We think the order of May 29th authorized a private sale and that the sale might be made at the meeting set for June 10th. The public notice to be given was prescribed in the order, and was not only conformed to, but in point of fact largely exceeded. The 10 days' statutory notice of sale under section 58 (4) was also given to creditors. The circumstances of the case are, as the District Judge has pointed out, very exceptional, and the interest of the petitioner very small. We think the sale made was authorized, and was made in conformity with law. The question was fully discussed, and we have fully considered it, notwithstanding the fact that no petition to revise the order of May 29th was ever filed.

The order is affirmed.

WESTINGHOUSE v. CARLTON.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 104.

1. MASTER AND SERVANT (§ 3*)—CONTRACT OF EMPLOYMENT—CONSIDERATION.

Where defendant orally agreed that, if plaintiff would enter the employ of a corporation of which defendant was president, plaintiff should receive from the corporation \$12,000 a year, and in addition 200 shares of the stock of the company from defendant at the end of each year's service, the contract was not nudum pactum as to the plaintiff's right to stock after the first year.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.*]

2. PLEADING (§ 430*)—VARIANCE—WAIVER OF OBJECTIONS.

Plaintiff having orally agreed to enter the employment of an electric company at a salary of \$12,000 per year and a bonus of 200 shares of the corporation's stock from defendant, defendant wrote plaintiff a letter so stating the arrangement as to provide that plaintiff should receive 200 shares of the stock at the end of each year's service. Plaintiff, in reply, called defendant's attention to the difference, and stated that he did not desire to accept defendant's letter beyond the oral arrangement, unless defendant was quite satisfied to have him do so, to which defendant replied that his letter was in accordance with his understanding of the matter, and trusted that it was satisfactory to plaintiff, to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 202 F.—9

which plaintiff did not reply, but entered the employment and received stock in accordance with the substituted arrangement for the years 1905 and 1906. *Held* that, even if the correspondence made a new contract, different from that alleged, the letters having been introduced in evidence without objection, plaintiff was entitled to recover according to the proof made by them, since, in case an objection had been made, he could have amended the complaint to conform to the proof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1438-1441; Dec. Dig. § 430.*]

3. MASTER AND SERVANT (§ 73*)—CONTRACT OF EMPLOYMENT—DISLOYALTY.

Defendant induced plaintiff to enter the employ of a corporation at a salary of \$12,000 a year, to be paid by the corporation, and 200 shares of stock, to be delivered to plaintiff each year by defendant. The contract was complied with and stock delivered for the years 1905 and 1906; but, on request for the stock for the year 1907, defendant wrote plaintiff, merely asking for more time in which to make delivery, but making no objection that plaintiff had been disloyal, though there had been differences of opinion as to management. *Held*, that it was plaintiff's duty to differ from defendant with reference to the corporation's management, if plaintiff honestly disagreed with defendant in respect thereto, and that plaintiff by reason of such difference was not chargeable with disloyalty, so as to deprive him of his right to the stock for the year 1907.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 90-102; Dec. Dig. § 73.*]

In Error to the District Court of the United States for the Southern District of New York; Charles M. Hough, Judge.

Action by Newcomb Carlton against George Westinghouse. Judgment for plaintiff, and defendant brings error. Affirmed.

Louis Marshall, of New York City, for plaintiff in error.

Rush Taggart, of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. Carlton, the plaintiff below (defendant in error), sued Westinghouse to recover damages for his failure to deliver to the plaintiff 200 shares of assenting stock of the Westinghouse Electric & Manufacturing Company in the year 1907, and 200 shares in the year 1908 in accordance with a contract made between the parties in November, 1904. The answer denied that the defendant ever became legally bound to deliver the said stock to the plaintiff, and averred that the defendant's undertaking was to give, without any consideration moving to him therefor, such stock to the plaintiff at the end of each year of his service with the company upon the understanding that the plaintiff would at all times remain loyal to the defendant.

The plaintiff testified that the defendant, being president of the Westinghouse Company, asked him to go into the company's service as a vice president at a salary of \$12,000 a year and that he individually would give him in addition to his salary from the company 200 shares of the stock in question at the end of the year's service. To this the plaintiff agreed, and November 29, 1904, he was appointed vice president of the company at a salary of \$12,000 per an-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

num by formal resolution of the board of directors. September 15, 1905 he wrote to the defendant as follows:

"111 Broadway, New York. September 15, 1905.

"Dear Mr. Westinghouse: You were to send me a letter regarding the 200 shares of Electric Company stock which has probably escaped your attention in the pressure of other things. I would be glad to have it at your convenience.

"Respectfully,

Newcomb Carlton."

Thereupon the following correspondence ensued:

"Pittsburgh, Pa., September 16, 1905.

"Newcomb Carlton, Esq., 111 Broadway, New York—Dear Mr. Carlton: This is to confirm our understanding arrived at when you entered the service of the Westinghouse Electric & Mfg. Co., as vice president, namely, that you are to receive 200 shares of the assenting stock of the company either from the Security Investment Company or from me at the end of each year's service. I regret exceedingly that great press of matters has prevented my writing this letter at an earlier date.

"Very truly yours,

Geo. Westinghouse."

"120 Broadway, New York, 18 September, 1905.

"Dear Mr. Westinghouse: Your letter of the 16th about the stock really goes further than my understanding of our conversation last November. At that time you said, according to my recollection, that I was to have 200 shares of Electric Company stock for the year's services. You did not, however, promise me the stock for each year of my service, and I therefore do not desire to accept your letter beyond the arrangement as I recall it, unless you are, in view of this explanation, quite satisfied to have me do so.

"Respectfully,

Newcomb Carlton."

"Pittsburgh, Pa., September 19, 1905.

"Newcomb Carlton, Esq., 111 Broadway, New York—Dear Mr. Carlton: In answer to your letter of the 18th, replying to my letter of the 16th, about the stock, would say that my letter is in accord with my understanding of the matter, and I trust it will be entirely satisfactory to you.

"Truly yours,

Geo. Westinghouse."

"111 Broadway, New York, 17 October.

"Dear Mr. Westinghouse: The several matters in my charge are in shape to turn over to others and there is nothing to prevent my sailing on the 26th. I understand that I am to go to England as a vice president of the American Company, and as such without authority, until such a time as you make me an officer of the British Company, when my authority is to be broad and full. Should Mr. Buchanan for any reason wish to retain his position as executive officer of the British Company, I would still expect to succeed him at the expiration of his term of office, which I understand is January 1st. My compensation to be my present salary and stock compensation, plus at least £1,500 from the British Company. The latter sum, however, to be paid after I have been placed in charge of the British Company. The usual traveling and other expenses to be borne by the American or British Company.

"Yours respectfully,

Newcomb Carlton.

"George Westinghouse, Esq., New York."

The defendant delivered 200 shares of the said stock to the plaintiff for the years 1905 and 1906. In 1907, when called upon for it by the plaintiff, he did not deny his liability; but on December 3d, after the employment for 1907 had terminated, asked for further time. Subsequently, considering himself to have been ill-used by the plaintiff, he refused to deliver to him the stock for that year, or for the

year 1908, at the end of which the plaintiff resigned his office as vice president of the company.

[1] The trial judge quite properly denied the defendant's request to charge that the defendant's engagement, except for the year 1905, was a case of *nudum pactum*. If the oral contract of November, 1904, alone is to be considered, the plaintiff's entry into the employment of the Westinghouse Company was admittedly consideration for the defendant's undertaking to give him 200 shares of stock for that year.

[2] The defendant, however, contends that the correspondence, if given any effect, made a new contract as to subsequent years, which was not sued upon. We do not think it made a new contract. It shows that the parties had different understandings of the oral contract made in November, 1904. When the plaintiff, against his own interest and with perfect frankness, suggested in his letter of September 18th to the defendant that the defendant's letter of September 16th admitted a larger obligation under that contract than the plaintiff thought had been assumed, and that he would not be willing to accept it unless the defendant were entirely satisfied, in view of his explanation, the defendant replied that his letter was in accordance with the undertaking he intended to assume, and if the plaintiff was satisfied with the engagement so stated he, the defendant, was satisfied. The correspondence, the plaintiff having accepted this view, fixes precisely the character and extent of the contract made in November, 1904, about which the recollection of the parties differed, viz., that the 200 shares of stock were to be given the plaintiff for every year of his service.

Even assuming that the correspondence did make a new contract, still we think the plaintiff was entitled to recover. The letters in question were admitted without objection, and, being admitted, were in the case for all purposes. If they showed that the plaintiff was entitled to recover, though not under the contract stated in the complaint, the defendant should have objected on the ground of variance between the *allegata et probata*, so that an opportunity might have been afforded to amend the complaint. Not having done so, we will treat the complaint as amended, so as to make its allegations conform to the proof. *Railroad Co. v. Lindsay*, 4 Wall. 650, 18 L. Ed. 328.

[3] The further objection that the plaintiff forfeited any right to the stock for the years 1907 and 1908 because of disloyalty is hard to understand. He owed his loyalty to his employer, the Westinghouse Company, and only such loyalty as was consistent with that, to the defendant. The trial judge held that as to 1907 the defendant's letter of December 3d, asking merely for time in which to deliver the stock, was an admission of liability, and he instructed the jury that the plaintiff was entitled to recover the value of those shares; but he left the question of loyalty in 1908 to them, and they found in the plaintiff's favor. There were differences of opinion between the plaintiff and defendant as to management. It was the plaintiff's

duty to differ with the defendant, if he honestly disagreed with him in respect thereto.

The judgment is affirmed.

MERCK v. TREAT, Collector, etc.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 25.

1. INTERNAL REVENUE (§ 38*)—WAR REVENUE ACT—STAMP TAX—CHEMICALS—VOLUNTARY PAYMENT.

Where plaintiff prior to being advised of a decision that a preparation known as ichthyol was an uncompound chemical not subject to the war revenue stamp tax, purchased and affixed stamps without protest or objection, the payment was voluntary, and he could not recover the value of stamps, so used.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. § 38.*]

2. INTERNAL REVENUE (§ 38*)—STAMP TAX—VOLUNTARY PAYMENT.

Plaintiff manufactured and sold a medicinal preparation known as ichthyol, on which prior to December 1, 1898, he had paid a stamp tax under War Revenue Act June 13, 1898, c. 448, 30 Stat. 448 (U. S. Comp. St. 1901, p. 2286); but on that date, ascertaining that it had been determined that the substance was an uncompound chemical and not taxable, he omitted to affix stamps to containers of the preparation sold between that date and December 13, 1899. This being discovered, revenue officers insisted that the material was taxable, and that plaintiff should pay a sum equivalent to the face value of stamps which the government claimed should have been affixed, which plaintiff subsequently did. *Held*, that the payment was voluntary, and not under duress, and therefore could not be recovered.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. § 38.*]

3. INTERNAL REVENUE (§ 38*)—STAMP TAX—PAYMENT UNDER DURESS—PROTEST.

Plaintiff put out a chemical substance, known as ichthyol, on which the government insisted on the payment of a war revenue stamp tax, notwithstanding it had been determined that the substance was uncompound and not taxable. Plaintiff purchased stamps, which were later affixed to containers, and, being compelled to pay the tax on sales of the chemical sent out without stamps, did so after filing a protest against the imposition of the tax, past and future, on the ground that it was exempt from taxation as an uncompound chemical, and notified the government that plaintiff at different times had affixed stamps, and was still affixing the same, to the articles under duress. *Held*, that such notice was a sufficient protest to entitle plaintiff to recover the value of stamps affixed subsequent to the same; the tax not having been actually paid until the stamps were actually affixed to the containers.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. § 38.*]

In Error to the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

Action by George Merck, doing business as Merck & Co., against Charles H. Treat, as Collector, etc. A verdict was directed in favor of defendant, and plaintiff brings error. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The action was brought to recover something over \$5,000 claimed to have been illegally collected as taxes upon certain medicinal preparations under the so-called War Revenue Act of June 13, 1898 (30 Stat. 448, c. 448 [U. S. Comp. St. 1901, p. 2286]). The claim represents in part moneys expended for stamps affixed to said preparations and in part taxes demanded by the collector for preparations which went into consumption unstamped. The act which imposed these taxes on medicinal preparations contained in its twentieth section, this proviso: "No stamp tax shall be imposed upon any uncompounded medicinal drug or chemical."

Defendant concedes that substantially all the drugs which form the subject of the present controversy were uncompounded drugs and not taxable under the act, but contends that the sums for which the action is brought were paid voluntarily and without protest, and therefore cannot be recovered back.

A few weeks after the passage of the act the Commissioner of Internal Revenue published and plaintiff received a circular setting forth a sweeping construction of the law, broad enough to cover the ichthyol and similar preparations made by plaintiff, and also aristol, euophen, and other similar preparations made by other manufacturing druggists. Six weeks later the Commissioner issued a second circular, August 29, 1898, which will be hereinafter referred to, classifying ichthyol and many other preparations as not within the terms of the proviso, announcing that they were "being improperly put on the market as uncompounded chemicals."

The classification of the Commissioner seems to have been promptly objected to, and certainly one manufacture, one Albert Stubbs, applied to the courts for a construction of the statute. On November 2, 1898, the case of *U. S. v. Stubbs*, 91 Fed. 608, was decided in the District Court, Southern District of New York. It held that aristol, euophen, and other enumerated preparations which were the immediate subject of that suit were "uncompounded" within the meaning of the statute, and in so doing indicated a method of distinguishing between compounded and uncompounded preparations, which when applied to plaintiff's ichthyol and to many other preparations brought them within the proviso. The government never brought the *Stubbs* Case up for review.

The War Revenue Act was repealed June 30, 1901.

Curie, Smith & Maxwell, of New York City (T. M. Lane, of New York City, of counsel), for plaintiff in error.

A. S. Pratt, Asst. U. S. Atty., of New York City, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] The claim of the plaintiff may be divided into three parts. The first of these is for stamps purchased and affixed from July 18, 1898, to November 30, 1898, on which latter date the plaintiff became advised of the decision of *U. S. v. Stubbs* and of the opinion filed therein. As to this claim the record does not disclose anything which could be taken as a protest or objection of any sort on the part of plaintiff. For all that appears, he bought stamps and affixed them voluntarily, waiting perhaps for the determination of the *Stubbs* Case before deciding whether or not he would enter upon any controversy with the government. For this part of his claim plaintiff cannot recover.

[2] The second part of the claim covers a period from December 1, 1898, to December 13, 1899. As soon as he learned what was decided in *U. S. v. Stubbs*, plaintiff, being satisfied that certain of his preparations, ichthyol and others were "uncompounded" within the rule of that decision, ceased to affix stamps to the containers of those preparations, offered them for sale, and marketed them unstamped.

After a few months the revenue agent, finding out this fact, took the matter up with plaintiff, required him to furnish samples, and a statement of all ichthyol, ichthyol sodium, and ichthalbin which he had sold and removed from his premises without affixing stamps. A statement covering these items down to December 13, 1899, was furnished, and the revenue officer insisted that plaintiff should pay a sum equivalent to the face value of the stamps which the government contended should have been affixed. This sum plaintiff paid, and part of that sum is included in this section. The defendant concedes that this payment was made under a sufficient written protest; but the record does not show any duress of goods. The claim thus paid was concerned only with goods, which had been marketed, which were no longer in plaintiff's possession, and which the government, therefore, could not have taken from him. For this part of the claim there can be no recovery. The payment, although made under protest, seems to have been voluntary.

[3] As soon as plaintiff was advised that the government, despite the Stubbs decision, was insisting that stamps should be affixed to his ichthyol and to the other two preparations above-named, he began again to affix the stamps, and continued so to do until the act was repealed. The third part of the present claim is for the price of the stamps thus affixed. The two questions presented are: Were these payments made under protest? Were they made voluntarily or under duress?

Plaintiff marketed many other preparations upon which, concededly, stamps were to be and were affixed. When he bought \$1,000 worth of stamps, it could not be definitely known upon what containers they were to be affixed, therefore his payment for war tax was made, not when he bought a lot of stamps, but when he affixed a stamp to a container. Until that was done he had not parted with his money, because the revenue office was prepared at any time, upon proper explanation, to repurchase unused stamps.

When payment was made for the unpaid taxes which constitute the second part of the present claim, the plaintiff delivered to the collector a written protest against being required to pay tax on ichthyol, ichthyol sodium, and ichthalbin, on the express ground that they were not subject to the stamp tax imposed by section 20 and Schedule B of the act of June 13, 1898, but that each of them was exempted as an uncompounded chemical as provided in said section 20. This protest concludes as follows:

"And we further protest against the imposition of said tax on the said articles past and future, and respectively give notice that we have at different times affixed internal revenue stamps and are now affixing such stamps to the said articles under duress."

It seems to us that this protest was, under all the circumstances, sufficient to cover the stamps affixed during this third period. The case is clearly distinguishable from the two mainly relied upon by the government. In *Chesborough v. U. S.*, 192 U. S. 253, 24 Sup. Ct. 262, 48 L. Ed. 432, no intimation of any sort, oral, written, or by action, was given, until 1½ years after payment, that the payment

was not made with entire acquiescence in the claim of the government that the stamps were rightly to be affixed. In *U. S. v. New York & Cuba Mail S. S. Co.*, 200 U. S. 488, 26 Sup. Ct. 327, 50 L. Ed. 569, there was a like failure to give any intimation that the payment was objected to for any reason.

In the case at bar, however, there could be no possible doubt as to plaintiff's position. After the decision of the *Stubbs Case*, believing that his preparations (ichthyol and the other two) were covered by that decision, being uncompounded preparations, he ceased putting stamps on their containers. He did so openly, notoriously, to the knowledge of defendant, whose inspectors reported that plaintiff was selling ichthyol, etc., without stamps. Thereupon he was called to account; the government contending that the *Stubbs Case* covered only the preparations named in it, apparently ignoring its underlying decision. After examining his samples, it persisted in the assertion that they were "compounded," although it now concedes that this was a mistake, and that the preparations were really "uncompounded." Upon being thus called upon to put stamps on these three preparations, plaintiff did not abandon his position. Fearing prosecution, he paid, but paid under a protest which in no uncertain terms indicated, as to these three preparations, that he did not abandon his contention, but protested that he was under no legal obligation to affix stamps to these articles, and that all he might thereafter affix thereto would be affixed only because he was a helpless individual, and the taxing power a sovereign, not accepting the decisions of its own court, and threatening to seize his goods.

It seems unreasonable to require a repetition of this protest every time a stamp was affixed to a container. It is suggested that renewed protests would have enabled the government "to preserve evidence." This proposition seems somewhat imaginative. The government knew the simple issue presented:

"Is Ichthyol (and are the others) *uncompounded* under section 20?"

It knew the plaintiff insisted that they were uncompounded. It knew precisely what the preparations were. It had been furnished with all the samples it asked for in quantity sufficient to enable its chemists to qualify themselves to testify. We can think of no further evidence, and none is suggested in record or brief, material to this issue, and which the government might have preserved, if it had been advised each day that plaintiff affixed stamps to containers of these preparations—many times a month it might be—that plaintiff had not abandoned his contention that ichthyol and the other two were uncompounded preparations.

We think, too, that the several payments made, by the affixing of the stamps on and subsequent to December 13, 1899, were made under duress. On August 29, 1898, the Commissioner of Internal Revenue issued a circular. It states that there are a number of medicinal chemical compound preparations which are being put on the market as uncompounded and unstamped; that "among these are antipyrine, ichthyol, and others"; that in regard to these there "seems to be a

disposition among chemists to put them on the market unstamped, notwithstanding their claim to exemption from stamp duty as uncompounded chemicals has been disallowed by this office"; that this action of the chemists threatens the integrity of the whole tax system under Schedule B, and "calls for the serious attention of the entire service." Then follows:

"I desire this examination of the *stocks of dealers* to be made in no perfunctory manner, but thoroughly and zealously and with a view to prevent the evasion of the tax and the illegal sale of unstamped articles. All articles liable to tax under the terms of Circular 501 *which are found unstamped must be seized*," etc. "A prompt and vigorous compliance with this circular is expected and will be required of every collector and revenue agent, and in addition to the special reports of seizures as they are made," a general report will be demanded.

This circular was no idle threat. Stubbs' aristol, euphphen, etc., were actually seized, *being offered for sale* without being stamped. 91 Fed. 608, 610. By this circular, by its subsequent conduct, by the correspondence of the collector with plaintiff, he was plainly informed that the government was concerned to compel him to affix the stamps. If he did not stamp his ichthyol (and the other two), he stood in imminent peril of having revenue agents appear any day on his premises and seize his goods. Practically, perhaps, since dealers were many and revenue agents were few, plaintiff might have gone on for some time getting rid of unstamped goods; but he might equally well anticipate that, if he sold a lot one day to some one, the very next day would witness a raid upon his premises.

This seems to make out a case of payment under duress. Surely it cannot be that a dealer situated as he was must wait for an actual seizure of each lot of goods before he can attach the stamps thereto and maintain a claim to recover the money illegally required of him. Moreover, no reputable citizen would be willing to expose himself to public obloquy, by having his warehouse raided each week, because of his continued failure to pay a tax imposed for the support of his country at war with a foreign power.

We are of the opinion that the protest covers only ichthyol, ichthyol sodium, and ichthalbin. There can be no recovery for any other preparations.

The judgment is reversed.

IN RE KINNEY.

(Circuit Court of Appeals, First Circuit. January 22, 1913.)

No. 981.

COURTS (§ 344*)—FEDERAL COURTS—RULES—FORMS OF PROCESS.

The form of original writs in the federal courts in the District of Massachusetts, fixed by Act Sept. 29, 1789, c. 21, § 2, 1 Stat. 93, and made returnable on the first day of some term fixed by statute in accordance with the then practice in the courts of the state of Massachusetts, remains, notwithstanding a subsequent statute of Massachusetts modifying

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the form of writs; and, as the statutory return day of writs is the first day of some term appointed by statute, the District Court may refuse to direct the issuance of a writ returnable at another day.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. § 344.*]

Conformity of practice in common-law actions to that of state court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Gall*, 27 C. C. A. 392.]

Petition by Robert D. Kinney for a writ of mandamus to the judge of the United States District Court for the district of Massachusetts. Dismissed.

Robert D. Kinney, of Philadelphia, Pa., pro se.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. This is a petition for writ of mandamus to the judge of the United States District Court for the district of Massachusetts. The petition was filed, an order to show cause issued, and an answer was returned. For sufficient reasons we accepted from the petitioner a typewritten copy of the record. We find the record more voluminous than we expected. The petitioner has been so thoughtful as to preface it with an index, but apparently there are some errors in the paging, so that we are not sure that we may not have overlooked some propositions, because it is impossible to be entirely certain with reference thereto without reading the entire typewritten copy, which is not practicable with our other engagements as judges of the Circuit Court of Appeals.

The main ground for complaint is that the petitioner offered to the judge of the District Court a formal request that either the court or judge should direct the clerk to issue what is called a "writ of summons in contract," and also a writ which might perhaps have been framed as a judicial writ, but which was in fact framed as an original writ and described as a "scire facias sur judgment." The frame of these writs was presented to the court or judge, with a request that the clerk be directed to issue and seal them. This request was refused. Both were on their face dated the 28th day of February, 1912, and made returnable "before our justices of our District Court next to be holden at Boston, within and for our district of Massachusetts, on the first Monday of April next." The only statutory terms, however, of the District Court for the Massachusetts district are opened on the third Tuesday of March, the second Tuesday of May, the fourth Tuesday of June, the second Tuesday of September, the first Tuesday of December and the second Tuesday of December, and there is no statutory term opening on the first Monday of April, 1912. Consequently the judge of the District Court refused to issue the order requested, among other reasons because the proposed writs "were not made returnable at the proper return day." It is not necessary for us to examine the reasons given by the judge of the District Court beyond this, because this was a sufficient reason for his refusal.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

For the present purposes a sufficient statement by the petitioner of his case is as follows:

"This application is by motion on petition and pleadings filed for judgment and order that peremptory mandamus issue commanding the respondent, as judge of the District Court for the district of Massachusetts, to instruct the clerk of his court to issue, on petitioner's application, the process of summons in an action of contract, and also a writ of scire facias, the clerk, under respondent's direction, having refused to issue such process on petitioner's application therefor.

"The desired process is based on a judgment that was rendered in the late Circuit Court of that district upwards of one year prior to petitioner's application heretofore made for it, but the docket entries and minutes and record of which judgment, and the proceedings leading up to it, the clerk of court has neglected to make up. The petitioner also prays that the respondent be commanded to direct the clerk of court to make up such record nunc pro tunc from the papers filed by the marshal and plaintiff in the course of his prosecution of the action in which judgment was rendered."

The substantial difficulty seems to be that the petitioner has confused the practice in the various districts of Pennsylvania, or in some other districts, with the practice as to the return of original writs in the district of Massachusetts. From the beginning, all original writs in the district of Massachusetts have been made returnable on the first day of some term fixed by statute, and are required to bear teste some days sufficiently in advance of such return days to afford opportunities for service, in accordance with law, on the parties against whom they are issued. The practice has never been changed since the organization of the federal courts in this circuit.

The rule is shown in Howe's Practice, at pages 98, 99, 130, 131, as published in 1834 from the lectures of Judge Howe, delivered at his law school at Northampton. That gives the settled practice to the effect that all original writs from the superior courts of judicature "should be made returnable at the next succeeding term of the court, if issued a sufficient number of days before its sitting, to allow legal service to be made, otherwise at the next following term," that service on individuals must be made 14 days at least before the day of the sitting of the court to which returnable, and that regularly each writ should specify the day of the week and the week of the month when the court is to be holden. Although, of course, errors in these details as to the week and the day of the week were always amendable, yet the fact that they are primarily required shows how specific and peremptory the law is in requiring writs to be made returnable on the first day of some term of the court to be held in accordance with the statute.

The result of this practice is in accordance with the statutes of Massachusetts as they existed at the time of the organization of the federal courts. The act of October 30, 1784 (chapter 28), gave in full the forms of the various original writs strictly in accordance with what was said by Judge Howe, containing the words "next to be holden," with blanks which, when filled, specified, not only the day of the week, but the week when the term to which the writ was returnable was to commence, although not precisely verbatim in that form. With some provisions authorizing the court to modify the forms of writs,

this fixed return day remained the law of Massachusetts until, as we understand, 1885, when the Legislature introduced a modification in reference thereto, making the first Monday of every calendar month a return day.

On the other hand, according to section 2 of the act of September 29, 1789 (1 Stat. 93, c. 21), forms of writs in the matter we are discussing, in the Circuit and District Courts, in suits at law, were fixed to be the same in each state, respectively, as then "used or allowed" in the Supreme Courts of the same state. There is no statute of the United States which changed this provision of law, except that section 7 of the act of March 2, 1793 (1 Stat. 335, c. 22), authorized the courts to make rules and orders directing the returning of writs and processes. This is now found in section 918 of the Revised Statutes (U. S. Comp. St. 1901, p. 685). It is true that section 5 of the act of June 1, 1872 (17 Stat. 197, c. 255), now found in section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), directed "that the practice, pleadings and forms and modes of proceeding in civil cases" should conform to the existing practice of the state within which each court is situated. Yet, as decided in *Boston & Maine Railroad v. Gokey*, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002, the question we have here is governed by the law found in section 918 of the Revised Statutes, and is not controlled by section 914; so that in that particular case it was directly decided that the practice of the Circuit Court for the district of Vermont in reference to the form of writs, was determined by an old rule of that court, and was not affected by the act of 1872, as found in section 914 of the Revised Statutes. This is precisely the proposition we have here.

The forms of original writs of the federal courts in the district of Massachusetts, as fixed by the law of 1789 which we have cited, have never been changed by any rule in that district. On the other hand, the practice has been so uniform on the old methods as to obviate the suggestion of any change or intended change in the Massachusetts district in that respect. In fact, the rules of the Circuit Court, now the rules of the District Court, for the district of Massachusetts, are framed upon the theory that the return day of the writ is the first day of some term appointed by statute. An original writ returnable at any other day would be entirely out of adjustment with those rules; as, for example, rule 7, par. 2, provides that "all actions by writ shall be entered within the first two days of the return term, and not afterwards," unless by agreement or special order; and rule 8 directs that "all pleas and motions in abatement or to the jurisdiction" shall be filed "within two days after the return day of the writ." A more crucial example is found in paragraph 3 of rule 9, which specifically is framed under section 918 of the Revised Statutes, and gives express directions about "forms of executions and other final process," with no reference to original writs, thus, by the rule of interpretation by implication, making clear that any suggestion of changing the form of original writs is excluded. In various other ways the rules adjust themselves to the ancient, and what may be called the historic, practice with reference to return days of original writs; but it is plainly not necessary to go

further in that direction. Consequently, it follows beyond question that, in the framing of original writs with reference to return days, the return day must be on the opening day of some term of the District Court fixed by statute, and that the order of the District Court, or of the judge thereof, which we are asked to reverse, was correct.

Apparently the petitioner has confused the present practice of the state courts of Massachusetts with the historic practice of the federal courts in the district of Massachusetts, and has assumed by a misunderstanding that the rules governing these questions in the various districts of Pennsylvania, and elsewhere, extend to this district. The petition asks us to require the District Court to direct its clerk with reference to making up certain records; but, in view of our conclusions on the main point, we find it unnecessary to pursue the matter further, in accordance with the rules just laid down by us in *Re Welch Co.*, Petitioner, 201 Fed. 519, January 6, 1913.

The petition is dismissed, with costs for the respondent.

NILES v. LUDLOW VALVE MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 103.

CORPORATIONS (§ 156*)—PROFITS—RIGHTS OF COMMON AND PREFERRED STOCK-HOLDERS.

Preferred stockholders of a corporation, where the certificate of incorporation provides, as permitted by the law of the state, that the preferred stock should "receive interest or dividends of 8 per cent. per annum and be preferred as to capital as well as to dividends," who have for years received their dividends, have no interest in surplus profits which have been allowed to accumulate during such years; but such earnings belong to the common stockholders, and may be distributed among them as cash dividends, or in the form of stock dividends.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 581-583, 593-603; Dec. Dig. § 156.*]

Ward, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York; Charles M. Hough, Judge.

Action at law by William W. Niles, as administrator of Isabel W. Niles, deceased, against the Ludlow Valve Manufacturing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 196 Fed. 994.

Niles & Johnson, of New York City (Hartwell Cabell, William W. Niles, and John J. Cunneen, all of New York City, of counsel), for plaintiff in error.

Samuel Untermeyer, Louis Marshall, and Abraham Benedict, all of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

COXE, Circuit Judge. At a meeting of the board of directors of the defendant corporation held February 3, 1911, the following resolution was duly ratified:

"Further resolved that the directors of the company be, and they hereby are, authorized, in their discretion, to distribute said increased stock (amounting to 3,000 shares of general stock of the company) by way of dividend or otherwise, as they may determine, to the holders of the issued and outstanding shares of general stock of the company in the proportion of their holdings of said general stock as of such date as may be fixed by the board of directors of the company."

This resolution had previously been passed at a special meeting of stockholders by an affirmative vote of 2,989 shares of common stock and 3,401 shares of preferred stock. The plaintiff, who, as administrator, represents 100 shares of preferred stock, insists that he is entitled to share in this division of the accumulated surplus. The original capitalization of the defendant company was \$700,000 divided into 4,000 shares of cumulative preferred stock, which received annual dividends of 8 per cent. and was "preferred as to capital as well as dividends," and 3,000 shares of common stock, par value of \$100 each.

The sole question to be determined is whether a preferred stockholder of the defendant is entitled to share in the stock dividend declared as aforesaid. The New Jersey law at the date of the incorporation of the defendant provides that preferred stockholders are entitled to a fixed yearly dividend not exceeding 8 per cent., which is to be paid before any dividend can be declared on the common (or general) stock. It also provides that the preferred stockholders shall in no event be personally liable for the debts of the corporation. In short, the preferred stockholders are a privileged class, receiving a fixed and certain rate of interest without incurring any personal liability for the debts of the corporation. Their legal status approaches nearer to that of bondholders than of common stockholders.

Dividends have been paid by the defendant for 20 years and in almost every instance the dividend on the common stock has been larger than on the preferred. Never has there been any formal protest or objection by the preferred stockholders, including the plaintiff and his intestate. The preferred stockholders had the voting power and could have elected a board of directors and officers wholly in their interests had they so desired. During nine years, from 1891 to 1910 the company paid 15 per cent. to its common stockholders during five years and 10 per cent. during three years, without objection from the preferred stockholders. This fact while it may not operate as an estoppel, is persuasive evidence as to their understanding of the reciprocal rights of the two classes of stockholders.

Judge Hough correctly states the issue when he says that the question turns upon who owned the \$500,000 accumulated by the defendant prior to the time the stock dividend was declared. If the common stockholders were entitled to have the amount dis-

tributed to them as cash, they were clearly entitled to certificates of stock representing that cash. It seems evident that as these profits arose from year to year, the board of directors might properly have divided them annually, as dividends, among the common stockholders. We think they might legally have done this, and, if so, it is not easy to understand how the common stockholders lost these rights because the board reserved the division until the surplus had reached the sum of \$500,000. The fund, large or small, belonged to the common stockholders and whether they received cash, or certificates which represented cash, is immaterial. These stockholders have the burden of administration upon them; if the corporation is unsuccessful, the loss falls upon them; if successful they receive the benefits. We think that when the preferred stockholders receive the large interest of 8 per cent. provided for in the certificate they receive all to which they are entitled from the income of the corporation. It seems evident that the rights of the respective stockholders must be measured by the certificate of incorporation and the law of New Jersey in force when the defendant was organized. By this certificate the preferred stockholders were entitled to a dividend of 8 per cent. whether the common stockholders received any dividend or not, and they are preferred as to capital as well as interest. Upon what principle of law or equity should they be permitted to share in surplus earned by the corporation when they are exempted from bearing any of the loss incurred? Before a dollar can be paid as a dividend to the common stockholder the entire 8 per cent. must be paid to the preferred stockholders. In addition to these advantages, it is now asserted that though they bear no share of the burden when the business is unsuccessful, they should share equally with the common stockholders when it is prosperous. We venture to think that very little of the common stock would have been subscribed, if it had been stated at the time that such were the conditions which surrounded it. The common stockholders bear substantially all the losses of adversity and are entitled to the gains of prosperity. A contract that they should assume all the risk with no corresponding advantage should be clearly established. We find nothing in the law or the certificate or in the past action of the defendant to indicate that any one connected with the business supposed that the preferred stockholders were to share equally with common stockholders in the division of surplus earnings. If the plaintiff's contention be correct, why should not the preferred stockholders share ratably with the common stockholders in all the surplus applicable for dividends? The absolute unfairness of such a division is at once recognized, and, to meet the suggestion, plaintiff argues that only the surplus after the common stock had been paid its 8 per cent. dividend should be thus divided. But there is nothing to sustain such contention. Where can be found any agreement to pay the common stockholders an 8 per cent. dividend at any time or under any conditions? Once admit that the preferred stockholder is entitled to share in the surplus after his preferred divi-

dend is paid, and it follows as an inevitable conclusion that he shares on equal terms with the common stockholder.

We think the preferred stockholders are entitled to receive a dividend of 8 per cent. per annum and nothing more. The judgment is affirmed with costs.

WARD, Circuit Judge (dissenting). The general principle is that all stockholders share equally in net profits, except as their relations are altered by statute or contract. If a preference is given to one class of stockholders over the rest, it should be construed consistently with this general principle as far as possible. For instance, if the preferred stockholders are given the right to receive a dividend of a fixed amount before the common stockholders get anything, the latter should next receive an equal amount, and then the surplus, if any, be equally divided between the preferred and common stockholders. Where the privilege is intended to be restrictive, the intention should be expressed as by saying that the preferred stockholders are to be paid a certain dividend before the common stockholders get anything and are to receive nothing more. In this case the certificate of the company provided that the preferred stockholders should be paid an annual cumulative dividend of 8 per cent. before the common stockholders received anything. There were no words of restriction. Therefore I think they were entitled to receive their proportion of the stock dividend in question. It is true that dividends had for many years been declared and paid as if the privilege to the preferred stockholders were restrictive, the question never having been raised, but I think this does not prejudice the rights of the preferred stockholder who now for the first time raises the question.

KIRKPATRICK v. McBRIDE. †

(Circuit Court of Appeals, Fourth Circuit. November 22, 1912.)

No. 1,106.

1. EQUITY (§ 339*)—ANSWER AS EVIDENCE—RESPONSIVENESS.

Under equity rule 41 (29 Sup. Ct. xxx), where answer under oath is not waived by the bill, responsive averments in an answer under oath are evidence for the defendant, and the application of the rule is not affected by a state statute excluding testimony of a party as to personal transactions with a person deceased, etc., but averments of the answer which are not responsive, or which tend to establish a defense by way of avoidance, are not evidence for the defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 685-696, 703-705, 710, 714; Dec. Dig. § 339.*]

2. EXECUTORS AND ADMINISTRATORS (§ 134*)—ESTATE—LEASEHOLDS.

A lease for a term of years not shown to have run to the heirs and assigns of the lessee does not inure to the benefit of his heirs or devisees on his death.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 550; Dec. Dig. § 134.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† For opinion on rehearing, see 203 Fed. 449.

3. EQUITY (§ 345*)—ANSWER AS EVIDENCE—PROOF TO OVERCOME.

The evidence in behalf of a defendant afforded by the averments of a sworn answer, required by, and responsive to, the allegations of the bill, may be overcome by facts and circumstances alone without the testimony of a witness.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 715-724; Dec. Dig. § 345.*]

4. LANDLORD AND TENANT (§ 18*)—EVIDENCE AS TO RELATION AND TERMS OF TENANCY—SUFFICIENCY.

Evidence considered, and *held* to entirely negative the claims of a tenant as to the terms of the tenancy and the property included therein as against the devisee of the landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 45-48; Dec. Dig. § 18.*]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge.

Suit in equity by Harriet Elizabeth McBride against Emma Jane Kirkpatrick. Decree for complainant, and defendant appeals. Affirmed.

This is an appeal from a decree entered in the District Court of the United States for the Northern District of West Virginia. The suit was instituted by Harriet Elizabeth McBride in her own right and as executrix of the will of her husband, Leander McBride, deceased, against Emma Jane Kirkpatrick for an accounting of all financial dealings between Leander McBride and Emma Jane Kirkpatrick and for delivery to the said Harriet Elizabeth McBride, as executrix of the last will and testament of Leander McBride, and as the sole devisee under said will, of all property, real, personal, and mixed, in the possession of Emma Jane Kirkpatrick, situate at Brookside, in the county of Preston, in the state of West Virginia.

It appears from the testimony that prior to 1900 Leander McBride, husband and testator of the appellee in this cause, a resident of the city of Cleveland, and the state of Ohio, was engaged in the wholesale dry goods business under the firm name of Root & McBride Company, of which he was president; that at that time he purchased a 4-acre tract of land situate in the county of Preston, W. Va., on which is situated a cottage known as "Gaymont," and this piece of property was conveyed to Mrs. McBride; that he spent his summers in this cottage with his family; that about 1900 a large portion of the surrounding property was owned by a man by the name of Wright; that it had reached a bad state of repair, and being adjacent to the property of McBride, its condition was such as to depreciate the value of the property owned by McBride. It appears that McBride received a letter from one Roger Kirkpatrick, the deceased husband of the appellant in this cause, in which it was suggested that the Wright property could be purchased at a reasonable figure, put in repair, and that by so doing it would be advantageous to the property owned by McBride. As a result of the negotiations the property was purchased by Kirkpatrick with money furnished by McBride, and, in pursuance of an agreement, the property was duly transferred by deed of conveyance to McBride and McBride continued to be the owner until the date of his death, when, by the terms of the will, it passed in due course to the appellee in this action.

The principal matter in controversy in this action relates to what is known as the Brookside Farm, consisting of about 400 acres lying adjacent to the property known as "Gaymont," it being the property to which we have referred as having been purchased by Kirkpatrick for McBride. It consists of a dairy farm on which is located a barn for the stabling of cows, a large number of milch cows, all the necessary equipment for dairy purposes, and other domestic animals. There is also said to be on this property 10 cottages, and a large cottage known as a hotel, containing a dining room and kitchen maintained for the purpose of furnishing board to transient guests for charge who

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
202 F.—10

may from time to time visit the place as a summer resort. Soon after McBride acquired this property, Roger Kirkpatrick died, leaving his widow, Emma Jane Kirkpatrick, who went on the premises, and has been there continuously until the present. It is alleged in the bill that her occupancy was by virtue of a tenancy from year to year, and that she had from time to time yearly leases from the said McBride on the buildings and personal property therein described. Among other things, she specifically denies that she "had for several years taken, from time to time, yearly leases from the said Leander McBride of the real property and the buildings heretofore referred to, and also the personal property hereinbefore referred to, including the machinery, tools, wagons, carriages, horses, cattle, chickens, and ducks referred to." And further denies that she procured in the spring of 1908 a lease from Leander McBride for the term of one year to said property, and that, in consideration of the services rendered McBride in acquiring the property in question, the said McBride executed a lease for the premises to the said Kirkpatrick, containing the usual terms and conditions, and that the said lease was for a period of 25 years from the 1st day of May, 1900, and that the yearly rental agreed to be paid by Kirkpatrick was \$1,000, and that after the execution and delivery of said lease Kirkpatrick entered into possession of the premises and continued in possession of the same until he contracted an illness and departed this life on the 29th day of March, 1900, that, shortly before the death of Roger Kirkpatrick, Leander McBride was present in Philadelphia, and it was thereupon agreed by and between Kirkpatrick and Leander McBride that the respondent should become the tenant under the said lease as the sole heir at law of the said Roger Kirkpatrick, etc. This allegation is denied by the appellee, and thus the principal issue is raised.

The answer also contains a denial of the allegations of the bill, and in part contains averments of new matter by way of defense and avoidance. The appellant in the same manner also filed her cross-bill, alleging therein practically the same averments made by her in her answer and praying for affirmative equitable relief. A replication was filed to the answer of the appellant, and an answer was likewise filed by the appellee to the cross-bill of the appellant to which the appellant filed her replication.

It was adjudged by the court below that Emma Jane Kirkpatrick was entitled to have a lease for the term of 25 years beginning on the 1st day of May, 1900, and continuing for the remainder of the 25 years, which have not yet elapsed, and ending April 20, 1925, and that the lease should include the hotel and cottages, other than Gaymont, now situate upon the said real property, but should not include any of the other part of the real estate formerly belonging to Leander McBride, nor any of the things situated upon or connected therewith. The decree also makes provision for the payment of \$1,000 a year rental, and also decrees the recovery of past due rent amounting to \$2,000, from which decree this appeal was taken.

Charles H. Burr, of Philadelphia, Pa. (William H. Cochran and Nelson C. Hubbard, of Wheeling, W. Va., on the brief), for appellant.

Henry M. Russell, of Wheeling, W. Va., and Thos. M. Kirby, of Cleveland, Ohio (Squire, Sanders & Dempsey, of Cleveland, Ohio, on the brief), for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and SMITH, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). The principal question to be determined here is as to whether the court below erred in failing to find from the evidence that the defendant had any interest in the farm property and limiting the lease to the hotel and cottages alone, and that the complainant was the owner and entitled to the possession of the farm property known as "Brookside," includ-

ing the barns, farming machinery, tools, wagons, horses, cattle, and other things situated upon the same.

While the decree provides that Mrs. Kirkpatrick shall have a lease for 25 years on the hotel and cottages other than Gaymont now situated upon the said real property, it does not include or cover any of the other part of the said real estate formerly belonging to the said Leander McBride, nor any of the things situated upon or connected therewith, yet no cross-appeal was taken to the ruling of the lower court in this respect. Therefore, we are only concerned with that part of the decree which adjudicates that the complainant is the owner, and "entitled to the possession of all other portions of said property known as Brookside apart from the said hotel and cottages covered by the said lease and including Gaymont."

[1] It is insisted by counsel for the defendant that inasmuch as the bill did not waive answer under oath, and the defendant having answered under oath of her own personal knowledge, her answer amounted to evidence in her behalf which could only be overcome by the evidence of two witnesses or the evidence of one witness and corroborating circumstances. On the other hand, counsel for the complainant insists that the answer of the defendant cannot be treated as evidence owing to the provision of section 3945 of the Code of West Virginia (1906), which, among other things, provides as follows:

"No person offered as a witness in any civil action, suit, or proceeding, shall be excluded by reason of his interest in event of the action, suit or proceeding, or because he is a party thereto except as follows:

"No party to an action, suit or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, insane, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such person, or the assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committee shall be examined on his own behalf, nor as to which the testimony of such deceased person or lunatic shall be given in evidence. * * *

It cannot be reasonably contended that this statute can be construed so as to abrogate that portion of equity rule No. 41 (29 Sup. Ct. xxx), which relates to this subject.

The complainant by failing to waive answer under oath thereby invited the defendant to testify as to the transactions involved in this controversy. In other words, the very nature of the bill rendered it necessary for the defendant to testify as to those matters alleged in the bill. Under these circumstances, is it unreasonable to assume that the complainant in this instance did not waive any right she may have had to object to the evidence of the defendant under the statute in question. To say the most of it, the court below erred in refusing to treat as evidence those averments of the answer that were responsive to the allegations of the bill; but we are of the opinion that this was harmless error as will hereafter appear.

It is well settled that responsive averments in an answer under oath, where the same are not waived by the bill, must be treated as evidence in behalf of the defendant. Amendment to equity rule No. 41 reads as follows:

"If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the Act of Congress of July 2, 1864."

Thus it will be seen that, under this rule, only such averments of the answer under oath as are responsive to the allegations of the bill shall be admitted as evidence in behalf of the defendant.

1 Beach, Modern Equity Practice, § 366, provides as follows:

"An answer which contains facts which are not responsive to any allegation or interrogatories in the bill is not evidence for the defendant, but the facts must be established by independent proof."

Also section 367 of the same work contains the following:

"Such facts as tend to constitute a defense by way of avoidance will not be considered, unless established by proof."

Applying the rule that only those averments that are responsive to the allegations of the bill are admissible as evidence, it appears from an inspection of the pleadings in this cause that such allegations contained therein, together with the oral and documentary testimony offered by the defendant, are not sufficient to establish the fact that Leander McBride during his lifetime executed a 25-year lease on the property in question. In other words, taken as a whole, there is not sufficient legal evidence to support the contention that the lease was executed.

[2, 3] However, it is contended by the defendant that after the death of her husband, to whom she alleges the lease was given she had a conversation with Leander McBride at which time he agreed that she could remain upon the property under the 25-year lease which he had given to her husband during his lifetime. The lease, according to the contention of the defendant, was a lease to the defendant's husband for a term of 25 years, but there is no evidence to show that such lease was given to Kirkpatrick and his heirs. Such being the case, even if there had been sufficient evidence to establish the lease, Mrs. Kirkpatrick could not claim any rights thereunder and any verbal lease to her for 25 years would be void under the statute of frauds. She would be precluded from setting up a lease of this character which, upon her own showing, was not reduced to writing, but was simply a verbal promise on the part of the lessor. There are many facts and circumstances in this cause that tend to contradict the theory of the defendant as to the term of the lease upon which she relies. Even if the averments of the answer were such as tended to establish the existence of a lease, such evidence could be refuted by facts and

circumstances alone without the aid of the positive testimony of a single witness. In the case of *Snow v. Hazlewood*, 157 Fed. 898, 86 C. C. A. 226, the Circuit Court of Appeals for the Fifth Circuit disposes of this question, among other things, in the following language:

"In reaching our conclusion we have not overlooked the sworn answers of Hazlewood and Campbell to the interrogatories of the bill, to the effect that there was no agreement between them prior to the sale that Hazlewood was to have any interest in the purchase from Mrs. Snow; nor have we been unmindful of the general equity rule that, where the defendant on complainant's requirement has answered under oath interrogatories propounded by the plaintiff, the answers are to be taken as true, unless contradicted by two witnesses or one witness supported by strong corroborative circumstances. We find that the answers of Hazlewood and Campbell are not only contradicted by admitted documentary evidence which unexplained is conclusive on the subject-matter of the answers, but by so many facts and circumstances that we may well apply the exception to the above-mentioned equity rule announced in *Clark's Executors v. Van Riemsdyk*, 9 Cranch, 153, 3 L. Ed. 688, approved in *Bowden v. Johnson*, 107 U. S. 262, 2 Sup. Ct. 255, 27 L. Ed. 386, where it is said: 'This case, on the whole, is brought within the principle asserted by Mr. Chief Justice Marshall, speaking for this court, in *Clark's Executors v. Van Riemsdyk*, 9 Cranch, 153, 3 L. Ed. 688, as a case where the evidence arising from circumstances is stronger than the testimony of any single witness. Greenleaf states as a rule that the sufficient evidence to outweigh the force of an answer may consist of one witness, with additional and corroborative circumstances, which circumstances may sometimes be found in the answer itself; or it may consist of circumstances alone, which, in the absence of a positive witness, may be sufficient to outweigh the answer even of a defendant who answers of his own knowledge. 3 Greenleaf on Evidence, § 280.'"

See, also, *Commercial Bank v. Reckless*, 5 N. J. Eq. 650; *Morris v. White*, 36 N. J. Eq. 324; *Long v. Kinkel*, 36 N. J. Eq. 359; *Veile v. Blodgett*, 49 Vt. 270.

[4] The circumstances surrounding this transaction are such that, while it appears that Mrs. Kirkpatrick was there and had the management and control of the hotel, yet her statements as to the lease are entirely inconsistent with the actions of both when McBride was alive. Among other things, the complainant produced vouchers and testimony showing that McBride during his lifetime and up to the time of his death had paid out the sum of approximately \$130,000 for the purchase of live stock and other matters, with the current and operating expenses of the farm. The bills of sale and receipts being bought by him personally as done on his behalf at the very time that Mrs. Kirkpatrick was carrying on the business of operating the hotel. It is impossible to conceive that McBride would have paid the sum of \$130,000 for all the current and operating expenses, as shown by the number of vouchers, checks, and exhibits produced, if Mrs. Kirkpatrick had been operating the same under a lease, and was entitled to the profits thereof. These facts and circumstances completely negative the idea that the farm and buildings were being used in connection with the company as an incident of any lease that may have existed upon Gaymont and the other property disposed of in the decree herein.

The learned judge who heard this case, as appears from the record, gave the matter careful consideration, and no doubt weighed every fact and circumstance affecting the rights of the parties, and after having done so found as a fact that the defendant did not have a lease

on the premises involved in this appeal. While, under the rule, this finding is not conclusive, yet it is entitled to great weight in determining this question. We have carefully considered the testimony offered by the defendant in all of its bearings, but fail to find sufficient legal evidence to show that the lease in question was ever executed by Leander McBride during his lifetime.

We are therefore of the opinion that the decree of the lower court should be affirmed.

Affirmed.

PHILADELPHIA PICKLING CO. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. January 31, 1913.)

No. 1,704.

1. FOOD (§ 12*)—FOOD AND DRUGS ACT—OFFENSES—SHIPMENT OF ADULTERATED FOOD.

Under Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354), which prohibits "the introduction into any state * * * of any article of food * * * which is adulterated," and makes it an offense for any person to "ship or deliver for shipment" from one state to another such adulterated food, it is not a defense to a prosecution for making such a shipment that the articles were not shipped for sale, where the shipment was for any business purpose which constituted interstate commerce.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 12.*]

2. FOOD (§ 12*)—FOOD AND DRUGS ACT—OFFENSES—SHIPMENT OF ADULTERATED FOOD.

Defendant shipped an adulterated tomato paste from its place of business in New Jersey to itself at its other place of business in Pennsylvania, for the purpose of having it there tested with a view to its export to England if it conformed to the English standard, which would have been lawful under the proviso in Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354). It failed to meet the test and was destroyed, not being used nor sold. *Held*, that its shipment was in interstate commerce, and constituted an offense under said section of the act.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 12.*]

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

The Philadelphia Pickling Company was convicted of a violation of the Food and Drugs Act, and brings error. Affirmed.

Wilson & Carr, of Camden, N. J., for plaintiff in error.

John B. Vreeland, of Morristown, N. J., and Walter H. Bacon, of Bridgeton, N. J., for the United States.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. [1] The Philadelphia Pickling Company was convicted under section 2 of the Food and Drugs Act of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1906, the indictment charging a shipment of adulterated tomato paste from the company's place of business in New Jersey to its place of business in Pennsylvania. Other facts will appear in a few moments; but it seems advisable to consider in advance the general question: Does the act apply where the owner has shipped to himself for some other business purpose than sale? The trial judge directed the verdict, but no complaint is made of this, if his construction of the act was correct.

The statute imposes penalties in three sections, but we are concerned only with sections 2 and 10. The latter section provides for condemnation, and permits an offending article to be seized, if it—

"is being transported from one state, territory, district, or insular possession to another for sale; or having been transported remains unloaded, unsold, or in original unbroken packages; or if it be sold or offered for sale in the District of Columbia, or the territories, or insular possessions of the United States; or if it be imported from a foreign country for sale; or if it is intended for export to a foreign country."

This section speaks repeatedly of sale, and the courts have had several occasions to consider what Congress meant by the language quoted. In *United States v. 65 Casks* (D. C.) 170 Fed. 449, it appeared that the casks in question (which were insufficiently marked) contained a liquid that had been manufactured and shipped by the owner's agent in Michigan to the owner himself in West Virginia for the primary purpose of being bottled and properly labeled there. It was not to be sold until this had been done, and the District Court held *inter alia* (pages 445, 446) that Congress—

"did not * * * have power to restrict one from manufacturing in one state such product and removing it from that state to another for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles to be legally branded when so manufactured."

The Court of Appeals affirmed the judgment in a brief opinion (175 Fed. 1022, 99 C. C. A. 667), which is silent concerning the power of Congress, and merely gives the following reason for affirmance:

"No attempt to avoid the law, either directly, indirectly, or by subterfuge, has been shown; it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing for the purpose of completing the same for the market. Under the circumstances disclosed in this case, having in mind the object of the Congress in enacting the law involved, we do not think the liquid extract proceeded against should be forfeited. Reaching this conclusion, we do not find it necessary to consider other questions discussed by counsel and referred to in the opinion of the court below."

In *United States v. 46 Packages* (D. C.) 183 Fed. 642, it was held that a libel in rem under section 10 was defective, because it failed to aver that the articles seized were transported "for sale." The foregoing cases are referred to in *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364, and although they are not definitely disapproved they are certainly not accepted as correct. At the best, they are noticed with a word or two of comment, and of course they must yield if they clash with the decision or the opinion of the Supreme Court. One of the points decided in the *Hipolite Case*

is that section 10 permits the condemnation of adulterated food, although it has not been transported for sale directly, but is intended solely for use as raw material in the manufacture of another product. This is clear, for the court on page 52 of 220 U. S., on page 365 of 31 Sup. Ct. (55 L. Ed. 364), states the first contention of the Egg Company to be that:

"Section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product."

And this contention is declared (page 55 of 220 U. S., on page 366 of 31 Sup. Ct. [55 L. Ed. 364]) to be "untenable."

But the reasoning that supports this declaration goes farther, we think, than the precise point decided. We may perhaps venture to give an outline of the argument: Congress has taken away from adulterated food the right to be transported in interstate commerce, whatever the object of such transportation may be. The act has two clearly separate objects (220 U. S. 54, 31 Sup. Ct. 364, 55 L. Ed. 364): First, to keep adulterated articles completely out of the channels of interstate commerce; and, second, if they do enter such channels, to sanction their condemnation while being transported, or even after they have reached their destination, as long as they remain unloaded, unsold, or in original unbroken packages. These objects of the act are not changed or qualified by the purpose of the owner. He may, or may not, intend to sell. If he so intend, perhaps he may also intend that the articles shall first undergo a further process of manufacture; but, even if the latter intention be present, he would still be transporting for sale. Therefore, even if the "condition" (contention?) be accepted that section 10 does not allow condemnation unless such articles are transported for sale, nevertheless the facts of the case then being considered showed that a "sale" was intended. Not directly, it is true, but only one step removed; for the eggs were intended to be used in making cakes for the market, and were therefore to be sold as a part of the cake. The court points out that all articles, compound or single, not intended for consumption by the producer, are designed for sale, and because they are so designed it is the concern of the law to have them pure.

One of the Egg Company's arguments—that a producer in one state is not interested in an article shipped from another state, if such article be not intended for sale or consumption until it is manufactured into something else—is said to be "peculiar." The court declares that both the producer and the consumer are interested in having an article pure, no matter whence it may come, and that the law seeks to protect such interest both by the personal penalties of section 2 and by the seizure and condemnation under section 10.

This is in outline the court's reply to the Egg Company's first position; but we think the attitude of that tribunal appears even more clearly in the discussion of the company's second position, which was:

"That at the time of the seizure the eggs had passed into the general mass of property in the state, and out of the field covered by interstate commerce."

The containers had been stored at the company's bakery among other supplies, but the original packages has not been broken. It was held that Congress might pursue the packages into the bakery and might seize them there. The offending articles had not escaped, although they had reached their destination, and had already become part of a larger collection of supplies. The act had forbidden the transportation of adulterated food, and not only had made the shipper subject to penalties, but had made even the goods themselves so far culpable as to be liable to seizure in rem:

"It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce, and be stealthily taken out again upon arriving at their destination, and be given asylum in the mass of property of the state. Certainly not, when they are yet in the condition in which they were transported to the state, or, to use the words of the statute, while they remain 'in the original, unbroken packages.' In that condition they carry their own identification as contraband of law. Whether they might be pursued beyond the original package we are not called upon to say. That far the statute pursues them, and, we think, legally pursues them, and to demonstrate this but little discussion is necessary."

And one characteristic of adulterated food is thus insisted upon, with the legal consequences that flow therefrom:

"We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express ourselves), and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit or before they have become a part of the general mass of property of the state. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of federal power and state power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the national government when they are within the borders of a state. The question in the case therefore is: What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the states by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages."

We have examined this case at such length, because it seems to us that, if our understanding of the court's reasoning be correct, the decision of the present controversy is inevitably foreshadowed. It is true that this is a prosecution under section 2, and not a seizure under section 10; but the difference (if important) is in favor of section 2, for its meaning is not restricted by the words "for sale," and is therefore even broader than the language of section 10. One of the chief objects of the act is declared in section 2, namely, to forbid "*the intro-*

duction into any state or territory," etc., "of any article of food * * * which is adulterated"; and, while the section does not attempt to punish criminally every method of "introduction," it does punish the method here in question—"any person who shall *ship or deliver for shipment* from any state or territory," etc., "shall be guilty of a misdemeanor," etc.—and the breadth of the prohibition justifies us at least in refusing to narrow the ordinary meaning of the words that define the crime. Of course, the shipment must be in the way of "commerce." Such a limitation is constitutionally necessary; but, if the limitation be assumed, no reason is perceived why "shipment" should be construed to mean "shipment for sale." Its ordinary meaning in this connection covers any shipment for any purpose in the course of commerce, and we accept this as the intended scope of the word. And the correctness of such construction seems more probable when we observe that the next penal clause of section 2 should apparently be construed in a similar manner. This clause applies to any person "who shall receive in any state or territory," etc., "and, having so received, shall deliver in original unbroken packages, * * * or [shall] offer to deliver, to any person any such article so adulterated"—the delivery being punished, whether it be "for pay or otherwise." In other words, to receive and deliver offending articles in the course of commerce is indictable, whatever the business purpose may be.

The Court of Appeals of the Second Circuit in *United States v. 300 Cans*, 189 Fed. 352, 111 C. C. A. 83, has also ruled that, since the *Hipolite* decision at all events, a libel for condemnation need no longer aver that the articles were transported for sale—the food there in question having been shipped from Nebraska by the owner to himself in New York, and remaining unsold in original unbroken packages.

[2] The facts of the present dispute are these: The defendant has two places of business, one in New Jersey and one in Pennsylvania. The adulterated tomato paste in question was at the New Jersey house, and was shipped to Philadelphia in order to be examined and tested in that city. The test was necessary, because a customer in London had sent an order, and the paste, unless it could meet the English standard, would not fill the customer's requirements. It was not to be sold or used for food in Philadelphia, and it was not so sold or used; but, having failed to meet the English test, it was immediately destroyed, without attempt to use or sell. The test was not made in New Jersey, because facilities for making it there were lacking. The sale would have been completed in Philadelphia, and the shipment for export would have been made from that city, if the paste had met the English test; and in that event the paste (although it might have been adulterated according to the United States standard) would not have been subject to seizure by this government, if it had been "prepared or packed according to the specifications or directions of the foreign purchaser," etc. (See proviso to section 2.) That an ultimate sale was a possibility, when the shipment was made in New Jersey, is not a decisive consideration; for the sale was never made, and, of course, the goods were never prepared or packed for export. But the English order does have this bearing; it explains why the interstate move-

ment took place, and shows that the reason was a trade or business reason, and therefore that the movement was in the course of commerce.

In our opinion it was interstate commerce for the owner to ship the goods from New Jersey to Pennsylvania for a business purpose such as examination and test; and as the goods were adulterated such a shipment was unlawful.

The judgment is affirmed.

JOHN H. RICE & CO. v. REDLICH MFG. CO. †

(Circuit Court of Appeals, Third Circuit. January 31, 1913.)

No. 71 (1,677).

TRADE-MARKS AND TRADE-NAMES (70*)—UNFAIR COMPETITION—WHAT CONSTITUTES.

No one is entitled to a monopoly in the manufacture and sale of a toy bottle or container for candy, perfumery, etc., made in miniature imitation of an unpatented article, as a desk telephone; and the fact that one was the first to make and sell such an article as a novelty does not render its manufacture and sale by another unfair competition, where there is no attempt to deceive purchasers as to origin of manufacture, by imitation of dress, mark, or label, but the likeness is in the article itself, because both are copies of another article.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*

Unfair competition in use of trade-marks and trade-names, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; John B. McPherson, Judge.

Suit in equity by Alexander E. Redlich and Otto Redlich, trading as the Redlich Manufacturing Company, and another, proceeding to judgment only as to plaintiffs named, against John H. Rice & Co. From an order granting a preliminary injunction, defendants appeal. Reversed.

Bertram D. Rearick and Frank S. Busser, both of Philadelphia, Pa., for appellant.

Charles M. Clarke and Griffith & Mitchell, all of Pittsburgh, Pa. (Cyrus N. Anderson, of Philadelphia, Pa., of counsel), for appellees.

Before GRAY and BUFFINGTON, Circuit Judges, and RELL-STAB, District Judge.

GRAY, Circuit Judge. This is an appeal from a decree of the court below ordering a preliminary injunction in a suit in equity brought originally by certain parties comprising the present appellees, Alexander E. and Otto Redlich, trading as the Redlich Manufacturing Company, and West Bros. & Co., against the appellants, John H. Rice & Co., as defendants, for alleged unfair competition in the making

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 8, 1913.

and sale of a certain article of manufacture, viz., telephone-shaped bottles adapted to contain candy, perfumery, and the like. On objection to the jurisdiction, on account of the citizenship of West Bros. & Co., they, as parties complainant, were, with permission of the court, withdrawn, and the suit proceeded in the name of the Redlich Manufacturing Company, as complainants. The bill alleges that complainants—

"are engaged in the business of manufacturing and selling to the trade generally, certain novelties for the retail trade, in packages for candy, bottled goods, etc., and particularly in a certain novelty telephone-shaped bottle made in imitation of a desk extension telephone, the body portion of which comprises a bottle containing or adapted to contain candy, perfumery, and the like, and having a removable cork or stopper, made in imitation of the transmitter mouthpiece of a telephone, and including an imitation receiver."

Complainants also allege that they have manufactured and sold their goods under and by virtue of rights accruing from letters patent of the United States, issued in 1907 to the said Alexander E. Redlich, for certain improvements in bottle stoppers, which letters patent, it is alleged, identify and cover the construction, arrangement and form of the said novelty telephone-shaped bottle. They allege that they have, during a period of upwards of six years, established various agencies and distribution depots in various parts of the United States, and have sold large quantities of the telephone-shaped bottles to the trade, and that West Bros. & Co., as exclusive licensees, have likewise sold large quantities of the said article throughout different parts of the United States. It is further alleged that this novelty telephone-shaped bottle, so sold and identified by said letters patent, is of great value and utility, and that the trade and public generally have acquiesced in and recognized the exclusive rights of the complainants. That large sums of money have been expended "on and about the said bottle," for the purpose of carrying on the business of manufacture, introduction and sale of the same.

It is then charged that the defendants, well knowing the premises, and in contravention of the exclusive rights of the complainants and their exclusive ownership and identification with the trade property in these telephone-shaped bottles, "due to complainants' origination, long continued manufacture, introduction and sale thereof," did, without license and against the will of complainants and in violation of their rights, make and sell bottles "embodying the novel features of appearance, construction, style, mode of operation, and otherwise, substantially similar to the novelty telephone-shaped bottles exclusively owned by complainants," and threaten to continue so to do. The bill then charges that such acts by defendants constitute unfair trade, and that complainants' business is threatened with demoralization, etc.

It appears that, though the patent for an improved bottle stopper is often mentioned in the said bill and alleged rights resulting therefrom more than once referred to, no claim is made by reason of the patent, and the suit has been pursued throughout as one for unfair competition.

It is admitted in argument that a suit under the patent was instituted prior to the bringing of the present suit, and is still pending. The

complainants, however, seek by the present bill for an injunction and an accounting. The article on which this monopoly of manufacture and sale is claimed by the complainants, is a diminutive bottle, not more than $3\frac{1}{2}$ inches in height, in the exact similitude of a desk telephone, including mouth piece and receiver. Its capacity as a container is, of course, exceedingly small, adapted only to hold pellets of candy not larger than bird shot or minute portions of perfumery. Its function as a container of anything is negligible. It is a toy, rendered attractive by being a diminutive representation of a well-known article. It belongs to a class of such articles whose attractiveness consists in miniaturizing articles of common use. It has been pointed out as a matter of common knowledge, that there are manufactured and on sale many so-called novelties, in the shape of miniature trunks, hand-bags, suit-cases, automobiles, violins, opera-glasses, cash registers, etc., and also many other things that would serve as toy containers. They are not articles of utility, and the only reason assignable for their production is that, being diminutive replicas of things in common use, they appeal to a certain sense akin to that of humor, especially in children. No proprietorship can be predicated in the novelty of such articles. They are neither new nor useful. The most that can be said is, that they are odd, or absurd. Every one is at liberty to make a replica, diminutive or otherwise, of an unpatented article. No one can obtain a monopoly on such an article by being the first to manufacture it, or the first to put it on the market. It is not unfair trade or unfair competition with the originator of such article of manufacture, that others should manufacture and sell the same thing.

The principle upon which the law in regard to unfair competition is judicially administered is well settled and has been abundantly illustrated by numerous decisions of courts of equity in this country and in England. It rests on the proposition that equity will not permit any one to palm off his own goods on the public as those of another. Any one who manufactures and deals in an article of public use and in public demand has, under this doctrine, the right to protection of whatever reputation and good will he has established, in regard to the excellence or quality of such article, as associated with the source of its manufacture. Every one may have the right to make such article, but no one has the right, in putting the same article upon the market, to use any package, common-law, trade-mark, label, or other dress or indicia calculated to induce the casual purchaser to believe that the article is the manufacture of another person. This general statement of what may constitute unfair competition, while not exhaustive, may include such imitation of form, color, or other unessential and external details of the article itself, as may deceive the casual purchaser as to the origin of the manufacture. This, however, does not permit any person to monopolize the manufacture and sale of the article itself. So a person may manufacture and sell an unpatented article that has been previously manufactured by another, without being guilty of unfair competition, even though in all essential features the one article is an exact simulacrum of the other.

Turning to the case in hand, it is to be observed that, neither in the

bill of complaint nor the moving affidavits is there any allegation that the defendants have done more than to make an article structurally similar to the articles made by complainants. No common-law trademark is alleged to have been appropriated, and there is no allegation that any distinguishing marks, not essential features of the goods themselves, have been copied by the defendants. No allegation that the defendants so packed, dressed, or labeled their goods as to induce the casual purchaser to believe that defendants' goods were those of the complainants. The gravamen of complainants' case, as stated by themselves, is that defendants made a miniature imitation of a desk telephone, which imitation had been previously made by the complainants. As both imitations were of the same object, they were necessarily exactly alike. The similarity consists in the construction of the article in question. The defendants' imitation in miniature of a desk telephone was bound to resemble in all its essential features the miniature desk telephone of complainants, and there is no allegation—certainly there is no proof—of any imitation of such non-essential features of form, color, or other external details as would be calculated to cause deception as to the origin of manufacture.

The case thus differs from that of *Yale & Towne Mfg. Co. v. Alder*, 154 Fed. 37, 83 C. C. A. 149, much relied upon by the appellees, in which certainly the doctrine of unfair competition has been carried to the utmost verge, as was said by the court in *Rushmore v. Manhattan Screw & Stamping Works*, 163 Fed. 939, 90 C. C. A. 299, 19 L. R. A. (N. S.) 269.

It is to be observed, however, that in *Yale & Towne v. Alder*, the charge of unfair competition was, that the defendant had so closely copied the plaintiff's padlock, in form, size, coloring, lettering and details of finish, as that purchasers would likely be induced to buy his padlock, supposing it to be the padlock of the plaintiff. The court said:

"His (defendant's) apparent purpose was to extend his trade with retail dealers and supplant the plaintiff's sales to such dealers by furnishing them with an article which could be sold readily to customers as the article made by the plaintiff."

There is no such feature presented in the case before us. The Yale lock had a world-wide reputation, and apparently a large part of the value of defendant's lock consisted in the belief of the purchaser, induced by the defendant's imitation of unessential details of form and color, that the lock was of the Yale & Towne manufacture. It is apparent, and there is no evidence to the contrary, that any one who purchased the defendants' miniature telephone, cared nothing for the origin of its manufacture, much less does it appear that any one was induced to buy by the belief that he was buying an article made by the complainants. The right to make a toy by a minute imitation of a natural or artificial object was common to all the trade. Defendants here were selling the same article, or rather an exactly similar article to that manufactured and sold by the complainants. There was no attempt by the defendants, and no reason for attempting, to deceive the public as to the origin of

manufacture. The likeness was in the goods themselves,—not in any brand, label, trade-mark or package. As said by Judge Holmes in *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667, in speaking of the right of defendant to make a musical instrument called a “zither,” precisely in form and construction like that of the plaintiff:

“Under such circumstances, the defendant has the same right as the plaintiff has to manufacture instruments in the present form, to imitate the arrangement of the plaintiff’s strings or the shape of the body. In the absence of a patent, the freedom of manufacture cannot be cut down under the name of preventing unfair competition. * * * The instrument sold is made as it is, partly at least, because of a supposed or established desire of the public for instruments in that form. The defendant has the right to get the benefit of that desire, even if created by the plaintiff. The only thing he has not the right to sell is the good-will attaching to the plaintiff’s personality—the benefit of the public’s desire to have goods made by the plaintiff.”

In the case of *Marvel Co. v. Pearl* (C. C. A. 2d Circuit) 133 Fed. 160, 66 C. C. A. 226, the plaintiff made a bulb syringe to use as a douche, by means of a whirling spray, under the name of “Whirling Spray.” Defendant made one like it under the name of “Whirl-spray.” The Court of Appeals, in affirming the decree of the court below, quoted and approved the following finding of that court:

“There is nothing about the article, as made and sold by the defendants, that is not necessary in the making and operation of such an instrument. It is made in the form that it must be made in order to accomplish its purpose, and, if the making in that form is any representation that the thing made came from the plaintiff, it is because of the extent to which the plaintiff had made and displayed and sold it before the defendants began.”

The Court of Appeals then adds:

“Unfair competition is not established by proof of similarity in form, dimensions, or general appearance alone. Where such similarity consists in constructions common to or characteristic of the article in question, and especially where it appears to result from an effort to comply with the physical requirements essential to commercial success, and not to be designed to misrepresent the origin of such articles, the doctrine of unfair competition cannot be successfully invoked to abridge the freedom of trade competition.”

None of the cases cited by the appellees seems to us applicable to the case in hand. Nearly all, if not all, of them concern the imitation of the dress, label, or container of an article as a means of deceiving the public. The likeness here was in the thing itself, not in any container, mark, or label attached to it. The thing sold by both complainants and defendants was a toy, made attractive by reason of being an imitation of the same article of common use, to wit, a desk telephone.

It is true that in *Cook & Bernheimer v. Ross* (C. C.) 73 Fed. 203, cited by the appellees, the unfair competition complained of was the use by defendant of a peculiarly shaped bottle for holding a brand of whisky known as “Mount Vernon.” The form of the bottle was square, and such form was copied, but was shown to have been original with the complainant and used as a brand or trade-

mark of the whisky he manufactured. The court said that it could not—

"escape the conviction that they found the square shaped bottle convenient and useful, because it was calculated to increase the sale of their goods, and that such increase, if increase there be, is due to the circumstances that the purchasers from defendants have reasonable expectation that the ultimate consumer, deceived by the shape, will mistake the bottle for one of complainants'."

No comment is necessary to point out the distinction between this case and the one before us. It is not alleged that defendants in the case before us sought to sell minute portions of candy or perfumery, by packing them in telephone-shaped bottles like those first used by the complainants. The bottles themselves were the goods that were sold, and the unfair competition is not in selling either candy or perfumery, but in selling these very bottles. No doubt could have been entertained in the case last above referred to, as to the right of defendants to trade in the square-shaped bottles, as bottles, without regard to their contents. The conduct of the defendants denounced by the court as unfair competition was their using the peculiarly shaped bottle of complainants as a means of selling their own whisky as that of the complainants. The square-shaped bottle having been long associated with the whisky made by the complainants, its use by the defendants was likely to induce in the casual purchaser the belief, in buying the defendants' whisky, that he was buying that of the complainants.

We think the proposition a sound one, that, where the likeness is in the goods themselves, because of the copying of the unpatented structure or design of complainants' article, and not in unessential marks applied to the goods, or in the container or dressing up of the goods, and there is no evidence that defendants attempted to palm off their goods as those of complainants, there is no legal basis for an action of unfair competition.

Further discussion of the cases cited by the complainants below seems unnecessary, and for the reasons stated the decree below is reversed.

EVANS v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,091.

1. TRIAL (§ 142*) — QUESTIONS OF LAW OR FACT — DIRECTION OF VERDICT — QUESTION FOR JURY.

Where, from any proper view of the undisputed facts, the conclusion necessarily follows that plaintiff cannot recover, it is the trial court's duty to direct a verdict for defendant; but if reasonable minds might fairly draw different conclusions as to the facts, and different inferences from the evidence in respect to alleged contributory negligence, such question is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CARRIERS (§ 347*)—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

A local train, which plaintiff desired to take from a suburban station to P., was due to leave at 10:45 p. m. The train had been in the habit of switching before it reached such station; but, a new switch having been put in beyond the station, the switching was done there for the first time on the night of the accident. Plaintiff, approaching the track to take the train, saw it standing beyond the station, and, believing it was about to depart, started to run up the track to catch it, and was injured by the train backing toward the station without ringing the bell, blowing the whistle, or having any light or employé on the rear thereof. *Held*, that plaintiff was not negligent as a matter of law; the mere going or running on the track under such circumstances not being in itself contributory negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. § 347.*]

In Error to the District Court of the United States for the District of Oregon; Chas. E. Wolverton, Judge.

Action by Thomas Evans against the Southern Pacific Company. Judgment for defendant, and plaintiff brings error. Reversed, and remanded for new trial.

John M. Gearin, of Portland, Or., and G. E. Hayes and Latourette & Latourette, all of Oregon City, Or., for plaintiff in error.

W. D. Fenton, Ben C. Dey, and Kenneth L. Fenton, all of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. Our impression at the argument of this case was that the judgment would have to be reversed, and a careful examination of the record confirms us in that view.

The action was brought by the plaintiff in error to recover damages for the loss of his leg, caused by the alleged negligence of the defendant railway company in backing over him, without a rear light or other warning, one of its local trains running between Portland and a small town called Oswego, situated about nine miles southerly of that city, on the night of September 25, 1909. The plaintiff had purchased a ticket from Portland to Oswego and return, on which ticket he rode from Portland to Oswego, arriving there in the afternoon, and in the evening, in attempting to catch the 10:45 and last train back to Portland, the accident happened.

About 1,300 feet north of Oswego, and between the latter place and Portland, was a station called Wilsonia, at which the railroad company had that day for the first time put in operation a switch, for the purpose of changing the position of the engine for the return trip to Portland. Theretofore the switching had always been done southerly of Oswego, and there was evidence given tending to show that the plaintiff was unaware of that change in the accustomed mode of operating the road. The record shows that Oswego is a small place of several hundred inhabitants only, and that on the east side of the railroad is an iron foundry, from which and its vicinity several

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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paths lead in the direction of Oswego and Wilsonia and across the railroad tracks, which paths people were accustomed to travel; and there was also evidence tending to show that, although there was a county road running along and parallel to the railway track between the two places, many people had for a long time been accustomed to walk along the railway track, instead of the county road, of which custom the railroad company was aware, and to which it had never made objection.

The evidence tended to show that the night in question was dark and cloudy, and that the plaintiff, with a companion named Emmett, started from the vicinity of the foundry to take the 10:45 train back to Portland, and in proceeding along one of the paths, discovering, by means of its side lights, the train at Wilsonia, concluded that it was there on its way to Portland, ran along the path leading towards Wilsonia, reached the railroad track, and ran or walked along it towards that station, for the purpose of catching the train; the plaintiff being about ten feet in advance of Emmett. After proceeding along the track a few hundred feet, the plaintiff was run over by the train, resulting in the crushing of his leg; the fact being that, instead of being on its way to Portland when it was at Wilsonia, it was there for the purpose of switching, and was, at the time of the accident, being backed to Oswego, the point of switching having that night for the first time been changed from southerly of Oswego to Wilsonia. There was evidence tending to show that the train was being backed without any outside light at its rear end, and that the bell was not rung, nor any other timely warning given the plaintiff of its approach.

The trial court held that there was sufficient evidence of negligence on the part of the railroad company to go to the jury for determination; but it held as a matter of law that the plaintiff was guilty of contributory negligence, and on that ground directed a verdict for the defendant company, which action of the court is the only ground of complaint here.

[1] It is undoubted law that if, from any proper view of the undisputed facts of a case, the conclusion necessarily follows that the plaintiff cannot recover, it is the duty of the trial court to direct a verdict accordingly, for in such case the court would, in the exercise of a sound judicial discretion, be compelled to set aside the verdict, if returned in the plaintiff's favor. Decisions to this effect are too numerous to require citation. It is just as well settled, however, that if reasonable minds may fairly draw different conclusions as to the facts, and different inferences from the evidence in respect to alleged contributory negligence, the determination of that question is for the jury, under appropriate instructions from the court. In *Jones v. East Tennessee, etc., Railroad Co.*, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478, Mr. Justice Miller, speaking for the Supreme Court, said:

"The evidence is embodied in the bill of exceptions before us, and we cannot agree with the Circuit Court that there was such a clear case of negligence on the part of the plaintiff as to justify the court in withdrawing the whole subject from the consideration of the jury. The plaintiff himself states that he was in the depot of the defendant on business; that the passenger platform was alongside the tracks, which ran between it and the

depot; that he passed out of the depot by the usual way, and was struck between the wall of the depot and the platform. He further says that the way he was going he could not see a train approaching from the east, because there was a car on the side track, and he had no warning of any approaching train, although he listened as he went out of the depot. There is also some evidence that there was so much noise about the place of exit from the depot that the sound of the advancing train could not be distinguished. On the other hand, there is some testimony to show that the plaintiff ran carelessly through the depot, that he knew the train was approaching, and that he might have guarded himself against it, if he had stopped at the exit of the depot long enough to have looked about him. But we think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others. There is nothing in a case in which it is conceded, fully and unreservedly, that the defendant company is in fault on account of the manner of running its trains, such as the high rate of speed and other careless matters mentioned by the court in its instructions, which should justify the court in refusing to submit to the jury the question whether the defendant company is relieved from the liability incurred by it, by reason of the acts of the plaintiff showing that, in some degree, he may not have been as careful as the most cautious and prudent man would have been. Instead of the course here pursued, a due regard for the respective functions of the court and the jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict."

[2] In the case at bar it was shown without dispute that the first time the local train ever switched at Wilsonia, instead of its previously accustomed place, was on the occasion in question, and the testimony of some of the defendant's own witnesses tended to show that the train was backed from Wilsonia towards Oswego without any outside light on the rear of the train, and the plaintiff testified, among other things, that, when he went up on the train in the afternoon, the train proceeded a little further south and switched as it had always done on his previous visits; that when he and Emmett started to return they intended to take the train at Oswego, and started to go to that station; that they took a well-beaten path leading towards the railroad; that they saw the train at Wilsonia, and could see from the side lights and the engine that it was headed towards Portland, and thought it had already been to Oswego. Being asked to tell the jury what he did, and what he saw, and what occurred from the time he got on the railroad track, the witness answered and was questioned as follows:

"A. Well, we came right up on the track, and went right up the track till it hit me there and knocked me off. Mr. Fenton: I didn't hear. A. We went up the track until the train hit me. Q. Did you run? A. No, sir; we started to run, and we was going up the hill there. We had been running from the barn, and we was pretty well out of wind at that time. Q. You started to run? A. Yes, sir. We wasn't running at the time it hit me. Q. How fast were you going when the train hit you? A. As fast as I could walk. Q. As fast as you could walk? A. Yes, sir. Q. Now, did you hear any bell ring? A. No, sir. Q. Did you hear any whistle? A. None at all. Q. Well, was there any bell rung or any whistle sounded at that time? A. No, sir. * * * Q. Now state, was there anybody on the rear end of that train when you were struck? A. No, sir. Q. Was there any light there, or anything? A. Nothing at all. Q. Well, were you looking and listening? A. Yes, sir; I was looking straight ahead."

And the witness Emmett testified much to the same effect.

Unless it can be held—which we think cannot properly be done—that the mere going and rapidly walking or running on the company's track by the plaintiff in and of itself constituted contributory negligence, we regard it as clear that the evidence and attending circumstances were such as to have entitled the plaintiff to the submission of the question of his alleged contributory negligence to the jury under appropriate instructions.

The judgment is reversed, and the cause remanded to the court below for a new trial.

NEWMARKET MFG. CO. v. CHAPMAN.

CHAPMAN v. NEWMARKET MFG. CO.

(Circuit Court of Appeals, First Circuit. January 30, 1913.)

Nos. 1,003, 1,004.

APPEAL AND ERROR (§ 855*)—CONTENTION NOT PASSED ON IN TRIAL COURT—
RES JUDICATA—JUDGMENT IN STATE COURT.

Where the District Court of the United States, in a suit involving defendant's right of flowage on complainant's land, reached a correct determination of the case, without reference to any findings in a prior suit in the state court, or inquiry as to how far complainant's rights had been determined thereby, the question of res judicata would not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3406; Dec. Dig. § 855.*]

Appeal from the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Suit by Electa A. Chapman against the Newmarket Manufacturing Company. From a decree granting relief, both parties appeal. Affirmed.

Oliver W. Branch, of Manchester, N. H. (Branch & Branch, of Manchester, N. H., on the brief), for plaintiff.

John Scammon, of Exeter, N. H. (Davis, Peabody & Brown, of Boston, Mass., and Eastman, Scammon & Gardner, of Exeter, N. H., on the brief), for defendant.

Before DODGE, Circuit Judge, and BROWN and HALE, District Judges.

HALE, District Judge. This action in equity involves defendant's right of flowage on complainant's lands. The bill alleges that for more than six years past the defendant has maintained its main dam and waste gates at Newmarket, N. H., on the Lamprey river, and that it has maintained certain other dams and waste gates on its storage ponds some miles above Newmarket, in such a manner as to cause an unreasonable height of water, and an unlawful flowage of complainant's lands at Newmarket.

The complainant is the owner of a farm located on the easterly bank of the river, partly in Durham, Stratford county, and partly

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in Newmarket, Rockingham county, in New Hampshire. She complains that by the unlawful acts of the defendant at certain times of the year, for more than six years past, her farm has been overflowed and submerged by water, and the grass thereon growing has been injured, and the soil itself greatly damaged. The defendant denies the improper use of the main dam and gates at Newmarket, and of the dam and gates on its storage reservoir, and asserts that it has not exceeded the rights of flowage acquired by three certain deeds from the complainant's ancestors in title, namely, the deed of December 11, 1824, April 26, 1833, and September 14, 1840, and that it has the right under those deeds to hold back the water by means of its main dam, and to flow complainant's land in a reasonable manner whenever it has a beneficial use for the water.

The further claim is made by the complainant that by a suit brought in the state courts of New Hampshire, which resulted in a judgment for the present complainant, it was determined, on appeal to the New Hampshire Supreme Court, that the operation by the defendant of its waste gates in connection with its main dam has been determined to be unreasonable and unlawful, and that damages have been awarded to her for such unreasonable and unlawful use; but that since the decision of the case in the state court the defendant has continued to keep its waste gates shut when the water in the river has been high enough to pass over the dam, and has caused an unreasonable and unlawful flowage of complainant's farm. The defendant denies that it has ever been determined at law that closing the waste gates on the dam at Newmarket when the water is high enough to pass over the same is unreasonable and unlawful.

The case was referred to a master, who heard all the evidence and made a complete report to the District Court. In that report he found, among other things, that a reasonable use of the dam requires that its waste gates should be raised in times of high water, at certain seasons, to prevent an unreasonable flowage of complainant's land; that the evidence before him disclosed that the water was running excessively high over the dam at certain times enumerated by him, and that the waste gates were not used to their full capacity; that the evidence has led him to the conclusion that the defendant has not always done its best to protect the complainant's land in times of high water, and the result has been an unreasonable flowage. The master makes it clear that in saying that the defendant has "not done its best" he means that the defendant has not exercised all the reasonable care which a prudent man should use, under the circumstances, to prevent the flowage of the complainant's land in times of very high water. After considering the testimony before him, the master finds that little, if any, damage can result from the water flowing over the dam at a height not exceeding four inches above the flashboards of the dam. In his report he mentions the finding of the jury, and of the court, in *Chapman v. Newmarket Manufacturing Co.*, 74 N. H. 424, 68 Atl. 868,

15 L. R. A. (N. S.) 292; and he makes some reference to the determination of the state court in that case, and to the fact that the claim is made by the complainant that certain questions of fact, passed upon in that case, have become *res adjudicata*.

In September, 1912, this case came on for hearing in the District Court of New Hampshire. At that hearing the District Court re-committed the master's report for specific findings, independent of the findings in the action at law in the state court of New Hampshire. The District Court requested the master, from the evidence before him, and without further arguments, to report what is a reasonable height for the defendant to allow the water to flow over the flashboards of the dam, both when its mill is in operation and when it is not in operation, and to find specifically whether the defendant has kept its waste gates closed, and thereby caused the water to rise to a higher point than is reasonable and lawful, resulting in damage to the complainant. Thereafterwards the master made a supplemental report, as follows:

"There were two views during the hearing before me; and upon recommitment of this case I make the following specific findings, based solely upon the evidence submitted before me, and entirely independent of the findings of the jury or the evidence submitted to that jury in the action at law formerly pending in the state court:

"(1) Four inches on the dam is a reasonable height for the defendant to allow the water to flow over the flashboards of the dam in question as now maintained, both when the defendant's mill is in operation and when not in operation.

"(2) I find specifically from the evidence presented before me that the defendant has unreasonably kept its waste gates closed, thereby causing the water to rise to a higher point, resulting in flowage and consequent damage to the plaintiff.

"(3) Solely from the evidence presented before me, I assess the damages resulting to the plaintiff from the unreasonable use of the dam at \$600."

The District Court then ruled that it found no ambiguity in the deeds to which reference has been made; that the right of flowage is one to be used reasonably—the principle of reasonableness under an express grant having been recognized in *Chapman v. Newmarket Manufacturing Co.*, 74 N. H. 424, 68 Atl. 868, 15 L. R. A. (N. S.) 292, and in *State v. Sunapee Dam Co.*, 70 N. H. 458, 460, 50 Atl. 108, 59 L. R. A. 55. The District Court therefore affirmed the supplemental report, and entered a decree:

(1) That the plaintiff have judgment against the said defendant for the sum of \$600, with costs.

(2) That the said defendant be enjoined and restrained from keeping the waste gates in its dam, in the town of Newmarket, closed when and after the water reaches a height of four inches above the top of the flashboards thereon.

(3) It is further ordered, adjudged, and decreed that upon application to its office the defendant shall at all reasonable times admit the plaintiff or her agents to the millyard to observe the height of the water upon said dam and the position of the said waste gates.

Exceptions were taken by the defendant to the master's supplemental report; and an appeal was taken by the defendant from the decree of the District Court.

The complainant also appealed from the decision of the District Court, alleging that the court erred in denying complainant's motion for a mandatory injunction in accordance with the master's original report, as follows:

"That if in times of high water it becomes impossible to control the water in said river by means of the waste gates in said dam said defendant shall close the gates in its storage reservoirs, known as Pawtuckaway Pond and Mendum's Pond, and thus reduce, so far as possible, the flow of water in said river until such excessive high water shall have abated, so that the same can be controlled by said waste gates."

Touching this appeal of complainant, there is nothing in the master's report which would have justified the District Court in taking the action asked for. It is enough for us to say that we find nothing in the record which warrants us in further considering the complainant's appeal. It is clear that the District Court committed no error relating to it.

In reference to the appeal of the defendant, it appears that the final decree of the District Court was based entirely upon the supplemental report of the master. That court reached a complete and correct determination of the cause without reference to any findings in the suit in the New Hampshire state court, or to the inquiry how far complainant's rights had been determined by that suit. There is, therefore, no need for us to consider how far the questions brought before us in this appeal are *res adjudicata*. The District Court properly held that, although the deeds to which we have referred were absolute in form, they do not grant a right to exercise the easement in an unnecessary and unreasonable manner. *Olcott v. Thompson*, 59 N. H. 154, 156, 47 Am. Rep. 184; *Bean v. Coleman*, 44 N. H. 539, 543; *Berry v. Hutchins*, 73 N. H. 310, 316, 61 Atl. 550.

We think the judgment of the District Court was without error.

In each case the decree is as follows:

The decree of the District Court is affirmed; and the appellee recovers costs of appeal.

L. E. WATERMAN CO. v. STANDARD DRUG CO.

(Circuit Court of Appeals, Sixth Circuit. January 11, 1913.)

No. 2,270.

1. INJUNCTION (§ 211*)—PERMANENT INJUNCTION—CONSENT ORDER.

Complainant having applied for a temporary injunction, defendant at the hearing stated that it would have no further affidavits or evidence on the hearing to be had later and that the matter of temporary injunction might be considered on the hearing as for permanent injunction, whereupon the court entered an order that "a motion for a writ of permanent injunction this day by consent coming on to be heard on the bill of complaint," etc. *Held*, that such order should not be considered as a con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sent order, but as a submission to final hearing of complainant's right to an injunction and not as admitting such right.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 434; Dec. Dig. § 211.*]

2. INJUNCTION (§ 210*)—ORDER—MODIFICATION—RULE TO SHOW CAUSE.

An injunction order entered at a prior term is not open to modification on a subsequent rule to show cause, but the only power residing in the court in respect to such injunction is to construe and enforce it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 433; Dec. Dig. § 210.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 97*)—INJUNCTION—VIOLATION.

An injunction enjoined defendant, a corporation, its officers, agents, servants, employes, and all persons taking or holding under, from, or through it, from infringing complainant's trade-mark "Waterman's Ideal Fountain Pen, N. Y.," and also restraining the use of the word "Waterman" in connection with the manufacture and sale of pens unless accompanied by words distinguishing such name from that of complainant. Defendant T., who was a tenant of defendant company, was not a party by name to the original suit, but was shown the injunction order and agreed not to sell pens marked "A. A. Waterman & Co." while a tenant of defendant, but did so, stating orally to each purchaser that they were A. A. Waterman & Co. pens and not the L. E. Waterman pens sold by complainant. *Held*, that such conduct on the part of defendant T. constituted a violation of the injunction in case the relationship between defendant company and T., so far as the sale of pens was concerned, was that of principal and agent.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. § 97.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 100*)—JUDGMENTS APPEALABLE—ADDITIONAL PARTIES—CONTEMPT PROCEEDINGS.

Complainant having obtained an injunction against defendant company restraining the use of the word "Waterman" in connection with the sale of pens not of complainant's manufacture, complainant instituted a proceeding for civil contempt against defendant company and defendant T., who was not a party to the original suit, claiming that T. was an agent of defendant company and that the injunction had been violated by sales made through him. *Held*, that an order dismissing the proceeding was appealable both as to defendant corporation and as to T.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 114; Dec. Dig. § 100.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Action by the L. E. Waterman Company against the Standard Drug Company. From an order dismissing a rule entered against defendant and one Sol. Teller, as its alleged agent, to show cause why a writ of attachment should not be issued against them as for contempt for violating an injunction previously granted in favor of complainant, it appeals. Reversed and remanded.

Samuel S. Watson, of New York City, for appellant.

John A. Chamberlain and T. H. Bushnell, both of Cleveland, Ohio, for appellee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

WARRINGTON, Circuit Judge. This is an appeal from an order made in the court below November 9, 1911, dismissing a rule theretofore entered against appellee and one Sol. Teller, as its alleged agent, to show cause why a writ of attachment should not issue against them "as and for contempt of court" for violating an injunction order previously granted in the cause. The injunction had been granted nearly two years before upon bill of appellant, and proofs of infringement of complainant's trade-names and trade-marks and of unfair competition; and these matters form the subject of the controversy. The order enjoined defendant, a corporation, "its officers, agents, servants, employés, and all persons taking or holding, under, from, or through it, from" infringing complainant's trade-mark "Waterman's Ideal Fountain Pen, N. Y.," also its trade-mark "Waterman's," as stated in four paragraphs. Paragraphs 3 and 4 are relied on and are as follows:

"(3) Using the name of 'A. A. Waterman & Co.,' or any corporate name containing the word 'Waterman' or 'Waterman's' or 'Watermans's' in connection with the manufacture, or sale, of fountain pens, unless accompanied by words which conspicuously, clearly, and unmistakably distinguish such corporate name from that of the complainant.

"(4) Selling, representing, or advertising in any manner whatsoever fountain pens (other than fountain pens of complainant's manufacture), as 'Waterman Pens,' 'Waterman's Pens,' 'Watermans's Pens,' 'Waterman Fountain Pens,' 'Waterman's Fountain Pens,' 'Watermans's Fountain Pens,' or using any other words which would indicate that the fountain pens so sold represented or advertised are fountain pens of complainant's manufacture."

{1} The application made under the original bill was for a temporary injunction, but counsel for the present appellee admittedly stated to counsel for the present appellant:

"That defendant would have no further affidavits or evidence upon a hearing to be had later and that the matter of a temporary injunction might be considered upon hearing as for a permanent injunction."

The order of injunction as made commences thus:

"A motion for a writ of permanent injunction this day by consent coming on to be heard upon the bill of complaint," etc.

The order remains in full force and effect; no appeal or other steps having been taken to review it. It was treated below by Judge Kilbitts as a consent order; but we interpret the consent to have been meant and considered as a submission to final hearing, and not as admitting complainant's *right* to the injunction.

The question demanding ultimate consideration is whether the true legal relation between the appellee Drug Company and Sol. Teller places the latter fairly within the language of the order enjoining the Drug Company, "its officers, agents, servants, employés, and all other persons taking or holding, under, from, or through it." Stated shortly: Is Teller an agent or employé of the company? The proceeding for contempt was heard and disposed of upon affidavits and exhibits. The acts claimed to have been violative of the order of injunction were

committed within the Euclid Avenue store of the Drug Company in Cleveland. The defenses made in substance are: (1) That the relation between the Drug Company and Teller was at the date of the injunction, and still is, that of landlord and tenant; and (2) that Teller was not a party to the original suit. The learned trial judge, who dismissed the rule to show cause, did not find it necessary to determine the true relation that existed between the Drug Company and Teller. This was because of a ruling made in *L. E. Waterman Co. v. Modern Pen Co.*, 183 Fed. 119, 105 C. C. A. 408 (C. C. A. 2d Cir.), that the third paragraph of the injunction order there involved was erroneous; the court below holding in the instant case:

"The facts do not connect the Standard Drug Company with the transaction unless it may be said that they are responsible for the acts of Sol. Teller, their tenant. In fact, there is at most here nothing more than a technical contempt, or a technical violation of an order which it is quite plain the court would not now grant under the same circumstances and which we are very clear the court granting it would not have granted had it been contested."

[2, 3] Judge Hand has since interpreted the decision of the Court of Appeals in the case just cited to mean that "there should be no absolute injunction against the name 'A. A. Waterman & Co.' on the showing made," but he did not understand the rule to forbid placing a limitation upon the use of the name. (D. C.) 193 Fed. at 248. Apart from that case, however, it is clear that the order of injunction, which Judge Tayler had entered at a previous term, was not open to modification on the rule to show cause. *Loeser v. Savings Deposit Bank & Trust Co.*, 163 Fed. 212, 213, 89 C. C. A. 642 (C. C. A. 6th Cir.); *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *Barrell v. Tilton*, 119 U. S. 637, 643, 7 Sup. Ct. 332, 30 L. Ed. 511; *Turner v. Railway Co.*, 24 Fed. Cas. 367. The only power residing in the court below, or in this court, in respect of such an order of injunction, is to construe and enforce it. It was admitted that, although Teller was not a party by name to the original suit, when the order of injunction was served on the Drug Company, it was either shown or read to Teller, and that he "agreed not to sell the pens marked A. A. Waterman & Co. while tenant of defendant." This is hardly consistent with a total absence of control in the Drug Company. Both Teller and a saleswoman in charge of the business carried on by him stated in substance in affidavits that they sold "A. A. Waterman & Co." pens, and that the pens were so marked, but that they in each instance orally stated to the purchaser that they were such pens, and that she also stated that they were not the L. E. Waterman pens.

Thus Teller's agreement "not to sell the pens marked A. A. Waterman & Co.," before mentioned, was confessedly not kept. It is equally clear that, if the relation between the company and Teller is in legal effect that of principal and agent, both the Drug Company and Teller violated the order of injunction. *Estes v. Worthington* (C. C.) 30 Fed. 465, 466; *Dadirrian v. Gullian* (C. C.) 79 Fed. 784, 787; *Featherstone v. Ormonde Cycle Co.* (C. C.) 53 Fed. 111; *Cramer v. Fry* (C. C.) 68 Fed. 201, 205. The injunction forbade the Drug Company to use the name "A. A. Waterman & Co.," or to use "any corporate

name containing the word 'Waterman,' in connection with the sale of fountain pens, "unless accompanied by words which conspicuously, clearly, and unmistakably distinguish such corporate name from that of the complainant." If we regard this language, rather than one of the affidavits to the contrary, the late Judge Tayler thought it was not enough for the seller, when disposing of the pens, simply to state orally either that such pens were made by A. A. Waterman & Co., or that they were made by that company, and were not "L. E. Waterman pens"; because the inhibition is that such sales must be accompanied by words which *conspicuously* distinguish the name of A. A. Waterman & Co. from that of the L. E. Waterman Co. An oral statement cannot very well be employed to distinguish the two names "conspicuously." The injunctive order appears to be based on the theory that the public understands "Waterman" to signify the appellant's pens, and the evident purpose was to avoid confusion and deception of the public (*Dietz v. Horton Mfg. Co.*, 170 Fed. 872, 96 C. C. A. 41 [C. C. A. 6th Cir.]), and so to protect the average customer, rather than the discriminating dealer. It has been aptly said of the two names, L. E. Waterman Co. and A. A. Waterman & Co., in another case, that the ordinary customer would scarcely heed the difference between the initials "L. E." and "A. A."; he would be influenced by the name "Waterman." Indeed, it is hard to see how the requirement of the present injunction can be satisfied without plainly stating at least upon the packages containing A. A. Waterman & Co. pens, and similarly in advertising the pens, both that they are A. A. Waterman & Co. pens, and not pens of the L. E. Waterman Co. In *L. E. Waterman Co. v. Modern Pen Co.* (D. C.) 193 Fed. at page 247, it was said:

"Now it is perfectly plain to any candid person that the ordinary buyer pays little attention to such prefixes as 'L. E.' and 'A. A.'—an inattention upon which it is quite clear to me the defendant's purchase of the name depended. Dealers will, of course, know the difference very well; but they are privy to the fraud. It is the form in which the wares come to the final buyer that counts, and, while the defendant is not responsible for the spontaneous representation of dealers, it must not so mark or dress its goods as to create, or aid in, any misapprehension by the buyers."

Again, as there stated (193 Fed. 248):

"Therefore a decree will pass forbidding the use of 'Ideal,' of 'Waterman,' and of 'A. A. Waterman & Co.,' except in connection with the following phrase or its equivalent, all words to be written in letters of the same size, 'not connected with the original "Waterman" pen.'"

Further, as Judge Denison recently summed up in the Webster's Dictionary Case (*G. & C. Merriam Co. v. Saalfeld*, 198 Fed. at 375 [C. C. A. 6th Cir.]):

"Defendant may not use the word at all, unless he accompanies it with the explanation; he must neutralize an otherwise false impression; he must 'unmistakably inform' the public that the article is of his production (*Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 200 [16 Sup. Ct. 1002, 41 L. Ed. 118]); he must so distinguish that 'no one with the exercise of ordinary care can mistake' (*Saxlehner v. Eisner & Mendelsohn Co.*, 179 U. S. 19, 41 [21 Sup. Ct. 7, 45 L. Ed. 60]); he must give 'the antidote with the bane' (*Herring, etc., Co. v. Hall, etc., Co.*, 208 U. S. 559 [28 Sup. Ct. 350, 52 L. Ed. 626])."

[4] Clearly the object of the present proceeding is to vindicate and enforce private rights; it is remedial in its nature, and involves a charge only of civil contempt, not criminal contempt. *Merchants' Stock & Grain Co. v. Board of Trade*, 187 Fed. 399, 402, 109 C. C. A. 230 (C. C. A. 8th Cir.), and numerous cases there cited; *Enoch Morgan's Sons Co. v. Gibson*, 122 Fed. 422, 423, 59 C. C. A. 46 (C. C. A. 8th Cir.). It follows that, since the Drug Company was defendant in the original suit, the case as to it was appealable to this court. *Merchant's Stock & Grain Co. v. Board of Trade*, 187 Fed. 399, 109 C. C. A. 230; *Enoch Morgan's Sons Co. v. Gibson*, 122 Fed. 423, 59 C. C. A. 46; *Matter of Christensen Engineering Co.*, 194 U. S. 458, 460, 461, 24 Sup. Ct. 729, 48 L. Ed. 1072. Considering the object and nature of the present proceeding, in connection with the fact that Teller was joined as a defendant upon the theory and claim that he was an agent of the Drug Company, we think it is equally plain that the case was appealable as to him; because, if such relation existed, he admittedly aided and assisted the company in disobeying the injunction, and so was amenable to process as a party. *Estes v. Worthington*, supra; *Dadirrian v. Gullian* (C. C.) 79 Fed. 786. See, also, *Employers' Teaming Co. v. Teamsters' Joint Council* (C. C.) 141 Fed. 679. After the rule had been dismissed, appellant filed a petition again asking for a rule to show cause against the Drug Company and Teller "jointly and severally, why a writ of attachment should not issue against them as and for contempt of court in violating an injunction order of this court, dated December 14, 1909" (the order in question); and, further, that a reference be made to take proofs upon stated issues of fact tendered, among which is one concerning Teller's relation to the Drug Company. If it should appear on investigation that their relation was that of principal and agent, the court in which the injunction was granted would have no more right to decline to enforce it than it would to forbid the issue of an execution to collect an ordinary judgment there rendered. *Enoch Morgan's Sons Co. v. Gibson*, 122 Fed. 423, 59 C. C. A. 46.

Since this relation was not determined, the ruling below must be reversed with costs, and the cause remanded for trial upon that issue.

CARBON FUEL CO. v. CHICAGO, C. & L. R. CO. et al.

HEWITT MFG. CO. v. OLD COLONY TRUST CO. OF BOSTON, MASS., et al.

(Circuit Court of Appeals, Seventh Circuit. November 19, 1912.)

Nos. 1,843, 1,846.

1. RECEIVERS (§ 152*)—RAILROADS—PRIORITY OF CLAIMS.

Claims for supplies furnished to a railroad company within six months of the appointment of a receiver are not payable out of the corpus in preference to mortgage bondholders, where there has been no diversion of income and no surplus earnings before or after the appointment, unless the supplies and the payment therefor by the receiver are necessary

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexe

to his continuance of the business of the road, and the mere fact that a connecting road may be compelled under the Interstate Commerce Act to transact business with the receiver does not affect the rule.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 272-275, 278; Dec. Dig. § 152.*]

2. RECEIVERS (§ 152*)—RAILROADS—PRIORITY OF CLAIMS.

One furnishing coal and journal bearings to a railroad company within six months of the appointment of a receiver is not entitled to payment out of the corpus in preference to mortgage bondholders, though some of the supplies are on hand and unused at the time of the appointment; a claim for priority not being based on fraud in the acquisition of the supplies, nor facts shown which would have sustained such a claim.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 272-275, 278; Dec. Dig. § 152.*]

3. RECEIVERS (§ 152*)—RAILROADS—PRIORITY OF CLAIMS.

A mere failure to exercise the right to foreclose mortgages given by a railroad company does not, in the absence of fraud, displace the lien on the corpus of the estate in favor of claimants, who, with actual or constructive notice of the existence of the lien, furnished supplies to the company within six months of the appointment of a receiver and after a default justifying foreclosure.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 272-275, 278; Dec. Dig. § 152.*]

4. RECEIVERS (§ 152*)—RAILROADS—PRIORITY OF CLAIMS.

One furnishing supplies to a railroad company within six months of the appointment of a receiver acquires no right to compel payment out of the corpus of the estate in preference to mortgage bondholders, merely because such discretionary power is given to a receiver of the company in the order of appointment as would protect him in case he had actually paid for the supplies.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 272-275, 278; Dec. Dig. § 152.*]

Appeal from the Circuit Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit by George A. Fernald and others against the Chicago, Cincinnati & Louisville Railroad Company, in which James P. Goodrich was appointed receiver of the company, and in which the Old Colony Trust Company of Boston and others were made parties. From decrees denying priority to the Carbon Fuel Company and the Hewitt Manufacturing Company, supply claimants, they appeal. Affirmed.

Thomas B. Paxton, Jr., and Warrington & Seasongood, all of Cincinnati, Ohio, and William Pirtle Herod, of Indianapolis, Ind., for appellants.

Henry C. Starr, of Chicago, Ill., and Albert Baker and F. Winter, both of Indianapolis, Ind., for appellees.

Before KOHLSAAT and MACK, Circuit Judges, and LANDIS, District Judge.

MACK, Circuit Judge. It is unnecessary in these cases to consider the circumstances under which supply claims may be paid out of surplus earnings or because of diverted income. No such question is presented on these records. The important question is whether an in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

debtedness of a railroad to supply claimants, incurred within six months of the appointment of a receiver, shall be paid out of the corpus of the estate in preference to the indebtedness to mortgage bondholders, when there has been no diversion of income and no surplus earnings, either before or after the appointment of the receiver.

[1] The extremely narrow limits within which this may be done are clearly defined in the case of *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117, as interpreted by the latest decision of the Supreme Court in *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717. Not only must the indebtedness be a necessary operating expense in keeping and using the railroad and preserving the property in a fit and safe condition, not only must the supplies have been necessary for the *business* of the road, but the *payment* by the receiver of the indebtedness incurred before his appointment must be necessary to his continuance of the business of the road.

That the claim in the Gregg Case was for railroad ties used and to be used in the place of decayed and rotted ties, while in this case it is for coal and journal bearings, is immaterial. If the difference between the majority and minority of the court in the Gregg Case had been based upon the nature of the supplies, if the majority had rejected the claim because in their judgment railroad ties were to be deemed part of the permanent construction of the road and not in the nature of current supplies necessary for the immediate operation and business of the road, that case could be distinguished; but no such difference existed. The concession of counsel, adopted by the court, obviated the necessity of determining whether a claim for ties is strictly of the same character as a claim for coal.

The majority opinion, in stating that the *payment* for the supplies by the receiver, and not merely the supplies themselves, must be essential to the conduct of the business of the road before the claim therefor can displace a mortgage lien upon the corpus, followed the *Miltenberger* Case. The allowance there made to laborers was based upon the theory, adopted by the court, that the payment of such claims by the receiver is essential to avert the danger of a strike and to secure the continued operation of the road. The payment by the receiver of balances to connecting roads was likewise deemed essential to the further operation of the road because, unless paid, these connecting roads would have refused further to transact business with the receiver.

That a connecting road would now be compelled under the Interstate Commerce Act to transact business with the receiver, is merely an argument that such a claim as was allowed, prior to this act, in the *Miltenberger* Case, should no longer be entitled to such priority. It furnishes no basis, however, for counsel's contention that the rule laid down in that case, so narrowly restricting the priority of supply claims as against the corpus, is now to be disregarded.

[2] The fact that some of the supplies were on hand and unused at the time the receiver was appointed gives the claimants no priority. As the court says in the Gregg Case:

"The material point is not the time when they were used, but the time when they were acquired."

The claim for priority is not based upon any allegation of fraud in the acquisition of the supplies, and no facts have been shown which would have enabled the claimants to reclaim so much of their property as was on hand at the time of the appointment of the receiver, even if the petitions had been based upon a right to rescind the contract.

[3] Moreover, in our judgment, there is no basis for the creation of an estoppel as against any of the parties, either because of certain loans made by the trustee, or because of any possible failure to begin foreclosure proceedings at an earlier date. It is therefore unnecessary to determine whether, under the terms of the mortgage, the trustee might have begun foreclosure proceedings prior to the expiration of six months after default. Even if such a right existed, a mere failure to exercise it, in the absence of fraudulent conduct, will not operate to displace a lien on the corpus of the estate in favor of claimants, who, with actual or constructive notice of the existence of the lien, have furnished supplies after such default.

[4] The Gregg Case, moreover, is binding authority for the proposition that, even if such a discretionary power may have been given to a receiver in the order of appointment as would protect him in case he had actually paid supply claimants, no rights are given to the claimants themselves to demand priority, merely because of such an order.

The decrees of the Circuit Court, approving the special master's report and denying priority to the appellants' claims, will therefore be affirmed.

FOSTER MILBURN CO. v CHINN.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 90.

1. COURTS (§ 37*)—JURISDICTION—OBJECTIONS—WAIVER.

It is a general rule in the federal courts that an objection once taken to the jurisdiction is not waived by defendant's subsequently answering and taking part in the trial.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147-149, 151, 156; Dec. Dig. § 37.*]

2. JUDGMENT (§ 828*)—FOREIGN JUDGMENT—JURISDICTION—ATTACK.

A defendant may attack a judgment of a court of another state for lack of jurisdiction, either appearing on the face of the record or proved by testimony.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.*]

3. JUDGMENT (§ 828*)—FOREIGN JUDGMENT—"FULL FAITH AND CREDIT"—USAGES.

The full faith and credit which federal courts are required by Rev. St. § 905 (U. S. Comp. St. 1901, p. 677), to give to judgments of state courts, means the same faith and credit the judgment would have by law or usage within the state; and hence a usage, established by decision of the highest courts of Kentucky, that an appeal to the state Court of Appeals by a defendant, against whom judgment has been rendered, constitutes a waiver of an objection to the trial court's jurisdiction, based

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on alleged insufficient service of process, must be enforced in an action on the judgment in the federal courts.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.*]

For other definitions, see Words and Phrases, vol. 4, pp. 2998, 2999; vol. 8, p. 7667.

Giving full faith and credit, jurisdiction of federal courts, see note to Bailey v. Mosher, 11 C. C. A. 318.]

4. CONSTITUTIONAL LAW (§ 309*)—DUE PROCESS OF LAW—OBJECTIONS TO JURISDICTION—WAIVER.

The Kentucky rule, that an appeal by a defendant from a judgment against him to the state Court of Appeals operates as a waiver of objections to the jurisdiction of the trial court for insufficient service, is not invalid, as depriving the defendant of his property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

In Error to the District Court of the United States for the Western District of New York; John R. Hazel, Judge.

Action by John P. Chinn against the Foster Milburn Company. Judgment for plaintiff (195 Fed. 158), and defendant brings error. Affirmed.

Rebadow & Ladd, of Buffalo, N. Y. (Adolph Rebadow, of Buffalo, N. Y., of counsel, and F. R. Brown, of Buffalo, N. Y., on the brief), for plaintiff in error.

W. H. Ticknor, of Buffalo, N. Y., for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. John P. Chinn, the defendant in error, a citizen of the state of Kentucky, brought suit in the circuit court of Mercer county, Ky., a court of general jurisdiction, against the plaintiff in error, a corporation of the state of New York, engaged in the business of manufacturing proprietary medicines. The cause of action alleged was the false and fraudulent publication of the plaintiff's photograph, together with a copy of a testimonial not signed by him. Service of the summons was made upon one Monroe, as managing agent. His duty was to inspect throughout the United States the distributors of the defendant's advertising literature, who were employed by independent contractors. The defendant appeared specially to quash the return of service, on the ground that it had no office, officer, or managing agent in the state, and that service upon Monroe did not bind it. This motion having been overruled, the defendant, under protest and still objecting to the jurisdiction, answered and took part in the trial, which resulted in a verdict and judgment for the plaintiff, which was upon defendant's appeal to the Court of Appeals reversed, and the cause sent back for a new trial. On the second trial, the same objections of the defendant being overruled, it again contested at the trial, which resulted again in a judgment for the plaintiff, and the defendant having appealed on the jurisdictional question alone, the same was affirmed by the Court of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeals, on the ground that the defendant by appealing had waived its objection to the jurisdiction.

Thereupon the plaintiff brought this action upon the Kentucky judgment. The defendant set up in its answer the foregoing facts, alleging that the judgment was null and void, because the court had no jurisdiction of it, and that the proceedings were in violation of the Constitution of the United States, in that they sought to deprive the defendant of its property without due process of law. The action was tried by the court, a jury having been duly waived, and judgment was entered in favor of the plaintiff for the amount demanded in the complaint, with costs.

[1-3] It is certainly the general rule of the federal courts that an objection once taken to the jurisdiction is not waived by the defendant's subsequently answering and taking part in the trial. *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237. It is also true that the defendant may attack a judgment of the court of another state for lack of jurisdiction, either appearing on the face of the record or proved by testimony. *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897. It is, however, the law of the state of Kentucky that though the defendant appear specially to object to the jurisdiction of the court, if he thereafter appeal to a higher court from any judgment recovered against him in the action, he ipso facto waives his objection and transforms his special into a general appearance. It is not necessary for us to determine whether the service of process upon Monroe, as managing agent, was good or bad. We are obliged under section 905, U. S. Rev. St. (U. S. Comp. St. 1901, p. 677), to give full faith and credit to the judgment; that is to say, the same faith and credit it would have "by law or usage" in the state of Kentucky. So doing, we must treat the defendant as having appeared generally. The trial judge was right in holding that a usage established by the decision of the highest courts of Kentucky is to be given the same effect as if established by statute. In the latter case the Supreme Court has held that such a rule is binding in a suit upon a judgment in the courts of another state. *York v. Texas*, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604.

[4] The defendant, after its motion to quash the service of process was denied, might have treated it as bad and not defended the action at all; but, having done so, it cannot be said to be deprived of its property without due process of law because held bound by the procedure in the action as fixed by the usage of the state of Kentucky. Mr. Justice Brewer said in *York v. Texas*, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604:

"The fourteenth amendment is relied upon as invalidating such legislation. That forbids a state to 'deprive any person of life, liberty or property, without due process of law.' And the proposition is that the denial of a right to be heard before judgment simply as to the sufficiency of the service operates to deprive the defendant of liberty or property. But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is only when process is issued thereon, or the judgment is sought to be enforced, that liberty or property is in present danger. If at that time of immediate attack protection is afforded, the substantial guaranty of the

amendment is preserved, and there is no just cause of complaint. The state has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. *Antoni v. Greenhow*, 107 U. S. 769 [2 Sup. Ct. 91, 27 L. Ed. 468]. It certainly is more convenient that a defendant be permitted to object to the service, and raise the question of jurisdiction, in the first instance, in the court in which suit is pending. But mere convenience is not substance of right. If the defendant had taken no notice of this suit, and judgment had been formally entered upon such insufficient service, and under process thereon his property, real or personal, had been seized or threatened with seizure, he could by original action have enjoined the process and protected the possession of his property. If the judgment had been pleaded as defensive to any action brought by him, he would have been free to deny its validity. There is nothing in the opinion of the Supreme Court, or in any of the statutes of the state, of which we have been advised, gainsaying this right. Can it be held, therefore, that legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property, and his rights against any attempt to enforce a judgment rendered without due service of process, and therefore void, deprives him of liberty or property, within the prohibition of the fourteenth amendment? We think not."

Judgment affirmed.

OLD DOMINION COPPER MINING & SMELTING CO. v. LEWIS-OHN et al.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 101.

1. COURTS (§ 96*)—FEDERAL COURTS—RULES OF DECISION.

Inferior federal courts are bound to follow the law as laid down by the Supreme Court of the United States, though it may be in conflict with the rules of the Supreme Court of the state on the same facts.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 325, 327, 328, 334; Dec. Dig. § 96.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

2. JUDGMENT (§ 572*)—DECISION ON DEMURRER—RES JUDICATA.

Where a demurrer was sustained on the merits of an amended bill, in which complainants had an opportunity of presenting all the facts with reference to the controversy, a judgment entered on such demurrer was res judicata, precluding complainants from thereafter filing a new bill against the same parties, with reference to the same subject-matter, but based on a different statement of facts, on the theory that the facts stated in the previous bill were untrue.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1041, 1047-1049; Dec. Dig. § 572.*]

Appeal from the District Court of the United States for the Southern District of New York; C. M. Hough, Judge.

Bill in equity by the Old Dominion Copper Mining & Smelting Company against Frederick Lewisohn and others. From a decree dismissing the bill (195 Fed. 637), complainant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Brandeis, Dunbar & Nutter, of Boston, Mass., and Rounds, Schurman & Dwight, of New York City, for appellant.

Hoadly, Lauterbach & Johnson, of New York City (Edward Lauterbach and Eugene Treadwell, both of New York City, of counsel), for respondents.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The facts bearing upon every phase of this controversy have been stated so often, not only in the federal courts, but also in the courts of Massachusetts that no useful purpose will be subserved by restating them. See 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025; 225 U. S. 111, 32 Sup. Ct. 641, 56 L. Ed. 1009; 148 Fed. 1020, 79 C. C. A. 534 (C. C.) 195 Fed. 637; 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314. It is, of course, unfortunate that the entire burden of the alleged fraudulent transactions complained of must fall upon Bigelow alone, but that result is due to the fact that the Supreme Judicial Court of Massachusetts is not in accord upon the law with this court and the Supreme Court of the United States.

[1] Manifestly it is our duty to follow the law of the Supreme Court unless the present record contains facts which clearly differentiate the present case from the case on demurrer. That every opportunity was given to state the facts in the 30,000 share suit cannot be denied. With full knowledge of the infirmities of the bill, after it had been held insufficient on demurrer, it was amended in an attempt to meet the criticism of the court. Every fact which could be relied on to remedy the fatal defects pointed out was stated by the pleader, and the facts were as accessible then as they were when the present bill was drawn. The most favorable statement of the cause of action consistent with the facts was presented by the amended bill. The same result followed, the demurrer to the amended bill was sustained and the ruling was affirmed by this court and the Supreme Court of the United States. We are unable to understand how the differences in the facts, pointed out at the argument, between this case and the case on demurrer change the legal aspect of the controversy. We think that the differences in the facts are inconsequential and that the same result must follow in either case. The opinion of the Circuit Court sufficiently states our conclusions in this regard.

[2] But the decree in the demurrer suit is *res judicata* of the present controversy. The parties are the same, the subject-matter is the same and the questions are the same. Having stated the facts with great care and deliberation and having amended the bill to meet the criticism of the defendants, the appellant cannot now be permitted to assert that these facts are untrue and assert a new cause of action based upon different facts. The bill stated the facts as the appellant understood them, the defendant admitted the statement to be correct; on this statement the court rendered its decree and on these facts this court and the Supreme Court rendered their judgments. Even if

there were important differences on the facts, it is too late to assert them now.

The facts regarding the July meeting, its validity and finality, are admitted by the demurrer. The appellant is not now permitted to assert that these statements are untrue and that the transaction was not consummated until after the public, with no knowledge of the transaction, had subscribed for 20,000 shares of the stock.

The decree is affirmed with costs.

NOYES, Circuit Judge (concurring in result). I think that the Supreme Court has never passed upon the real question presented in this case. In the other case the averments were to the effect that the wrongful transaction had been consummated in July, 1895, before any stock had been offered to the public. Upon those averments the conclusion necessarily followed that the corporation had no ground of complaint against the promoters because the same parties were on both sides of the bargain; no one was injured. Men may cheat themselves in morals but not in law. But in the present case the facts are different. It now appears that although a contract had been entered into in July, 1895, the transaction was not then consummated; that the stock out of which the promoters obtained their profits was not issued until September, 1895; that the deeds conveying the property purchased by the stock were not delivered until December, 1895, and that before either of such dates stock had been offered to the public and had been subscribed and paid for.

Clearly the status of the corporation in respect of the presence of innocent interests must be determined as of the time of the consummation of the transaction. Until the promoters took something out of the corporation and thereby made profits there were none to be accounted for. Until the stock was issued to the promoters in September the corporation had no cause of action against them. The July agreement remained executory. It might never have been carried out. When it was so carried out that the corporation had ground of complaint the interests of third persons had become involved.

This is not a matter of technicalities. Much depends upon the accomplished fact. Subscribers for stock in a corporation may have no right to object to transactions carried out before they come in, while they may well call upon the directors to refuse to perform wrongful executory undertakings. In my opinion the crucial question is not whether innocent interests were involved when the agreement was entered into, but whether they were involved when it was carried out; when the wrong was done; when the cause of action accrued.

For these reasons, briefly outlined, I think that the present case is materially different from the other case and that if there were nothing else to prevent it would be our duty to consider it upon the merits. I cannot regard the decision of the Supreme Court as denying the right of the complainant to recover provided there was a wrong done to any one.

There is, however, something to prevent us from considering the case. I can see no other course than to agree that the defense of

former judgment is established notwithstanding that the real facts are so different from those appearing in the other suit. That suit was based upon a part of the same transaction. The ground of liability was the same breach of fiduciary relation. The time of the consummation of the transaction was as directly involved there as here. That time was established upon the complainant's own averments to be July, 1895, and, consequently, before there were any innocent interests. It is true that it was established upon demurrer but the decision went to the merits. And being so established the complainant cannot be heard to aver that the facts are different now. However unfortunate it may be that one promoter should escape a decree upon the real facts while his associate bears the burden of a heavy judgment, I am unable to see how the result can be avoided without disregarding established principles of the law of estoppel and of *res judicata*.

NORTH ATLANTIC DREDGING CO. v. McALLISTER STEAMBOAT CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 105.

1. SHIPPING (§ 40*)—CHARTER OF DREDGE—CONSTRUCTION.

A charter by which respondent hired a dredge from libelant for work in connection with the floating of a sunken vessel, and agreed to pay the crew and for all supplies from the time the vessel left the place where she was then employed until she was returned there, and to furnish all towage, construed, and *held* to entitle the owner to hire during all of such time, and not during the time only when she was at work on the wreck.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 40.*]

2. SHIPPING (§ 50*)—CHARTER OF DREDGE—CONSTRUCTION.

Where respondent employed a tug to tow the dredge, as required by such charter, but she remained in charge of libelant's master and crew, respondent was not liable as bailee for an injury to the dredge while being towed, but only on proof that the injury occurred through the fault of the towing tug.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 150-155; Dec. Dig. § 50.*]

Appeal from the District Court of the United States for the Southern District of New York; C. M. Hough, Judge.

Suit in admiralty by the North Atlantic Dredging Company against the McAllister Steamboat Company. Decree for libelant, and respondent appeals. Modified and affirmed.

Foley & Martin, of New York City, for appellant.

Kelley & Connelly, of New York City (M. E. Kelley and C. S. Lorentzen, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The libellant and respondent entered into the following contract:

"McAllister Steamboat Company,

"General Offices, 109-111 Broad Street, New York.

"June 22d, 1911.

"We hereby agree to rent to you our pump dredge Irving T., now located at Port Washington, L. I., for work in connection with the floating of the steamer Penobscot on the Hudson river, New York state, on the following condition:

"(1) Subject to a release from the Port Washington Estates of 30 Church St., New York City of the North Atlantic Dredging Company's contract without prejudice to the North Atlantic Dredging Company's contract with the Port Washington Estates.

"(2) The rate of hire per day of 24 hours is to be two hundred and twenty (\$220.00) dollars.

"(3) That the North Atlantic Dredging Company shall furnish the dredge Irving T. and a crew of eighteen men and pay and board same during the period of hire.

"(4) That all towing and individual expenses shall be without costs to the North Atlantic Dredging Company, including to and from where dredges is now working.

"(5) That all fresh water and coal required from the time the dredge leaves Port Washington until it is returned to Port Washington shall be furnished without cost to the North Atlantic Dredging Company.

"(6) That a payment of one thousand (\$1000.00) dollars shall be made to the North Atlantic Dredging Company upon the dredge's arrival at the site of the work in the Hudson river.

"That should the rental of the dredge at the price of two hundred and twenty (\$220.00) dollars a day be less upon its delivery at Port Washington than one thousand (\$1,000.00) dollars for the time of said rental the North Atlantic Dredging Company shall make rebate to McAllister Steamboat Company.

"Should the time of hire consume more than one thousand (\$1000.00) dollars at the above rate per day the McAllister Steamboat Company shall pay to the North Atlantic Dredging Company upon the dredge's return to Port Washington any and all moneys accruing above the one thousand (\$1,000.00) dollars aforesaid.

North Atlantic Dredging Co.,

"Thos. O'Connor, President.

"The McAllister S. B. Co.,

"Per Jas. P. McAllister, Treas."

The Irving T., having obtained a temporary release from the contract on which she was engaged at Port Washington, started June 22d, 7:30 p. m., to get ready to go to the Penobscot, and left the next morning in tow of the tug J. P. McAllister, belonging to another company, but sent by the respondent. June 25th, at 2 a. m., she arrived at the Penobscot, left there by respondent's orders after working three days, in tow of the same tug, June 28th at 8:30, arrived at Port Washington July 1st, at 2:30 a. m., and resumed work on her interrupted contract at 12:30 p. m.

[1] The respondent contended that the agreement was one for services, and that hire was payable only while the dredge was working; but the District Judge rightly held that the agreement was a charter under which the libellant was entitled to charter hire for every day from the time the dredge got ready to leave Port Washington until she resumed her work there again.

The next question is whether the dredge was fit for the work for which she was chartered, and whether the libellant either im-

pliedly or expressly undertook that she would get the mud from under the bottom of the Penobscot, so as to let the steamer slide from the bank she was on into deep water. The District Judge, although inclined to think that testimony as to negotiations preceding the signing of the charter was not admissible, still did admit it, and has found upon it, as well as upon the document, that the president of the respondent chartered the dredge, relying solely upon his own judgment as to her fitness; there being no express representation or warranty of it made by the libelant nor any agreement to do a specific thing, from which such a warranty could be implied. We agree in this finding.

The parties, "for the purpose of fixing the amount of damages in the final decree" and to avoid a reference, stipulated that the balance of charter hire due was \$741.68. The libelant contends that, an appeal in admiralty being in this circuit a new trial (*Munson S. S. Co. v. Miramar S. S. Co.*, 167 Fed. 960, 93 C. C. A. 360), it may recover more, because the sum stipulated for does not cover the hire day by day from the time the dredge got ready to leave Port Washington until she resumed work there. This might be so, but for the libelant's stipulation, in the face of which it cannot recover more than the amount it has agreed upon as the damage.

The libelant also claims for damages to its pontoons while working at the steamer, which the District Judge rightly disallowed as not being caused by the charterer.

[2] A further claim for \$118.26 damage to the dredge's hawsers by the wheel of the tug McAllister while towing he did allow, in the absence of any proof as to how the damage occurred. This was on the ground that the respondent was bailee of the dredge, and therefore the burden of proof lay upon it to show that any damage she or her equipment sustained while in its possession was not due to lack of care or skill upon its part, or upon that of its agents. He cited in support of this conclusion *Bouker v. Smith* (D. C.) 40 Fed. 839; *Id.*, 49 Fed. 954, 1 C. C. A. 481. That, however, was a clear case of the bailment of two scows to a tug, which were injured while in the exclusive possession and control of the tug. So in the case of *W. H. Beard Dredging Co. v. Hughes* (D. C.) 113 Fed. 680, the charterer undertook to do the towing, and in the case of *Swenson v. Snare & Triest Co.*, 160 Fed. 459, 87 C. C. A. 443, the dredge was in the exclusive possession of the respondent. The charter party in this case left the dredge in the possession and control of its owner and was in no sense a demise. *Clyde Commercial S. S. Co. v. West India S. S. Co.*, 169 Fed. 275, 94 C. C. A. 551. As the respondent did provide the tug to do the towing, it would be responsible for any negligence on the tug's part causing damage. There being, however, no proof on the subject at all, this claim should have been disallowed.

The decree must be modified, by striking it out, and, as so modified, is affirmed, without costs of this court.

CINCINNATI & C. TRACTION CO. et al. v. AMERICAN BRIDGE CO.
OF NEW YORK.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1913.)

Nos. 2,246, 2,308.

1. DAMAGES (§ 122*)—BREACH OF CONTRACT—BRIDGE CONSTRUCTION—DELAY.

Where unexcused delay in completing a contract for the construction of a railroad bridge delayed the beginning of operation of a portion of the line, the additional gross operating receipts after the bridge was finished and cars were operated over the succeeding section, as compared with the gross receipts during the preceding like period of partial operation, formed no proper measure of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 309-319; Dec. Dig. § 122.*]

2. EVIDENCE (§ 534*)—EXPERT TESTIMONY—DAMAGES—CONSTRUCTION CONTRACT—DELAY.

On the issue of loss sustained by delay in constructing a railroad bridge, expert evidence as to the value to the railroad company of the lost use of the bridge during the delay, which was nothing more than an estimate of additional gross earnings which the company would probably have received, and which did not undertake to estimate additional operating expenses, was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2342; Dec. Dig. § 534.*]

3. DAMAGES (§ 68*)—CONTRACT—BRIDGE CONSTRUCTION—DELAY—INTEREST.

Where a railroad company was wholly deprived of the use of its property along a section of its line by the delay of a bridge company in completing a bridge, the railroad company, in the absence of evidence indicating a better measure of damages, would be permitted to recover interest at the legal rate on the cost of the part of the road which it could not use for the period of the delay chargeable to the bridge company.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 141-143; Dec. Dig. § 68.*]

4. EQUITY (§ 41*)—RETENTION OF JURISDICTION—LEGAL RELIEF.

Where, at the time suit was brought by a railroad bridge contractor to enforce a lien for the contract price of the bridge under an Ohio statute, it had not been decided that the act was unconstitutional in so far as it related to a claim of lien by a contractor against the owner, the bill would not be dismissed, on the statute subsequently being declared unconstitutional; but equity would retain jurisdiction and enter a money judgment, it not appearing but that the bill was originally filed in good faith, and not as a subterfuge to give jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 116-118; Dec. Dig. § 41.*]

Appeal and Cross-Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio; J. E. Sater, Judge.

Suit by the American Bridge Company of New York against the Cincinnati & Columbus Traction Company and others. Decree for plaintiff for less than the relief demanded, and both parties appeal. Modified and affirmed, on appeal of complainant, on condition, and defendants' appeal dismissed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

C. B. Matthews, of Cincinnati, Ohio, for appellants.

J. S. Graydon, Lawrence Maxwell, and Joseph L. Lackner, all of Cincinnati, Ohio, for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and EVANS, District Judge.

PER CURIAM. The Bridge Company sought to enforce a lien for the contract price of a bridge erected by it at Milford, in connection with the Traction Company's construction of its line from Hillsboro, through Milford, to Norwood. The Traction Company claimed recoupment for delay. The trial court found that there was a delay of 60 days more than could be excused; that the Traction Company was not thereby delayed in opening and operating its road from Hillsboro to Milford, but suffered damage in such operation because it could not run through to Norwood; and that the opening and use of the track from Milford to Norwood were for the 60-day period wholly prevented.

[1] We adopt these findings, and we agree with the trial court that the additional gross operating receipts after the bridge was finished, and cars ran through to Norwood, as compared with the gross receipts during the preceding period of partial operation, formed no proper measure of damages.

[2] We also agree that the expert evidence by which the Traction Company endeavored to prove the value to it of the lost use of the bridge turned out to be wholly incompetent. The witnesses were really only estimating additional gross receipts, and did not undertake to estimate additional operating expenses.

[3] However, such failure to show the value of this use does not leave the case entirely without measure of damages. The Traction Company proved the cost of its road, and claimed interest thereon during the period of delay. As to the power house and the Hillsboro-Milford section, which were in use, there is no room to allow interest. The Traction Company was not wholly deprived of the use of this property, but only partly so deprived, and the extent of this deprivation cannot be computed. As to the Milford-Norwood section, the Bridge Company's delay did have the effect of wholly withholding from the Traction Company all opportunity to use this property—i. e., all opportunity to earn anything on its capital there invested.

Under such circumstances, for want of a better measure, and lacking proof indicating that interest would not have been earned, the Traction Company is entitled to interest at the legal rate on the cost of this part of the road for the period of delay chargeable to the Bridge Company. *American Bridge Co. v. Camden, etc., Co.*, 135 Fed. 323, 68 C. C. A. 131.

From the present record this interest cannot be precisely stated. Ordinarily, we would remand for an accounting, and in case of such remand the Traction Company should have a chance to perfect its proof, if it can, regarding the value of the use of the bridge; but this litigation should not be longer continued, and to that end

we have endeavored to approximate the proper interest allowance. Taking into account the claims that the road west of Milford cost less than the average sum per mile, that the Traction Company's delay in completing some parts and in ballasting contributed to the final delay, and that the interest on part of the cost did not begin until the latter part of the period, we conclude that an allowance of \$2,000 is the maximum supported by this record.

The Traction Company being at fault for leaving its proofs unexact, the Bridge Company may avoid a remand by filing in this court its consent to an abatement of \$2,000, and interest at 6 per cent. from April 7, 1911, the date of the judgment below.

[4] There is another question: In its opinion the trial court held that the Ohio lien law was unconstitutional, following *Shaw v. Cleveland, etc., Co.* (C. C. A. 6) 173 Fed. 746, 97 C. C. C. 520, and proceeded to direct a money judgment for the amount due. The Traction Company then moved to dismiss, on the ground that the remedy at law was adequate, and that a court of equity could not render a mere money judgment. It now relies on this position. The Bridge Company has taken a cross-appeal, insisting upon its right to a lien.

The Traction Company had not demurred, but had filed its answer and cross-bill, from which it appeared that the real controversy involved much of the character of an accounting. Long before this litigation the Supreme Court of Ohio had held unconstitutional the then existing lien law, upon the same reasoning which led to a similar holding regarding the present law in *Shaw v. Cleveland, etc., Co.*, *supra*; but thereafter the Legislature had passed the present law, and when the Bridge Company filed its bill (in 1906) there had been no decision on this law. Further, both the earlier Ohio case and the *Shaw-Cleveland Case* involved a lien claimed by a subcontractor or materialman, and the lien claimed was held inconsistent with the right of free contract between owner and contractor. The present claim of lien is by contractor against owner, and the precise question has not been decided. Under these circumstances, the court had jurisdiction to enter a money judgment for the amount due, both because the lack of power was not so clear as to excuse not raising the question at the first opportunity (*Toledo Computing Scale Co. v. Computing Scale Co.*, 142 Fed. 919, 923, 74 C. C. A. 89, and cases cited), and because there is no reason to doubt that when the bill was filed the equitable right to enforce a lien was claimed in good faith, and not as a subterfuge to give jurisdiction (*Siler v. Louisville & Nashville R. R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; *Mich. Cent. R. R. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. —, decided by Supreme Court of the United States, Jan. 20, 1913, at first paragraph of opinion).

The Traction Company having given a supersedeas bond, we understand counsel for the Bridge Company to say that they do not insist upon their lien, so we think it unnecessary to pass upon the question raised by the cross-appeal. If we are wrong in this, further consideration will be given upon counsel's request.

In the original case, if the Bridge Company files the remittitur above indicated, the decree below will be accordingly modified, and, as modified, affirmed. In default of filing such remittitur within 30 days from the filing of this opinion, the decree below will be reversed. In either event, the Traction Company will recover the costs of this court. In the cross-appeal, the same will be dismissed, without costs to either party. No costs will be awarded for or against the Trust Company, mortgagee.

TACOMA RY. & POWER CO. v. ERPELDING.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,152.

1. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in an action for injuries to a passenger, there was no evidence of explanation on the part of the surgeon that attended plaintiff and operated on him after the accident, a request to charge that if the operation was performed in a negligent and unskillful manner, and by reason thereof additional injuries were inflicted, plaintiff could not recover damages for the injuries inflicted by the unskillful operation, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

2. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS TO CHARGE—INSTRUCTIONS GIVEN.

It is not error to refuse requests to charge, the substance of which has been given in other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Frank H. Rudkin, Judge.

Action by William Erpelding against the Tacoma Railway & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John A. Shackleford and F. D. Oakley, both of Tacoma, Wash., for plaintiff in error.

B. F. Jacobs, of Tacoma, Wash. (J. F. Fitch, of Tacoma, Wash., of counsel), for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The defendant in error brought this action in the court below to recover damages for personal injuries sustained by him while a passenger on one of the street cars of the plaintiff in error, in a collision with another car of the same company. It was admitted that such collision occurred by reason of the negligence of the defendant company. The plaintiff was by occupation a mortar mixer and hod carrier, and was at the time 53 years of age. While

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his injuries appeared to the physician first summoned by him to be of such a character that he applied simple remedies, the plaintiff's sufferings, according to the evidence on his behalf, continued so great that after several months, and a change of physicians, his injuries were discovered to be far more serious than were at first supposed, and finally resulted in a serious and very unusual operation, by which the surgeon performing it—

"cut out an inch and one-half of the sixth rib near the spine, and then cut out the nerve, so as to kill the nerve and stop the pain, and also cut the fifth nerve to deaden the neuritis in it."

The medical witnesses for the respective parties differed in their opinions as to the correctness of such treatment—some of those on the part of the defendant to the action testifying that they never heard of such an operation, and also testifying that they did not consider such treatment the proper course, while one of such witnesses on the plaintiff's part testified that he knew of but one like operation to have been previously performed. Both of the medical witnesses on the plaintiff's behalf testified in effect that it was the only thing to be done in view of the plaintiff's then condition, and the evidence on the part of the plaintiff certainly tended to show that the operation did greatly relieve the intense pain that the plaintiff had theretofore suffered from the injury received by him.

There was no evidence tending to show any carelessness, negligence, or unskillfulness in the performance of the operation itself. The trial resulted in a verdict of the jury in the plaintiff's favor for \$4,500.

[1] One of the assignments of error made on behalf of the plaintiff in error (defendant below) is that the trial court erred in refusing to instruct the jury that if they believed from the evidence—

"that the operation performed upon plaintiff was performed by his physician in a careless, negligent, and unskillful manner, by reason of which additional injuries were inflicted upon the plaintiff, then plaintiff cannot recover damages for such injuries inflicted upon him by reason of such unskillful operation."

A conclusive answer to this assignment of error is that there was no such evidence in the case.

[2] Another assignment is the refusal of the court to instruct the jury that it was its duty—

"to determine to what extent plaintiff's injuries are due to the negligence of the defendant, and to what extent, if any, they are due to the unskillful treatment and act of his physicians. The plaintiff can only recover such damages as naturally and proximately resulted from the defendant's negligence, aside from any aggravation of damages caused by the negligence of the attending physicians."

The answer to this assignment is that the court below did give, in substance, the requested instruction in this portion of its charge:

"I further charge you that if you believe from the evidence in this case that it was not reasonably necessary to perform an operation upon the plaintiff to cure any injuries received by him through the negligence of the defendant at the time of the accident complained of, and that if you believe that an operation was performed which did in fact result in further and

additional injuries to plaintiff, then defendant cannot be charged with the additional injuries so inflicted, or for loss of time, pain, and suffering, which were the result of said operation, or for the expense of this operation."

The only remaining assignment of error relates to that portion of the charge of the trial judge in which he told the jury that they were only concerned with the measure of the plaintiff's compensation, and on that question that they should—

"allow him fair compensation for any pain and suffering he has endured in the past as the result of this accident. You will compensate him for any pain and suffering he will endure in the future as a result of this accident, and you will compensate him for any loss he has sustained through the impairment of his earning capacity in the past as a result of the accident, and also for any loss or impairment of his earning capacity in the future as a result of this accident."

The contention of the plaintiff in error is that the jury should have been cautioned to award damages only for pain that the plaintiff was "reasonably certain" to endure in the future, and to compensate him only for any loss or impairment of his earning capacity in the future "reasonably certain" to result from the accident. A conclusive answer to this contention is that the court did that expressly in that portion of its charge in which the judge said:

"I further charge you that the burden is on the plaintiff to show by a fair preponderance of the evidence that the injuries he complains of have resulted from the accident, and not merely that they may have so resulted. You are not justified in awarding him for purely speculative injuries, that is to say, for results which may or may not happen, and you will allow the plaintiff nothing for future pain and suffering, unless you are satisfied by a fair preponderance of the evidence that future pain and suffering are reasonably certain to result from the injuries."

We see no merit in the appeal, and the judgment is accordingly affirmed.

THE CETUS.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 94.

COLLISION (§ 95*)—STEAM VESSELS MEETING—FAULT.

A barge on the starboard side of the tug Arnott, passing up the Hudson river on a clear evening from 300 to 500 feet off the New York piers, with another tug and tow between, came into collision with the steamer Cetus coming down. When the vessels were a quarter of a mile apart, practically head on, one of the two, which the evidence tended to show was the Cetus, gave a signal for passing starboard to starboard, which was assented to. *Held*, that the Cetus was in fault for giving such signal, a port and port passing being required under the circumstances: that the tug was not in fault for agreeing to such signal, with the other vessel so close; but that a finding by the trial court, which heard the testimony, that she was in fault for not sooner changing her course in compliance with the agreement, would not be disturbed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*

Collision, signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Southern District of New York; Van Vechten Veeder, Judge.

Suit in admiralty for collision by Ferdinand Gildersleeve, Oliver Gildersleeve, and Alfred Gildersleeve, copartners as S. Gildersleeve & Sons, owners of the barge Elheurah, against the steamboat Cetus; the Iron Steamboat Company, claimant. Decree for claimant, and libelants appeal. Reversed, with directions for decree for half damages.

A decree of the District Court for the Southern District of New York dismissed the libel filed by the owners of the barge Elheurah for damages alleged to have been caused by the negligence of the steamboat Cetus in colliding with the barge in the Hudson river at about 8 o'clock on the evening of August 31, 1908. The testimony was not taken until January, 1912. The collision occurred about 500 feet off the New York shore and in the vicinity of the New Jersey Central Ferry slip.

Samuel Park and Carpenter & Park, all of New York City, for appellants.

Conrad Saxe Keyes and Wingate & Cullen, all of New York City, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The collision occurred in the Hudson river about 8 o'clock on a bright, clear August night, the tide being the last of the ebb. There was little or no wind and nothing in the elements to make navigation hazardous. It cannot be said that a collision occurring, in such circumstances, between vessels visible to each other a mile and a half distant, is either inevitable or inscrutable. Either one vessel is at fault or both vessels are at fault. The Arnott came around the Battery from the East River, having in tow a barge on each side. The Elheurah was a scow 120 feet in length and 27 feet beam, and was without a rudder. She was on the tug's starboard side. The barge Keeler was on her port side. The regulation lights were displayed on tug and tow. Their speed was about 4 miles an hour. The Cetus is an iron, side-wheel passenger steamer plying in summer between New York and Coney Island. She is 216 feet long and 50 feet beam and on the evening in question was making from 12 to 15 miles per hour. The Cetus was bound for Pier 1, North River, and the Arnott for Weehawken, N. J.

It is impossible to tell the exact distance the vessels were from the New York piers but it was probably somewhere between 300 and 500 feet. Coming up the river nearly abreast of the Arnott was a Lehigh Valley tug and tow close in to the pier line and between the Arnott and the docks. The master of the Cetus testified that as he approached the Arnott there was only about "20 or 30 feet" between her tow and the Lehigh Valley tug. The testimony is as follows:

"Q. I mean the opening between the two you had to go between? A. That is what I mean, that was the reason why I stopped, because I saw there wasn't room."

When the vessels first saw each other they were approaching upon opposite courses, both the red and green lights of each were visible from the other; they were end on or nearly so. The rule in such cases is clear that the vessels should pass port to port and must indicate their intention of doing so by exchanging one-blast signals. Had they followed the rule of the road and turned to the right, there would have been no collision. When, therefore, we have discovered who inaugurated a departure from this obviously safe course, we will have gone far in finding who was primarily responsible for the collision. It is impossible to reconcile the testimony on this question as the crew of each boat insist that the other gave the first two-blast signal. We must, therefore, have resort to the presumptions drawn from undisputed facts and endeavor to ascertain which vessel was to be benefited by departing from the usual course.

It is not pretended that the *Arnott* had anything to gain by the change. She was proceeding up the river on a course a little nearer the piers than the *Cetus* and only a slight starboarding of her helm was necessary to enable the vessels to pass port to port in safety. What advantage could she gain by turning towards the middle of the river, when she was bound for Weehawken and could have passed port to port without deviating perceptibly from her course?

The *Cetus*, on the other hand, had everything to gain from the maneuver; unless she passed the *Arnott* on her starboard side she could not make Pier 1, for which she was destined. Her master testifies:

"It was ebb tide and we had to pull straight for the tide, to make the pier.
 * * * Q. In order to make your landing at Pier 1 you would have had to go on the Manhattan side of the *Arnott* and turn out? A. We would have had to go inside. Q. And you had to pass her on her starboard side in order to get in to your pier? A. Yes, sir. Q. You couldn't pass her on your port side? A. Not and make the landing."

We have, then, a strong motive on the part of the *Cetus* for giving the two-blast signal, and no reason at all for doing so on the part of the *Arnott*. In such circumstances we cannot resist the conclusion that the *Cetus* initiated the maneuver which caused the disaster.

But it is said if it were a fault for the *Cetus* to blow two blasts, it was equally a fault of the *Arnott* to assent by blowing two in return. We cannot give an unqualified assent to this proposition. It must be remembered that the vessels were very close, probably about a quarter of a mile, and were approaching each other at the rate of about 18 miles per hour. The *Arnott* was incumbered by an unwieldy tow; she was making only about 4 miles an hour and could not maneuver quickly. The *Cetus* was a fast passenger steamer, easily and quickly handled. The dilemma which confronted the *Arnott* was one that had to be promptly met; there was no time for deliberation. Should she agree to the proposal of the *Cetus*, or take the responsibility of refusing to do so by giving the succession of rapid blasts provided for by rule 3, thus causing delay and the necessity for a new convention? It seems to us that the master of the tug had a right to rely upon the ability of the *Cetus* to carry out the proposed program safely. She knew of the position of the Lehigh Valley tug and unless she could pass between her and the *Arnott* or between her and the

piers, she should not have given the two-blast signal. The Arnott had a right to assume that the Cetus understood the situation and could perform the maneuver successfully. We think the Arnott cannot be charged with negligence in answering the two-blast signal.

Even after the danger was imminent, it might have been averted if the Cetus had immediately stopped and reversed, instead of porting her helm.

The District Judge finds that the Arnott was in fault for not starboarding her helm in accordance with the agreement. He says:

"The Arnott, on the other hand, does not appear to have done so until it was too late to avoid collision, although she had ample time and space to do so."

There is testimony to support this finding and we are not disposed to disturb it, although the master of the Arnott testified:

"Q. Did you keep your course up the river? A. Yes, until she blew us two whistles. Q. Then what did you do? A. I answered the two whistles and put our wheel hard-a-starboard and also told the captain of the barge Keeler to put his wheel hard-a-starboard."

However, the District Judge had the benefit of seeing and hearing a majority of the witnesses and his finding upon disputed facts should be accepted. Owing, undoubtedly, to the fact that the testimony was taken over three years from the date of the collision, it has been almost impossible to arrive at a definite conclusion as to the sequence of events and the location of the vessels, and we have therefore been compelled to rely upon presumptions drawn from admitted facts.

The decree is reversed with costs of this court to the appellants and the cause is remanded to the District Court with instructions to enter a decree in favor of the libelants for half the damages and costs.

In re AUERBACH.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 61.

BANKRUPTCY (§ 116*)—ADVERSE CLAIM TO PROPERTY—PROCEEDING BY TRUSTEE FOR SUMMARY ORDER—PROCEDURE.

An order by a District Judge, referring a petition by a trustee for a summary order requiring a third person to turn over money as a part of the bankrupt's estate to a special master, to take testimony and report his opinion, was not a final determination that the claim of such third person was merely colorable, which deprived the court of jurisdiction to subsequently direct the litigation of the matter in a plenary action, as recommended by the master.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 116.*]

Appeal from and Petition for Revision of Proceedings in District Court of the United States for the Southern District of New York; George C. Holt, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

In the matter of Sidney Auerbach, bankrupt. Morris B. Arnold, trustee, appeals to review an order of the District Court. Affirmed.

Rosenberg & Levis, of New York City (J. W. Rosenberg and Cornelius W. Wickersham, of New York City, of counsel), for petitioner. W. H. Chorosh, of New York City, for respondent.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. Petition in bankruptcy was filed in September, 1910. About a month prior thereto the bankrupt paid to Schwartz \$1,000. The latter testifies that this was in payment of a loan he had made to the bankrupt some time before. On December 2, 1910, Schwartz deposited \$500 in the savings bank, and made subsequent deposits of different sums till the total, with interest, amounted on September 7, 1911, to \$1,858.

On September 30, 1911, the savings bank notified Schwartz that the trustee in bankruptcy had made a claim on the money he had on deposit. Thereupon October 5, 1911, he brought an action against the bank in the state Supreme Court to recover the amount of his deposit. In due course the state court on November 2, 1911, directed that the trustee be brought in as a party defendant, which was done. On October 20, 1911, the trustee filed petition for a summary order directing Schwartz and the bank to turn the \$1,000 over to him as being part of the bankrupt's estate. On November 2d the District Court entered an order referring the issues raised by petition and answer to a special master, to take testimony and report whether "the trustee is entitled to receive the said \$1,000, as prayed in the petition." It also enjoined Schwartz and the bank from taking any further steps in the interpleader action. The special master took testimony. The affidavit and answer of Schwartz was produced and referred to, without objection by trustee's counsel. Schwartz was called as a witness for the trustee, and was examined and cross-examined.

The special master reported February 26, 1912, that in his opinion the application to compel Schwartz summarily to turn over the \$1,000 should be denied, but that an injunction should be continued against him and the bank to await the result of the state court action. The matter then came before the District Judge, who filed an order, March 22, 1912, allowing Schwartz to prosecute his state court action, and enjoining him and the bank from disposing of the \$1,000 pending its determination.

It may be noted that the special master did not pass upon the precise question submitted to him. He did not decide whether the \$1,000 belonged to Auerbach or to Schwartz. The District Judge, however, was under no obligation to send the matter back to the special master. He had all the testimony either side cared to produce, and could, if he chose, determine whether or not upon the record, the claim of adverse title was merely colorable. If it were not merely colorable, the controversy was one to be decided, not summarily, but in a plenary action.

It was suggested on the argument that the first order of the District Judge decided that the claim was merely colorable, and that it should

be disposed of summarily, and that, therefore, the judge had no power subsequently to overrule his first order. We do not thus construe such order. It was in no sense a final one. It merely directed the special master to take the testimony and report his opinion. The judge may then have been of the impression that the claim was colorable, but examination of the testimony subsequently taken may have changed that impression. Why he lost the power to make such an order as the facts called for, because he had made a prior order directing the facts to be ascertained, we fail to see.

It is not necessary to discuss the merits. The special master found discrepancies in Schwartz's testimony, and apparently doubted the accuracy of some of his statements; nevertheless he reached the conclusion that enough was shown to entitle him to have the question of title disposed of in a plenary suit. The District Judge found the case was "undoubtedly a very suspicious one"; nevertheless he thought it preferable to have it so tried. Such a plenary suit being then pending in the state court, the case was appropriately left to it to decide.

There is nothing in the evidence which induces us to differ with the master and the District Judge, and the order is therefore affirmed, with costs.

POOLER et al. v. HYNE (two cases).

(Circuit Court of Appeals, Seventh Circuit. October 25, 1912.)

Nos. 1,944, 1,945.

APPEAL AND ERROR (§ 396*)—APPEAL IN EQUITY—JURISDICTION OF COURT ON APPEAL—SERVICE OF CITATION ON APPELLEE—NECESSITY.

Jurisdiction of the court on appeal in an equity case is acquired on the allowance of the appeal, and service of citation on appellee is needful only to docket the appeal for hearing when allowed without his presence, either actual or constructive, and where the appeal is allowed during the term all parties are constructively present, and service is not required, but where the appeal is allowed after the term in the absence of appellee, service must be made before the appeal is docketed for hearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2099, 2102; Dec. Dig. § 396.*]

Jurisdiction of Circuit Court of Appeals in general, see notes to *Lau Ow Baw v. United States*, 1 C. C. A. 6; *United States Freehold Land and Emigration Co. v. Gallegos*, 32 C. C. A. 475.]

Appeal from the District Court of the United States for the District of Indiana.

Suits between Cecelia Lukins Pooler and another and Silas Hyne and Jennie Hyne. From decrees for the latter, the former appeal. Conditionally dismissed.

J. T. Hanna, of Chicago, Ill., for appellants.

G. V. Menzies, Roscoe U. Barker, and Walter S. Jackson, all of Mt. Vernon, Ind., for appellees.

Before SEAMAN and KOHLSAAT, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. Motions are presented in each of these appeals: First, on behalf of the appellee, to dismiss the appeal (1) for failure to serve the citation issued therein within 6 months after the entry of the decree, and (2) for failure of the appellants to pay the clerk's estimate of costs for printing the record; and, second, on behalf of the appellants for extension of time for payment of such costs, on affidavit of cause therefor.

1. The motions for dismissal of the appeal for want of jurisdiction are overruled. The decree appealed from in each case was entered December 21, 1911, and the trial court allowed the appeal and issued the citation June 18, 1912—after the term during which the decree was entered, but within 6 months from such entry. Although service of the citations upon the appellants was not obtained until June 24, 1912, the jurisdiction of this court is unaffected by the fact of such service after the expiration of the 6 months. *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33; *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127. The various authorities cited in support of the motion—in reference either to writs of error or to appeals in other jurisdictions—are inapplicable to these appeals in equity under the federal practice, wherein jurisdiction of the cause is acquired upon allowance of the appeal. Citation of the appellees is needful only for the purpose of docketing the appeal for hearing, when allowed without their presence, either actual or constructive. If allowed during the term, all parties are constructively present, and citation is not required; but allowance after the term entitled the appellees, in their absence, to service of citation before the appeal is docketed for hearing. So, the motion to dismiss for want of such service is without force. See *In re T. E. Hill Co.*, 148 Fed. 832, 78 C. C. A. 522.

The other motions, to dismiss for failure to pay the estimate for printing the record, remain open, subject to compliance on the part of the appellants with leave to make such payment, as hereinafter allowed.

2. The applications on behalf of the appellants for an extension of time to pay the costs estimated for printing the record in the appeals, respectively, show reasonable cause for an extension of 60 days from and after the commencement of the current term of this court. Leave is granted accordingly to make the payments within such period; and in the event of nonpayment thereof, as thus authorized, rules shall be entered for dismissal of the appeals respectively.

In re QUALITY SHOP CO.

TRADERS' NAT. BANK OF ROCHESTER, N. Y., v. WILSON.

(Circuit Court of Appeals, Seventh Circuit. October 25, 1912.)

No. 1,915.

BANKRUPTCY (§ 461*)—REJECTION OF CLAIMS—APPEAL—STATUTORY PROVISIONS.

Appeals under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), providing that an appeal as in equity cases may be taken from a judgment rejecting a claim, if taken within 10 days after the rendition of judgment, are governed by the rules in equity appeals, except as to time within which the appeal must be taken, and citation and bond are not jurisdictional requisites to an appeal allowed within the specified time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920-923; Dec. Dig. § 461.*]

Appeal from the District Court of the United States for the District of Indiana.

In the matter of the Quality Shop Company, bankrupt. From a decree rejecting a claim of the Traders' National Bank against the bankrupt's estate, it appeals, and Romney L. Wilson, trustee in bankruptcy, moves to dismiss the appeal. Overruled.

A. C. Ayres and F. C. Ayres, both of Indianapolis, Ind., for appellant.

Ralph Bamberger and Isidore Feibleman, both of Indianapolis, Ind., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. Appellant's claim against the bankrupt's estate was rejected. Section 25a provides that appeals, as in equity cases, may be taken from the judgment rejecting a claim of \$500 or over, provided that such appeal be taken within 10 days after the judgment appealed from has been rendered. Judgment of rejection was entered on February 9, 1912. On February 15, 1912, appellant filed its petition for appeal, together with its assignment of errors, and on that day the court made an order allowing the appeal and fixing the amount of the appeal bond. The bond was not approved and filed until March 4, 1912, and the citation was not served until March 5, 1912. On this state of the record the appellee has filed a motion that the appeal be dismissed on the ground that it was not taken within 10 days after the judgment appealed from was rendered.

In the Hill Company Case, 148 Fed. 832, 78 C. C. A. 522, we held that appeals under section 25a are governed by the rules in equity appeals, except as to the time within which such appeals shall be taken, and thereupon held that citation and bond are not jurisdictional requisites. In addition to the authorities cited in the Hill Company

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Case, reference may be had to our recent decision in *Pooler v. Hyne*, 202 Fed. 194.

The motion to dismiss is overruled.

In re ZINNER.

METROPOLITAN TRUST & SAVINGS BANK v. ROYAL TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1912.)

No. 1,792.

1. BANKRUPTCY (§ 467*)—PETITION FOR REVIEW—JURISDICTION.

On a petition to review a referee's order in bankruptcy, affirmed by the district court, the jurisdiction of the Circuit Court of Appeals is limited to determining the correctness of the action of the trial court as to matters of law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 140*)—COLLATERALS FRAUDULENTLY PLEDGED—RIGHTS OF COMAKER.

The maker of a note, who pledges collateral fraudulently obtained by a comaker, is not entitled to the collateral on paying the note, as against the trustee in bankruptcy of the person who made the fraudulent transfer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 221, 225; Dec. Dig. § 140.*]

Petition to Review and Revise an Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois, in Bankruptcy; *Kenesaw M. Landis*, Judge.

In the matter of bankruptcy proceedings of *Joseph Zinner*. A referee's order denying the petition of the Metropolitan Trust & Savings Bank, for the use of *Edward R. Newman* and another, as administratrix of the estate of *Joseph Sachs*, deceased, for delivery of certain collaterals, claimed by the Royal Trust Company as trustee of the bankrupt, having been affirmed by the District Court, the Metropolitan Trust & Savings Bank petitions for review. Petition dismissed.

Julius Moses (E. D. Wallace, of counsel), for petitioner.

James Rosenthal, for respondent.

Before SEAMAN and KOHLSAAT, Circuit Judges, and CARPENTER, District Judge.

PER CURIAM. This is a petition under section 24b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) to review and revise an order of the District Court. No certificate of the original proceedings was filed in this court, and no record, except as appears from the petition, the allegations of which were admitted by the answer.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

From these pleadings it appears that on August 5, 1904, the petitioner loaned to Louis Sachsel \$750 upon a warehouse receipt issued to the bankrupt. The loan was made in good faith and without knowledge on the bank's part that the receipt had been transferred fraudulently to Sachsel. Subsequently \$250 was paid upon this note. Afterwards it was taken up by somebody and destroyed. When this was done does not appear. On November 4, 1904, a new note for \$500, due in 30 days, and payable to the bank, was executed jointly by Louis Sachsel & Co. and Joseph Sachsel, brother of Louis. This was a collateral note, and pledged the same warehouse receipt which had been pledged to secure the original note. Three years after the maturity of this note Edward R. Newman, as counsel for Joseph Sachsel, paid the bank \$500 and took an assignment to himself, by separate instrument, of all the interest of the bank in the note, including the right to litigate in the name of the bank. Application was made in the bankruptcy court by the estate of Joseph Sachsel and Newman, to have the collateral, or its proceeds, turned over to them, claiming that Joseph Sachsel was an accommodation maker of the note, and by payment became subrogated to the rights of the bank.

The referee found that Joseph Sachsel was liable on the note as a maker (making no finding that he signed the note for the accommodation of his brother Louis), and found, as a matter of law that:

"In so paying the note Joseph Sachsel did not acquire any new right different from that of Louis Sachsel as the owner of the aforesaid collateral, and whether as between him and Louis he was an accommodation maker makes no difference, the note having been taken up by a maker who obtained it [the collateral] fraudulently, the collateral comes back to the trustee."

The trial court, without making any findings of fact or announcing any conclusions of law, approved and confirmed the report of the referee.

[1] Our jurisdiction is limited to considering the correctness of the action of the trial court as matters of law only.

[2] None of the evidence has been preserved upon which the referee reached his conclusion that Joseph Sachsel merely paid a note on which he was liable as maker. Even if the evidence had been preserved, we could not but accept this finding of fact as true. The trial court clearly was right in holding that the maker of a note who pledges as security collateral fraudulently obtained by a comaker is not entitled to the collateral upon the payment of the note, as against the trustee in bankruptcy of the person who made the fraudulent transfer.

The estate of Joseph Sachsel has no greater right than Joseph Sachsel had, and so far as Newman is concerned he is a mere volunteer.

The petition must be dismissed; and it is so ordered.

In re BROCKTON IDEAL SHOE CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 110.

1. BANKRUPTCY (§ 136*)—CORPORATION—PROCEEDING TO RECOVER PROPERTY FROM OFFICER—PETITION.

A District Court has jurisdiction to order an officer of a bankrupt corporation to turn over property of the corporation, which he holds without himself making an adverse claim to it; and in a petition by the trustee for such an order it is sufficient to allege that the officer wrongfully holds property of the corporation, leaving it to him to set up any adverse claim he may have.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

2. BANKRUPTCY (§ 136*)—CORPORATION—PROCEEDING TO RECOVER PROPERTY FROM OFFICER—PETITION.

The petition of the trustee of a bankrupt corporation for an order requiring an officer of the corporation to turn over property alleged to belong to it *held* insufficient, in that it did not show that the property was in his possession.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York; Learned Hand, Judge.

In the matter of the Brockton Ideal Shoe Company, bankrupt. Ancillary petition by Thomas F. Dolan, trustee, to require Ignatz Roth to turn over property. On petition by the trustee for revision of an order sustaining a demurrer to his said petition. Affirmed. See, also, 200 Fed. 745.

Lesser Bros., of New York City (W. Lesser, of New York City, of counsel), for petitioner.

Rosenberg & Lewis, of New York City (J. N. Rosenberg and Chas. E. Casey, both of New York City, of counsel), for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. [1] If the petition contained sufficient allegations that Roth had possession of the goods in question, we think the position of the petitioner would be correct. It would not be necessary, as the memorandum of the District Judge seems to indicate, for him to aver facts from which it would appear that Roth made claim to them and that his claim was a sham. The District Court has jurisdiction to order an officer of a bankrupt corporation to turn over property of such corporation which he holds without himself making any adverse claim to it. It is only when an adverse claim is shown that it is necessary to go further and aver that it is only colorable. As a matter of pleading it seems to us quite sufficient to aver that an officer of a bankrupt corporation wrong-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fully holds its property, and to let him set up the defense that he holds it by virtue of an adverse claim. When he does set up such a claim, the petitioner might then reply that it was merely colorable; but he need not negative it at the outset in his pleadings.

[2] The real difficulty with the petition now before us is that, although it is inordinately long and is filled with wholly irrelevant matter, it most studiously avoids making any averment that Roth has possession of the goods. The facts set forth in the petition are these: Roth was (and is) the treasurer of the bankrupt company and holds a large majority of the stock. The bankrupt's salesroom was at 149 Duane street. Two months before bankruptcy 37 cases of goods belonging to the bankrupt were removed from its premises to 477 Broome street. Three weeks before bankruptcy 66 cases were likewise removed from bankrupt's premises to 477 Broome street. The firm of C. A. Auffmordt & Co., mercantile bankers who have financed the business of another corporation, "Ignatz Roth, Incorporated" (in which it may be presumed that Roth has some interest), has a branch at 477 Broome street and pays the rent of the premises where that branch is located. Roth has an office with them for which he pays no rent.

There is certainly nothing here to indicate that the goods are in the possession or control of Roth. On the contrary, they seem to be in the possession and control of C. A. Auffmordt & Co. The general averment in the concluding paragraph of the petition of the legal conclusion that "Roth is now wrongfully withholding from the trustee the goods aforesaid, without right, or warrant, or authority of law," is not sufficient to help out the insufficient averments of fact, or to require the court to accept a conclusion different from that which the averments of fact indicate.

The order is affirmed.

ANDERSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,082.

1. PUBLIC LANDS (§ 120*)—HOMESTEAD—FEMALE CLAIMANT—RESIDENCE—FORFEITURE.

Where, after entry of a homestead by a single woman, she married the entryman of the adjoining claim, and from the time of her marriage until her final proof lived with her husband on his claim, and never returned to or resided on her own as a homestead, though it was improved and cultivated in connection with the claim of her husband, her proof of residence was false, and the claim subject to forfeiture.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

2. DOMICILE (§ 5*)—RESIDENCE OF HUSBAND—RESIDENCE OF WIFE

A husband's residence is in law the residence of his wife.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 24-35; Dec. Dig. § 5.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PUBLIC LANDS (§ 30*)—HOMESTEAD—ENTRY—HUSBAND AND WIFE.

The homestead law neither permits nor contemplates that both husband and wife shall take advantage thereof.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 48-50; Dec. Dig. § 30.*]

Appeal from the Circuit Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit by the United States against Jessie M. Anderson and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Emmons & Webster, of Portland, Or., for appellants.

John McCourt, U. S. Atty., and Walter H. Evans, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The government prevailed in this suit, brought by it for cancellation of a patent issued by it for a certain tract of land situate in Klamath county, state of Oregon, which was filed upon in September, 1898, by the appellant Jessie M. Wight, then a single woman, Jessie M. Anderson.

[1] The ground of the suit was the alleged falsity in the proof of the applicant in respect to her alleged residence upon the land for the period required by the statutes under which her filing was made. The court below found that within a few days after her filing she married the appellant William Wight, who lived on adjoining government land under a pre-emption and timber culture claim, one of which claims, embracing his residence, he subsequently changed to a homestead claim, which the record shows he never abandoned. The trial court found that, from the time of her marriage until the date of her final proof, the appellant Jessie M. Wight lived with her husband on his claim, and never resided upon the tract claimed by her as a homestead, although the latter was improved and cultivated by her in connection with the claim of her husband. A careful consideration of the evidence satisfies us that the court below was justified in that conclusion, and that the occasional visits that she made to her claim, and the money expended by her in the improvement thereof, did not answer the five years' continuous residence required by the statutes.

[2, 3] Moreover, the husband's residence is in law the residence of the wife, and the homestead law neither permits nor contemplates that both husband and wife shall take advantage of its provisions.

The judgment is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

AMERICAN GRAIN SEPARATOR CO. et al. v. TWIN CITY
SEPARATOR CO.

(Circuit Court of Appeals, Eighth Circuit. December 3, 1912.)

No. 3,760.

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 100*)—DECISIONS REVIEWABLE—ORDERS REGARDING
INJUNCTIONS.

An interlocutory order refusing to dissolve an injunction is appealable under section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [U. S. Comp. St. Supp. 1911, p. 194]), although the hearing on which it is founded is in effect a rehearing of the motion to grant the injunction, because the Congress did not except orders refusing to dissolve injunctions founded on rehearings of the motions to grant them from its general grant of the right of appeal from orders refusing to dissolve injunctions, and, where the legislative body has made no exception from a general grant or rule, it is not the province of the courts to do so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 670-680; Dec. Dig. § 100.*]

2. APPEAL AND ERROR (§ 100*)—"HEARING IN EQUITY."

The usual meaning of the term "hearing in equity" is the trial of the suit including the introduction of the evidence, the argument of counsel, and the decree of the court.

But under section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [U. S. Comp. St. Supp. 1911, p. 194]), wherein an appeal is allowed from an order granting or refusing to dissolve an injunction "upon a hearing in equity," that term means the presentation and submission for decision of the motion for the order including the introduction of the evidence, the arguments of counsel, the other proceedings at that time upon which the order is based, and the order itself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 670-680; Dec. Dig. § 100.*]

3. APPEAL AND ERROR (§ 954*)—INJUNCTION (§§ 135, 161*)—INTERLOCUTORY
INJUNCTION—DISCRETION OF COURT.

The granting or dissolution of an interlocutory injunction is intrusted to the discretion of the court of original jurisdiction, not to the discretion of the appellate court.

In the absence of a violation of the principles and rules of equity established for the guidance of the court of original jurisdiction, the action of that court in these interlocutory matters must be sustained, unless there is clear proof of an abuse of its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954;* Injunction, Cent. Dig. §§ 304, 347; Dec. Dig. §§ 135, 161.*]

4. PATENTS (§ 308*)—INTERLOCUTORY INJUNCTION—LACHES.

The failure for three months of a complainant to prepare and press its suit for infringement of patents to a final hearing is not such laches as will deprive it of its right to the continuance of a temporary injunction to which it is otherwise entitled.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 504-506; Dec. Dig. § 308.*]

5. PATENTS (§ 308*)—INTERLOCUTORY INJUNCTION—DISCRETION OF COURT.

Where there has been a prior adjudication on full proof in a suit against other parties, of the validity of complainant's patents, and of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

their infringement, where it is not clear that the defendants do not infringe, the evidence upon that subject is conflicting, and upon consideration thereof the chancellor is of the opinion that they do infringe, the granting or the refusal to dissolve an interlocutory injunction until the final hearing is not an abuse of the discretion of the chancellor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 504-506; Dec. Dig. § 308.*]

6. PATENTS (§ 324*)—INTERLOCUTORY INJUNCTION—APPEAL—RESERVING DECISION.

Where questions of fact, or of mixed law and fact, are presented to the appellate court on an appeal from an interlocutory order regarding an injunction made upon conflicting testimony after a prior adjudication in a suit against others of the validity of the patents in suit and of their infringement, the court will not consider and determine the questions of fact, but will reserve their decision until after the final hearing of the issues below.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600-606; Dec. Dig. § 324.*]

Review of interlocutory decree granting or continuing injunction in Circuit Court of Appeals, see notes to Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co., 3 C. C. A. 572; Southern Pac. Co. v. Earl, 27 C. C. A. 189; United States Freehold Land & Immigration Co. v. Gallegos, 32 C. C. A. 484.]

Appeal from the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Bill in equity by the Twin City Separator Company against the American Grain Separator Company and another. From an order refusing to dissolve an interlocutory injunction, defendants appeal. Affirmed.

A. C. Paul, of Minneapolis, Minn., for appellants.

James F. Williamson, of Minneapolis, Minn., for appellee.

Before SANBORN and HOOK, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from an order refusing to dissolve an interlocutory injunction against the infringement by the American Grain Separator Company and Robert J. Owens of the first claim of letters patent No. 668,175, issued February 19, 1901, to Anton S. Froslid, and the three claims of letters patent No. 684,751 issued to him on October 15, 1901, for improvements in grain separators.

These patents were adjudged valid by the court below, and that adjudication was sustained by this court in *J. L. Owens Co. v. Twin City Separator Co.*, in February, 1909, 168 Fed. 259, 271, 93 C. C. A. 561, 573. Reference to the opinion in that case is made for a description of the state of the art, of the principle and operation of Froslid's inventions, and of the device of the defendant in that case which was held to be an infringement of the four claims of Froslid's patents upon which this suit is founded.

When that suit was brought, the defendant Robert J. Owens was a stockholder in and the superintendent of the infringer, the *J. L. Owens Company*, and he was a witness in that case. He subsequently sold his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

stock in that company, and after the decision of this court in the case against that company he organized the defendant in this case, the American Grain Separator Company, a corporation, in which he holds a majority of the stock, and the defendants have since manufactured two kinds and ask to manufacture another kind of fanning mill called, respectively, the "Winner No. 1," "Winner No. 2," and "Winner No. 3," all of which the complainant insists infringe the patented claims in suit. In their Winner No. 1 they substitute for the long flexible slotted riding aprons between the sieves which the Owens Company had used, and which the court below and this court held constituted infringements of the claims in suit (168 Fed. 266, 93 C. C. A. 561), riding aprons made of thin slats of wood an inch and a half wide and three-sixteenths of an inch apart, held together by leathern straps fastened to the cross centers of the slats which were placed diagonally across the sieves on which they respectively rode and slanted in an opposite direction from the slats in the riding apron above and from those in the riding apron below that in which they were respectively located. The complainant asserted that these riding aprons in the defendants' fanning mills appropriated the principle and, by the same mode of operation, performed the functions of Froslid's patented inventions by mechanical means equivalent to those described in his patent, and after the defendants had made and sold some of their mills the complainant exhibited its bill and prayed for an injunction and for other relief. Upon a hearing upon the bill, affidavits and counter affidavits, and arguments of counsel, the issue of the infringement of the claims in suit by the Winner No. 1 was presented to, considered, and decided against the defendants, and the court below on October 23, 1911, issued its injunction against the manufacture and sale of that machine and against the infringement by the defendants in any other way of the claims in suit. Thereupon the defendants made their Winner No. 2, which differs from Winner No. 1 in that the wooden slats are $2\frac{1}{16}$ of an inch wide, and the spaces between them are $\frac{5}{16}$ of an inch in width, the slats are connected by rigid wooden strips and anchored to the stationary part of the mill by rigid metal strips. After the defendants had made and sold some of these mills, the complainant cited them for contempt of court for violating the injunction, and on March 1, 1912, after a hearing, at which affidavits and counter affidavits were presented, which occupy more than 40 printed pages of the record, the court below held that the Winner No. 2 was an infringement of the complainant's patents and fined the American Company \$500, which it paid on March 9, 1912. The defendants then devised a plan of the structure called "Winner No. 3," made a drawing thereof, and moved the court for permission to ship its fanning mills furnished with the rider aprons described in this drawing for the period of 30 days, and for a modification of its opinion on the question of the contempt. In the proposed Winner No. 3 the riding aprons differed from those in the Winner No. 1 and the Winner No. 2 in that the slats were to be thicker, heavier, and triangular in cross-section, were to be connected by stiff wooden strips nailed to the bottoms of the slats, the tops of the slats were to incline toward the heads of the sieves, and the apron was to be an-

chored by stiff metal strips. The court denied the motion. Thereupon on March 9, 1912, the defendants made a motion to dissolve the injunction (a) as to Winner No. 1, (b) as to Winner No. 2, and (c) as to Winner No. 3. The hearing on this motion was postponed until March 15, 1912. Additional affidavits and counter affidavits and all the affidavits and evidence theretofore offered in the case were introduced in evidence, and the court, after a full hearing of both parties upon the motion, denied it and refused to pass upon the question whether or not the proposed Winner No. 3 would be an infringement of the complainant's patents. It is from this order refusing to dissolve the injunction of October 23, 1911, that this appeal was taken.

At the threshold of this case the court is met by a motion to dismiss the appeal as to each of the three machines specified in the motion to dissolve: (1) For specific reasons applicable to each of these machines separately; (2) because the hearing upon the motion to dissolve was nothing but a rehearing of the motion for the injunction; and (3) because the order refusing to dissolve the injunction was not made upon a hearing in equity. The reasons for the dismissal of the appeal which are limited to one of the three machines are not material on this motion to dismiss and may be disregarded, because, if any part of the order refusing to dissolve the injunction is appealable, the motion cannot be sustained.

[1] There is force in the argument that the hearing on the motion to dissolve is only a rehearing of the motion for an injunction, and an order denying a rehearing is not appealable. But there is no exception in the statute of orders refusing to dissolve injunctions which rest on mere rehearings of motions to grant them from the general declaration of the Congress that:

"Where, upon a hearing in equity in a District Court, or by a judge thereof in vacation, * * * an application to dissolve an injunction shall be refused, * * * an appeal may be taken from such interlocutory order or decree * * * refusing to dissolve an injunction." 36 Stat. c. 231, § 129, p. 1134.

And the fact that Congress made no such exception raises a conclusive legal presumption that it intended to make none, and it is not the province of the courts to do so. *Omaha Water Co. v. City of Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614; *Madden v. Lancaster County*, 12 C. C. A. 566, 572, 65 Fed. 188, 194; *Cella Commission Co. v. Bohlinger*, 147 Fed. 419, 425, 78 C. C. A. 467, 473, 8 L. R. A. (N. S.) 537; *Wrightman v. Boone County*, 31 C. C. A. 570, 572, 88 Fed. 435, 437; *Union Central Life Ins. Co. v. Champlin*, 116 Fed. 858, 860, 54 C. C. A. 208, 210.

[2] The ordinary meaning of the term "hearing in equity" is the trial of the case, including the introduction of the evidence, the argument of counsel, and the decree of the court. But even a cursory reading of the section of the statute under consideration leaves no doubt that this was not the sense in which that term was there used, because the act grants an appeal from an interlocutory order upon such a hearing, and interlocutory orders are generally made before the trial of a suit in equity. It leaves no doubt that the term here means the presentation

and submission for decision of the motion for the interlocutory order, including the introduction of evidence, the arguments of counsel, the other proceedings at that time upon which the order is based and the order itself. *Root v. Mills*, 168 Fed. 688, 689, 94 C. C. A. 174, 175; *Taylor v. Breese*, 163 Fed. 678, 684, 90 C. C. A. 558, 564. The order refusing to dissolve the injunction was made upon such a hearing, no sound reason for the dismissal of the appeal from it is perceived, and the motion to dismiss it is denied.

[3] The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and, where that court has not departed from the rules and principles of equity established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that it abused its discretion. The question is not whether or not the appellate court would have made or would make the order. It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the power to grant or dissolve such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the court below? *Fireball Gas Tank & Illuminating Co. v. Commercial Acetylene Co.* (C. C. A.) 198 Fed. 650, 653; *Massie v. Buck*, 128 Fed. 27, 31, 62 C. C. A. 535, 539; *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 330, 107 C. C. A. 403; *High on Injunctions* (4th Ed.) § 1696; *Higginson v. Chicago, B. & Q. R. R. Co.*, 102 Fed. 197, 199, 42 C. C. A. 254, 256; *Interurban Ry. & Terminal Co. v. Westinghouse E. & Mfg. Co.*, 186 Fed. 166, 170, 108 C. C. A. 298, 302; *Kerr v. City of New Orleans*, 61 C. C. A. 450, 454, 126 Fed. 920, 924; *Thompson v. Nelson*, 18 C. C. A. 137, 138, 71 Fed. 339, 340; *Societe Anonyme Du Filtre Chamberland Sys. Pasteur v. Allen*, 33 C. C. A. 282, 285, 90 Fed. 815, 818; *Murray v. Bender*, 48 C. C. A. 555, 559, 109 Fed. 585, 589; *U. S. Gramophone Co. v. Seaman*, 51 C. C. A. 419, 423, 113 Fed. 745, 749.

[4] The validity of the patents in suit has been adjudged, and there are but two arguments in support of the contention that this record proves that the refusal to dissolve the injunction was an abuse of the discretion of the district court. They are that the complainant's laches in that it took no steps to prepare the case for final hearing between the rule day in January, 1912, and March 15, 1912, when the dissolution of the injunction was refused, and the failure of the court to find on the motion to dissolve that the appellants' mills did not infringe the claims in suit, evidence an abuse of the discretion of that court. It goes without saying that the failure of a complainant for three or four months to prepare and press a suit on its patent to final hearing constitutes no such laches as will deprive it of an equitable right to the continuance of an injunction against infringement to which it is otherwise entitled.

[5] Counsel for the complainant argues that the question of infringement presents an issue of law, and that the erroneous decision of such an issue necessarily implies an abuse of discretion. He contends that the construction and modes of operation of the appellants' mills are so clearly shown by the affidavits and by the mills themselves, some of which were produced and operated before the court below and before

this court, that it was a clear abuse of discretion for that court to hold that any of them infringed any of the claims which lie at the foundation of this suit. But the parties to this suit introduced in evidence the affidavit of a learned witness that these mills infringed these claims and the affidavit of another learned witness that they did not. Each of these witnesses explained at length the construction, mode of operation, and effect of the new riding aprons of the defendants; but their testimony relative to these modes of operation, the effect thereof, and the similarity thereof to the modes of operation and effect of the patented aprons was diametrically opposed. Affidavits of 10 other witnesses and still other evidence relating to this issue of infringement was presented to and considered by the court below until the affidavits alone cover more than 100 printed pages of the record, and all the affidavits and proceedings in evidence before the chancellor when he decided this motion to dissolve make a record of more than 400 printed pages. Upon this issue of infringement the affidavits were conflicting, and the court adhered to its earlier decisions when it issued its injunction and when it adjudged the American Company guilty of contempt. An examination of the evidence before him, of the defendants' two mills, and of their plan for a third, has convinced that the question of infringement decided by the trial court upon this mass of evidence was not a question of law, but was a question of fact, or a mixed question of law and fact, in which the issue of fact, the issue of the similarity of the principle and mode of operation of the defendants' and the plaintiff's rider aprons, was preponderant. In the decision of this issue no violation or disregard of any of the rules or principles of equity jurisprudence established for the guidance of the court below has been found. Nor does the record and the exhibition of the defendants' machines and their operation with which this court has been favored satisfy that the conclusion of the court below to adhere to its earlier decisions that they infringe the complainant's monopoly, and to let the injunction stand until the final hearing, evidence any abuse of its judicial discretion. That injunction had been granted more than four months before the motion to dissolve was presented on the condition that the complainant should give a bond in the sum of \$5,000 to pay any damages which the defendants might sustain therefrom. The defendants had taken no appeal from that order. The complainant had given the bond, the validity of the claims of the patent had been adjudicated, the evidence on the question of infringement was voluminous, and it was not clear upon that evidence and an examination of the defendants' machines and their operation that they did not infringe. Where there has been a prior adjudication on full proof in a suit against other parties sustaining the claims of a patent and a claim of infringement thereof, where it is not clear that the defendants do not infringe, the evidence upon that subject is conflicting, and upon consideration thereof the chancellor is of the opinion that they do infringe, the granting of an interlocutory injunction, or the refusal to dissolve it until the final hearing of the case, is not an abuse of his discretion and will not warrant a reversal of the order. *Victor Talking Machine Co. v. Talk-o-phone Co.* (C. C.) 146 Fed. 534; *Victor Talk-*

ing Machine Co. v. Leeds & Catlin Co., 148 Fed. 1022, 79 C. C. A. 536; Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U. S. 301, 311, 312, 29 Sup. Ct. 495, 53 L. Ed. 805.

[6] Counsel for the appellants invites the court to consider and decide this entire case upon this appeal from the interlocutory order of the court as did the Supreme Court in Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 495, 20 Sup. Ct. 708, 44 L. Ed. 856. But this case is more nearly analogous to Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U. S. 301, 311, 312, 29 Sup. Ct. 495, 53 L. Ed. 805, in which the courts below and the Supreme Court refused to determine the question of infringement and reserved it until the final hearing of the case, with the remark:

"If we should yield to this invocation and attempt a final decision, it would be difficult to say whether it would be more unjust to petitioner or to respondent."

The complainant alleges that the machines of the defendants infringe its patented claims, the defendants deny the averment, affidavits, and other evidence have been introduced, not to determine this issue, but to determine whether or not there is such a probability that there is infringement and continuing damage that an injunction that had been standing four months should remain until the final hearing. The main issue is one of fact. The complainant has the right to a trial of that issue upon the production, hearing, and cross-examination of the witnesses against it according to the salutary and searching practice under the common law, according to the best method yet devised to elicit the truth, and it protests against the final decision of this question upon affidavits. The conclusion is that the ends of justice will be better and more certainly attained by reserving, and we do hereby reserve, our opinion upon this question of infringement until the affidavit stage of this case has passed and the court below has investigated and decided the issue at the final hearing in the light of the testimony of the witnesses after their cross-examination, of the other evidence that may be produced and the arguments of counsel thereon.

Let the order below be affirmed.

PATTERSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,119.

1. PERJURY (§ 9*)—PATENTS—APPLICATION—VERIFICATION—AUTHORITY TO ADMINISTER OATH—NOTARY PUBLIC—"AUTHORIZED BY LAW."

A notary public of one of the states is an officer "authorized by law" to administer oaths, within Rev. St. § 4892, as amended by Act March 3, 1903, c. 1019, § 2, 32 Stat. 1226 (U. S. Comp. St. Supp. 1911, p. 1454), providing that an applicant for a patent shall make oath that he verily believes himself to be the original inventor or discoverer of the art, etc.,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for which he solicits a patent, which oath may be made before any person within the United States "authorized by law" to administer oaths, etc.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 27-35; Dec. Dig. § 9.*]

2. PERJURY (§ 32*)—FALSE AFFIDAVIT—APPLICATION FOR PATENT—ORIGINAL INVENTOR—DELAY.

In a prosecution for perjury, based on the affidavit of an applicant for a patent that he verily believed himself to be the first inventor or discoverer of the art, etc., the fact that a prior inventor had unreasonably delayed the making and prosecuting of an application for a patent for himself, and had failed to use due diligence in reducing his idea to practice and making application for a patent, was immaterial.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 108-116; Dec. Dig. § 32.*]

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Charles A. Patterson was convicted of perjury, and he brings error. Affirmed.

See, also (D. C.) 172 Fed. 241; 181 Fed. 970, 104 C. C. A. 434.

John F. Logan and Hayward H. Riddell, both of Portland, Or., for plaintiff in error.

John McCourt, U. S. Atty., and Walter H. Evans, Asst. U. S. Atty., both of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was twice convicted of the crime of perjury. On writ of error sued out by him on the first occasion, the judgment of the trial court was reversed, and the case remanded for a new trial. *Patterson v. United States*, 181 Fed. 970, 104 C. C. A. 434. Upon the retrial he was again convicted, and the case is again brought here.

It appears that about January, 1905, one Larsen had pending in the Patent Office an application for a patent for an improvement in a one-piece harness buckle, and entered into negotiations with the plaintiff in error, which culminated, about April of the same year, in an assignment by Larsen to the plaintiff in error, one Van Emon, and a Mrs. Parrish, of all his rights in and to the application and buckle; that the application made by Larsen was rejected by the Patent Office, and that shortly after the assignment mentioned a projecting lip was added by Van Emon and the plaintiff in error to the rear crossbar which connected the side pieces of the Larsen buckle, which addition was designed as an improvement on the buckle of Larsen. A joint application was thereupon made by the plaintiff in error, Van Emon, and Mrs. Parrish, for a patent upon the buckle as so improved, which application was subsequently abandoned. The plaintiff in error subsequently made application for a patent for the buckle as so improved, after, according to his testimony, the refusal of Van Emon and Mrs. Parrish to join him in such application; and the affidavit made by the plaintiff in error in support of such application is the basis of the indictment

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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against him, which charges, among other things, that he took an oath before C. W. Hobson, a notary public:

"That he verily believes himself to be the original, first, and sole inventor of the improvement in buckles described and claimed in the annexed specification; that he does not know and does not believe that the same was ever known or used before his invention or discovery thereof; * * * whereas, in truth and in fact, the said Charles A. Patterson, at the time when he so swore and made his said declaration and affidavit as aforesaid, well knew that he was not the original, first, and sole inventor of said improvement in buckles," etc., and that he "well knew and believed that the same had been known and used before his alleged invention and discovery thereof."

On the trial the testimony was substantially conflicting upon the question as to whether Van Emon or Patterson was the original and first inventor of the improvement in question, which conflict was, of course, a matter for the sole and exclusive determination of the jury.

[1] On behalf of the plaintiff in error it is earnestly insisted that Hobson, the notary public, was not authorized to administer the oath which Patterson took. The Supreme Court, in the case of *United States v. Curtis*, 107 U. S. 671, 2 Sup. Ct. 501, 27 L. Ed. 534, held that the provision of section 5392 of the Revised Statutes (U. S. Comp. St. 1901, p. 3653), in respect to the taking of an oath before a "competent tribunal, officer, or person," means some tribunal, officer, or person authorized by the laws of the United States to administer oaths in respect of the particular matters to which it relates. Specific provision, however, is made by Congress in respect to the oath required on the application for a patent in section 4892 of the Revised Statutes, as amended March 3, 1903 (32 Stat. 1226, c. 1019 [U. S. Comp. St. Supp. 1911, p. 1454]), which reads as follows:

"Sec. 4892. The applicant shall make oath that he does verily believe himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition, or improvement for which he solicits a patent; that he does not know and does not believe that the same was ever before known or used; and shall state of what country he is a citizen. Such oath may be made before any person within the United States authorized by law to administer oaths, or, when the applicant resides in a foreign country, before any minister, chargé d'affaires, consul, or commercial agent holding commission under the government of the United States, or before any notary public, judge, or magistrate having an official seal and authorized to administer oaths in the foreign country in which the applicant may be, whose authority shall be proved by certificate of a diplomatic or consular officer of the United States."

We agree with the court below that a notary public of one of the states is an officer "authorized by law," within the meaning of this section, to administer oaths.

[2] Upon the merits the gist of the contention on the part of the plaintiff in error is, not that there was no testimony to the effect that Van Emon was the original and first inventor of the improvement of the buckle in question, but that the oath taken by the plaintiff in error to the effect that he (Patterson) was the original and first inventor of it was not only intrinsically true, but also because Van Emon had unreasonably delayed making and prosecuting an application for a patent to himself. In a contest between rival claimants of the right to the patent, the failure of Van Emon to use due diligence in reducing his idea

to practice, and in making application for patent, would be material; but it is quite another question whether such negligence on Van Emon's part is pertinent to the charge that the plaintiff in error committed willful and corrupt perjury in swearing that he himself was the original and first inventor of the article.

We think the latter is not pertinent, as did the court below; for, if the contention of counsel for the plaintiff in error be correct, one in no sense an inventor could avail himself of the genius of the delinquent, make the statutory affidavit without danger of the charge of perjury, or even without any compunction of conscience, merely because of the fact that the real inventor was dilatory, and did not follow up his conception to the point of a finished article adapted for practical use. Such a doctrine, in our opinion, cannot be sound. It is true that in this case the testimony of the plaintiff in error was to the effect that he, and not Van Emon, was the original and first inventor of the improvement in the buckle in question; but there was testimony on the part of the government to the contrary, and that question of fact was for the exclusive determination of the jury. The court left it to the jury under instructions which were more than full, and quite fair, and which in part are as follows:

"Now, it is important that you should bear in mind that this is not a controversy—this case is not a controversy—between this defendant and Mr. Van Emon as to the ownership or the right to patent upon this alleged invention. That question is not in this case, because the charge here is simply one of perjury. Nor is there any question in this case as to whether Van Emon lost his right by abandonment. If he was the original inventor or discoverer of this article, which was subsequently patented to Mr. Patterson, and abandoned his rights or failed to prosecute his application in the Department, that, of course, would not have justified Patterson in making the affidavit that he himself was the first and original inventor; so the question here is for you to determine whether the statements in the affidavit filed by Patterson in March, 1907, when he applied for a patent upon this one-piece buckle, was true or false, and that is the real question in this case—whether he knew it to be so.

"You will notice that the indictment charges that the oath mentioned and contained statements alleged to be false in two particulars: First, that the defendant well knew that he was not the original and first inventor of this improvement, and that he well knew that Van Emon was such inventor; second, that he well knew and believed that the said invention had been known and used before his said invention and discovery thereof. If you are satisfied from the evidence, beyond a reasonable doubt, of the truth of either of these charges, in the light of the instructions given you by the court, you should find the defendant guilty.

"If you are satisfied from the evidence, beyond a reasonable doubt, that Van Emon was the original, first, and sole inventor of said improvement, and that defendant knew the same at the time he took and subscribed the oath—if you find that he did take and subscribe it as alleged in the indictment—it will be your duty to find the defendant guilty; but if you find from the evidence that the defendant was the first and original inventor of this improvement, or that he was the original and first inventor jointly with Van Emon or some one else, you cannot find the defendant guilty. And if you are not satisfied beyond a reasonable doubt that the defendant was not the original and first inventor, either jointly or solely, it will be your duty to acquit him, unless you further find to your satisfaction, beyond a reasonable doubt, that he knew and believed said improvement to have been known or used before his alleged invention or discovery thereof.

"Now, the first inventor is the one who first reduces the idea to some practi-

cal or useful form. It does not exist in the mere inventor's theories or ideas until they are reduced to some practical form. An invention cannot be predicated upon a mere conjecture, or mere speculation or conjecture, so that the mere idea of itself would not of itself constitute an invention until it was reduced to some practical form—put into some practical mechanical form.

"It is alleged in the indictment that the defendant well knew and believed that the invention had been known and used before his alleged invention and discovery thereof, and that defendant willfully made a false statement in said oath in this regard; therefore, if you find that the defendant knew he was not the first and original inventor, either joint or sole, of said invention, and knew Van Emon or some one else was such inventor, and willfully made the oath, then he would be guilty as charged.

"The oath set forth in the indictment, and which it is alleged defendant willfully took and subscribed, is one required by law. In the oath set forth it is stated that the applicant, or defendant, does verily believe himself to be the original, first, and sole inventor of the improvement mentioned. You will note that the word 'sole' is added to this affidavit. The statute, however, does not require an applicant for a patent to state whether he is the sole or joint inventor of the art or machine or improvement for which he solicits a patent, but only requires the applicant to state that he verily believes himself to be the first and original inventor.

"I instruct you that, inasmuch as the statute does not require the applicant to state whether he is the sole inventor, perjury cannot be predicated upon any statement that he is the sole inventor, and it is immaterial whether the defendant invented the patent solely by his own effort or jointly with another; that is, if defendant was either a joint or the sole inventor of the improvement, the oath would not be false in a material matter as to the part hereof relating to that question, but, if he was neither a joint nor a sole inventor, the oath would in that respect be false in a material matter.

"If Van Emon was the first, original, and sole inventor of the improvement, and the defendant had not a part in originating the same, he (the defendant) could be either the sole or joint inventor thereof, and if he knew this at the time he took and subscribed the oath set forth in the indictment, the oath would be false in two material particulars: First, wherein it is stated that the defendant is the original and first inventor of the improvement; and, second, wherein it is stated that he does not know and does not believe that the same was ever known before. And if you are satisfied, beyond a reasonable doubt, that the defendant willfully took and subscribed the same, knowing it to be false in either particular as stated, he will be guilty as charged in this indictment.

"The statements, however, in the affidavit made by the defendant, are presumed to be true, because they were made under oath. And such an oath is of equivalent value to the testimony of a creditable witness. In order, therefore, to convict one who subscribed such an affidavit of perjury, the government must satisfy you, beyond a reasonable doubt, of the falsity of the oath by the testimony of more than one credible witness, or the testimony of one witness and other corroborating proof sufficient to satisfy you that the statements were not true, or that the defendant did not honestly and in good faith believe that he was the first and original inventor at the time he made the affidavit.

The judgment is affirmed.

HALL v. FRANK et al.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 100.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BEDSTEAD.

The Hall and Tilley patent, No. 625,164, for bedstead fastenings, is of narrow scope, and must be limited to the precise device described and shown. As so limited, *held* not infringed by the device of the Frank patent, No. 650,311.

Appeal from the District Court of the United States for the Eastern District of New York; Thomas I. Chatfield, Judge.

Suit in equity by Frank A. Hall against David Frank and John Trounstone, doing business as the Greenpoint Metallic Bed Company. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 195 Fed. 946.

The decree of the District Court dismissed the bill, which charged that the defendants infringed letters patent No. 625,164 granted, May 16, 1899, to Frank A. Hall and E. F. Tilley for bedstead fastenings.

Isaac B. Owens, of New York City, for appellant.

Charles C. Gill, of New York City, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The Hall and Tilley patent in suit was granted May 16, 1899, the application being filed August 24, 1898. The invention relates to bedstead fastenings in which the side rails of the frame are joined to the posts by means of coacting hooks and pins in which the fastening is made rigid and unbreakable by constructing the two parts so that a binding action is produced between them in addition to the connection of the hooks and pins. The essential feature of the invention consists in fastening the upright posts and the side bars together by locking them at two points and causing them to bind against each other at a side point intermediate the locking points.

The only claim in issue is claim 4, which is as follows:

"4. A bedstead-fastening, comprising a post-section, and a rail-section, the post-section being provided with a hook at each end and with a wedge-like surface intermediate of the hooks, the said wedge-like surface being inclined from its upper to its lower end in a direction away from the post, and the other section provided with pins for engaging the hooks, and with an abutment intermediate of the pins for engaging the cam-surface, substantially as described."

The elements of the claim are:

First. A post-section, being provided with a hook at each end and with a wedge-like surface intermediate of the hooks being inclined from its upper to its lower end in a direction away from the post.

Second. A rail-section provided with pins for engaging the hooks and with an abutment intermediate of the pins for engaging the cam-surface.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In every bedstead, whether it be in three pieces or five, whether it be made of wood or metal, the cross-bars and side rails must be securely and detachably fastened and the means and appliances for doing this, as shown by the prior art, were very numerous. With the introduction of metallic bedsteads the problem was altered somewhat by the change from wood to iron, but, generally speaking, it was the same. The record contains some thirty prior patents and publications showing how earlier patentees had dealt with the fastening problem and proving that in this art, as in similar arts, when it was necessary to unite two parts detachably, hooks and pins were used, the hooks being on the posts and the pins on the rails or vice versa.

The Bernstein patents show every feature of the Hall structure except the wedging feature. This method of holding two pieces together tightly was very old in mechanics and had frequently been used in the bed-making art. Thus, Turner, in 1870, patented a bedstead, one of his claims being for:

"The wedge-shaped or inclined fastening hook, its supporting plate and the semi-circular or curved holding-rib, cast in one piece of metal, substantially as and for the purposes set forth."

It is unnecessary to consider the prior art in detail, for it cannot be denied that the invention, at best, is a very narrow one and that the claim, if sustained at all, must be limited to the precise method described and shown. All that Hall and Tilley did was to apply the well known wedge principle to the Bernstein hooks. The range of equivalents is so narrow that an infringer must use substantially the exact combination shown. So construed, the claim is not infringed by the defendants. Their beds are made under a patent granted to David Frank May 22, 1900, although the actual structure differs in some minor details from the drawings and description of the patent.

Judge Chatfield has carefully considered the question of infringement and as we agree with him in the conclusion reached, no useful purpose will be subserved by entering into the details upon which the conclusion rests.

The charge of infringement was made to depend largely upon defects in the casting of the outer edge of the rail-plate which approximates closely to the intermediate abutment 16 of the patent. As soon as this contention was made, the defendant changed the plate by removing the surplus metal directly between the upper and lower pins. We understand that it is admitted that the beds as now made by the defendants, having no abutment intermediate the pins, do not infringe claim 4. The metal so removed performed no useful function; its presence at the point in question was probably accidental; at any rate the fastening works as well, if not better, without it. It is said that in 1900 the complainant wrote defendants complaining of their infringement of the Hall and Tilley patent and that the latter answered indicating that they would confer further with the patentees. The defendants swear that they never received such a letter and have no recollection of writing one in reply. None of the letters is produced and nothing of importance can be predicated of this testimony. But assume that the letter was received and answered as the complainant

asserts, the fact remains that for over seven years the defendants continued to make and sell their beds with no word of complaint or remonstrance from the complainant. The defendants held a patent covering the beds they were manufacturing and they were justified in assuming that they could manufacture these beds without injury to any one. Had they been informed that the complaint against them rested upon the fact that some of their castings were defective, they presumptively would have made the change and thus have saved the annoyance of the litigation. Even if it were held that some of these defective castings infringed the claim, it would be most inequitable to permit a decree even for nominal damages to go against the defendants, when they gained nothing by retaining the defective castings and discontinued their use the moment they ascertained the basis of complainant's grievance.

The decree is affirmed with costs.

LORAINÉ DEVELOPMENT CO. v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 113.

1. PATENTS (§ 178*)—CONSTRUCTION AND SCOPE—LIMITATION BY CLAIMS.

A patent does not cover all the inventive conceptions the patentee may have had when he procured it, but only such a device, with reasonable equivalents of elements, as he described and claimed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 254½; Dec. Dig. § 178.*]

2. PATENTS (§ 328*)—INFRINGEMENT—ARC LAMP GLOBE.

The Carbone patent No. 975,935, for an arc lamp globe, claims 1 and 3, which describe the globe as "divided into a plurality of superposed chambers by suitable configuration of the walls," is not infringed by a globe in which the glass portion surrounding the arc is not divided into chambers at all by its configuration, but is shaped like an inverted cone, with straight walls.

Appeal from the District Court of the United States for the Northern District of New York; George W. Ray, Judge.

Suit in equity by the Lorainé Development Company against the General Electric Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 198 Fed. 100.

This cause comes here upon appeal from a decree dismissing complainant's bill. The suit was the usual one in equity for alleged infringement of United States patent No. 975,935, granted November 15, 1910, to T. L. Carbone, for an arc lamp. The claims in controversy are the first and third. In the District Court the cause was decided on the question of infringement solely; it being held that there were such limitations included in these two claims that they could not cover the particular device of defendant.

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

C. P. Goepel, of New York City, and W. G. Van Loon and Theo. H. Swift, both of Albany, N. Y., for complainant.

Albert G. Davis, of Schenectady, N. Y. (W. K. Richardson and A. D. Salinger, both of New York City, of counsel), for the defendant.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. Judge Ray's opinion quotes so fully from the specifications, and sets forth so clearly the character of Carbone's improvement, that a very brief statement is all that is here required. Flaring arc lights are burned in globes, and the products of combustion are liable to form deposits on the globe, and thus obscure the light. It is desirable to so regulate these deposits that they will form either above or below the zone through which light is emitted, or both above and below such zone. In the prior art a circulatory system was devised, whereby the vapors passed into the upper portion of the globe (usually of metal), and were then brought down through outside ducts to be returned to the lower portion of the arc space. This system had defects which the patentee points out. He says that he dispenses with the ducts, "reducing the whole structure to a single globe or inclosure, which is provided with a plurality of chambers suitably connected." He so arranges his device that the heat adjacent to the arc would be sufficient to prevent the deposit of the fumes in the zone through which light is emitted. The gases rising around the upper electrode are cooled in the upper chamber and deposit there; around the lower electrode suspended particles fall into the lower chamber.

The two claims involved are as follows:

"1. An arc lamp globe specially adapted for impregnated carbons, and divided into a plurality of superposed chambers by suitable configuration of the walls, the middle chamber having a transparent wall surrounding the arc closely for preventing the gases produced by the arc from condensing on said walls."

"3. An arc lamp globe specially adapted to the use of impregnated carbons, and divided into a plurality of superposed chambers by suitable configuration of the walls, the walls of the middle chamber surrounding the arc as closely as possible, the said walls consisting partly of glass and partly of metal."

The defendant's structure has two chambers only, a metal chamber above and below a single glass chamber shaped like an inverted cone.

[1] Carbone's patent does not cover all the inventive conceptions he may have had when he procured it, but only such a device (with reasonable equivalents of elements) as he described and claimed. The patent states that:

"One embodiment of the invention * * * has three * * * chambers one above the other, the middle chamber being transparent and containing the arc."

[2] The object is stated to be to separate in some way the spaces in which deposits are formed from the spaces which are to be kept clear for emitting light. As a means for securing a clear line of demarcation of the deposits and preventing their encroachment upon the transparent light-emitting wall, he states that a change of angle or inclina-

tion of the wall with respect to the arc is found effective, and an inner ridge or contraction will accomplish this result. He then says:

"A clear line of demarcation is not in all cases necessary and any means of confining to a greater or less extent the deposits will fulfill the conditions; the necessary feature being an organization whereby the phenomenon of diffusion operates to carry the vapors produced by the arc away from the light-emitting wall before they are condensed and the oxids deposited."

This somewhat broad statement might possibly indicate that Carbone had in mind something other than a plurality of chambers for securing a somewhat irregular, but still efficient, line of demarcation. But immediately after the quotation just given we find the following:

"The *present invention* consists in providing a separate chamber for the arc by forming a series of contractions in the globe, so that it is divided into several superposed chambers."

When this statement is followed by six claims, in four of which the globe is said to be "divided into three superposed chambers by suitable contractions in the walls," and in the other two of which (those sued upon) it is said to be "divided into a plurality of superposed chambers by suitable configuration of the walls, the middle chamber having a transparent wall surrounding the arc," by no possibility of construction can it be held to cover a globe divided only into two chambers by configuration of the walls, and in which that part of the globe surrounding the arc is not divided into chambers at all by any such configuration, or by "change of angle" of wall or "change of inclination" of wall, or by "inner ridge" or "contraction."

We fully concur with Judge Ray in the conclusion that claims 1 and 3 are not infringed.

Decree affirmed, with costs.

KRAUTH et al. v. CARTER-CRUME CO., Limited.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 6.

PATENTS (§ 328*)—INVENTION—AUTOGRAPHIC REGISTER.

The Krauth & Benninghofen patent No. 611,259, for an autographic register, for use in making duplicate records of retail purchases in stores, is void for lack of patentable invention, in view of the state of the art.

Appeal from the Circuit Court of the United States for the Western District of New York; John R. Hazel, Judge.

Suit in equity by Albert Krauth and Christian Benninghofen against the Carter-Crume Company, Limited. Decree for defendant, and complainants appeal. Affirmed.

The following is the opinion of the Circuit Court, by Hazel, District Judge:

The patent in suit, No. 611,259, dated September 27, 1898, granted to Albert Krauth and Christian Benninghofen, relates to improvements in automatic

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

registers, generally used in stores for the purpose of making on paper duplicate records of retail purchases. The writing paper is placed taut on the tablet and held by the machine, and after the purchase is recorded is withdrawn or detached at the end of the machine, while the carbon paper, which enables the reproduction of the original record, extends transversely from a roll-bearing device at one side of the casing across the tablet and is cut or torn off at the opposite side thereof. Claim 8 only is alleged to be infringed by the defendant. It reads as follows:

"8. In an autographic register, the combination, substantially as set forth, of a casing, a tablet supported thereby, a holder for a roll of carbon paper disposed at one side of the top of the casing, a margin frame over said tablet and hinged at said carbon paper holder, and a flexible flange upon the free edge of said margin frame and arranged to cap down over the side wall of the casing opposite said carbon paper holder and form a flexible clamp and tearing blade."

The elements claimed to be new are a margin frame hinged at the carbon paper holder and a flexible flange upon the free edge of the margin frame. In its original phrasing the eighth claim was rejected by the examiner of patents as too broad, in view of the patentee's prior patent, No. 538,264. It was pointed out by the examiner that the different elements were old, and in his estimation it made no patentable difference that it showed the feature of hinging the margin frame at the side. Thereupon the patentee amended his claim, and substituted the feature of a flexible flange upon the free edge of the margin frame. His acquiescence in the rejection of the claim in its original form, and substitution of an element which palpably was narrower, precludes him from now insisting that his claim should be construed to cover the feature which the patent office rejected. This well-known rule calls for no citation of authorities; but, if one is necessary, the recent ruling on the subject by the Circuit Court of Appeals of the Second Circuit in *Victor Talking Machine Co. v. American Graphophone Co.*, 151 Fed. 601, 81 C. C. A. 145, will undoubtedly be sufficient.

However, I am reasonably satisfied by the evidence that neither the disclaimed feature nor the feature which was added to the combination, in view of the state of the art at the date of the invention, involved patentability. In the prior patent to Shoup, No. 561,350, is shown a flexible flange and the other elements of claim 8, save the hinging of the margin frame at the carbon holder. The Dick patent, No. 525,449, is for an autographic register similar in appearance to the Krauth register in suit. The specification and claims describe a casing, a tablet supported by the casing, a holder for carbon paper at the side of the casing, and a margin frame overlying the tablet. In the Kirby patent, No. 469,665, for an autograph register, practically all the elements in suit are shown. In his structure there is no carbon paper holder, but the carbon feeds from the carbon roll, and is drawn over to the opposite side of the roll, where it is held in place.

The expert witnesses do not agree whether the margin frame of the structure is hinged at one of the ends or at the side, but an examination of the patent would seem to indicate that it is hinged at one end of the casing. But, in my mind, to hinge the margin frame at the side of the roll-containing trough, as in the patent in suit, instead of at the end of the casing, as in the prior art, does not disclose the exercise of invention. The mechanic skilled in the art of making automatic registers would readily have selected the carbon paper holder as a more suitable point for hinging the margin frame. With the trough containing the carbon roll attached to the tablet at the side, it became obvious that the margin frame should cover the trough and be hinged at the carbon roll. While, of course, it was necessary to consider the different co-operative parts affected by hinging the frame in locating such hinging, yet the structures and separate parts of the prior art tended to make the alteration or improvement in question a simple thing. The modification practically followed on the heels of Krauth's prior patent, and very likely expediency and greater convenience in holding the carbon in place on the tablet made it advisable to hinge the frame at the side of the carbon roll. That such modification added to the utility of the device is immaterial, in view of its obvious-

ness. The change in location of the hinging of the frame did not involve the exercise of inventive skill, and no advance was made in the art.

Neither, in my judgment, was the substitution of the so-called flexible flange within the exercise of the inventive faculty. Flexible flanges to facilitate cutting the carbon paper were not discovered by the patentee. In the Shoup, Dick, Farmer, and Kirby patents flexible flanges were used in connection with the margin frame. It is enough to specialize the Dick patent, in which the carbon paper is clamped in position by the lateral flanges of the frame. The record abundantly shows, I think, that there was no novelty, at the date of the invention in suit, to use a margin frame having a flexible flange so arranged as to enable clamping the carbon at the side of the casing. What the patentee has done was in principle disclosed by the anterior art, and the modification or improvement made by him produced no new result, and falls within the field of the skilled mechanic.

For the foregoing reasons, claim 8 is void for want of patentable invention, and infringement need not be considered. The bill is dismissed, with costs.

Wood & Wood, of New York City, for appellants.

Duell, Warfield & Duell, of New York City (H. S. Duell, of Yonkers, N. Y., and Charles H. Duell and Frederic P. Warfield, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. While not inclined to give as much importance as Judge Hazel does to the action of the Patent Office, we agree with him that, in view of the state of the art, neither side hinging nor an engagement of the parts effected either by a flexible flange or by a flexible hinge constitute invention.

The decree is affirmed, with costs.

LOVELL-McCONNELL MFG. CO. et al. v. INTERNATIONAL AUTOMOBILE LEAGUE.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 78.

PATENTS (§ 308*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION—ENFORCEMENT.

Where a preliminary injunction was granted restraining defendant, which was an association of automobile owners, from selling to its members horns covered by complainant's patents at a discount from the prices fixed by the license contracts under which they were sold by complainant, a scheme by which defendant charged the full price, but returned to the purchasing members a check for the amount of the discount previously given, payable to some charity designated by the purchaser, was a palpable device for evading obedience to the injunction, and required its modification.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 504-506; Dec. Dig. § 308.*]

Appeal from the District Court of the United States for the Western District of New York; John R. Hazel, Judge.

Suit in equity by the Lovell-McConnell Manufacturing Company and others against the International Automobile League. From an or-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep's Indexes

der granting a preliminary injunction responding in part only to the prayers of the bill, complainants appeal. Modified and affirmed.

See, also, 199 Fed. 989.

George C. Dean, of New York City (Drury W. Cooper, of New York City, of counsel, and Herbert H. Dyke, of Newark, N. J., on the brief), for appellants.

Corcoran & Corcoran, of Buffalo, N. Y. (J. B. Corcoran, of Buffalo, N. Y., of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The complainants make automobile horns (the Klaxon horn) under a patent and sell the same to dealers under a complicated form of license, which, among other things, provides that the purchasers shall not resell at less than a stated price. The injunction which was issued prohibits defendants from—

"selling or offering for sale, directly or indirectly, any of complainants' horns, marketed and sold by complainants under their conditional licenses set forth in tags or labels upon or secured to said horns, for less than the price designated by complainants at which said horns must be sold to the public, as shown by the tags and labels secured to said horns by the complainants."

It is not necessary to set forth the various other preliminary injunctions which complainants now ask for, because in our opinion they are of the sort that should be considered only at final hearing, especially because complainants' theory as to this additional relief apparently is that there has been some forfeiture of license, so that the defendant is to be regarded as never having had a license, and therefore as an infringer. Since the answer attacks the validity of the patent, which defendant may properly do, if he is not a licensee, and an extensive prior art is set up, the questions raised upon this argument should be left for disposition at final hearing.

In one particular, however, complainants are entitled to some further relief. The defendant is a concern operated on a membership and profit-sharing plan, whereby each member is obliged to pay a membership fee of \$10. It buys various automobile fittings and accessories at manufacturers' prices, and before this injunction sold these horns to its own members at a considerable abatement from the price fixed by the manufacturer for sale to the public. After the injunction was issued, it sent a circular to all its members, notifying them that it could no longer sell horns to them at cut prices. The same circular included the following offer:

"While the Klaxon people may insist upon the League charging its members the retail price, they surely cannot prevent the League giving the profits to charity. If you are insistent upon having a Klaxon (though, in our opinion, the Newtone horn, described on another page, is equal or preferable), send us your check for the full retail price, as given above. We will sell it at no other price. Then give us the name of two charitable institutions in your vicinity deserving of assistance, and we will select one of them and draw our check to its order for the difference between the cost to us and the retail price, forwarding the check in your care, so that we may be sure it will reach its proper destination."

This seems to be a very flimsy device for evading obedience to the injunction against cutting prices. Most of the individuals whose con-

dition in life is such that they can afford to own and use automobiles are presumably in the habit of making regular contributions at stated periods to one or more worthy charitable institutions. When defendant tells them that, if they will buy from it Klaxon horns at the price they must pay everywhere else, it will send them a check for \$8 or \$9 on each horn, drawn to the order of such charitable institution as they may designate, it is naturally to be expected that they will accept the offer, will take the draft, add to it sufficient to make up their usual contribution, and pass the same on to the institution.

Probably there are other persons whose charitable vision is bounded by the horizon of themselves and their individual families. It would be an easy thing for one of them to send on two fictitious titles of what seemingly are charitable institutions, but which in reality represent merely the distress produced in this family by the payment of the full list price for a Klaxon horn. Upon receiving the draft, he could write the fictitious name of the payee, and then indorse, deposit, and collect it in his own name. The suggestion that defendant would undertake any investigation to discover whether or not the selected "charitable institution" is real or fictitious puts a severe strain on one's credulity. We think this devotion of the discount from list price to "charitable institutions" is a mere evasion of the order, and that the present injunction should be modified, by inserting a clause which will put a stop to the practice.

As thus modified, the order is affirmed, without costs.

AMERICAN OPTICAL CO. v. BAY STATE OPTICAL CO. et al

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 89.

PATENTS (§ 328*)—ANTICIPATION—EYEGLASSES.

The Ludlow patent, No. 674,974, for eyeglasses, *held* void for anticipation.

Appeal from the District Court of the United States for the Southern District of New York; Charles M. Hough, Judge.

Suit in equity by the American Optical Company against the Bay State Optical Company and another. Decree for defendants, and complainant appeals. Affirmed.

Briesen & Knauth, of New York City (J. Edgar Bull and F. v. Briesen, both of New York City, of counsel), for appellant.

Duell, Warfield & Duell, of New York City (F. P. Warfield and C. H. Duell, both of New York City, H. S. Duell, of Yonkers, N. Y., and H. E. Bellows, of Providence, R. I., of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an appeal from a decree of the District Court dismissing the bill of complainant, assignee of United

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

States letters patent 674,974, dated May 28, 1901, for eyeglasses or spectacles, issued to D. H. Ludlow. The only claim in issue is the first, which reads:

"1. The nose-rest *n*, provided with an arm which leaves said nose-rest at a point posterior to its anterior edge and runs outward away from the plane of said nose-rest and then forward forming a backwardly convex fold *f*, substantially as described."

Counsel for the patentee originally contended that Ludlow's invention consisted of a malleable arm supporting the lenses which led from the posterior edge of the nose-rest in the form of a backward turning convex loop called by the patentee a fold. The characteristic feature of the invention was said to be its almost universal adjustability. By bending the arm by the use of the ordinary pliers, the nose-rest and the glasses could be fixed in almost any position in relation to the eyes. This saved the optician from carrying a great number of frames of different styles, each having a fixed adjustment, out of which he had to select a pair of glasses suitable to the nose of each customer. Judge Hough found that glasses made in accordance with the patent had a large commercial success, and were a new and useful invention, and directed a decree in favor of the complainant. Subsequently the case was reopened on the application of the defendant, in order to prove anticipation, viz., a structure called the Wells-Cling arm, which was sold by the firm of J. M. & C. A. Johnston, of Chicago, some two years before application was made for the patent in suit. This arm was made either with a forwardly or a backwardly extending convex loop, and was capable of adjustment in the same way as the Ludlow arms.

Thereupon the complainant contended that the characteristic feature of Ludlow's patent was the effect by bending the arm of pressing the forward edge of the nose-rest into the flesh, making a ridge along the whole edge, which prevented the glasses from sliding forward or tilting. This was described as a free front edge, and it was said could not have been accomplished by the Johnston arm, because that nose-rest was filled with cork. Judge Hough held, reversing his original decree and directing the bill to be dismissed, that the Johnston structure did anticipate; that a flat-edged nose-rest was well known in the trade, and that it required no invention to substitute celluloid or other hard material for the rounded cork, with which the Johnston nose-rest having a backwardly turning convex loop was lined; also that, if such a substitution could be held to be invention, the claim of the patent did not cover it, and that there was nothing in the specifications to show that Ludlow intended to cover a hard and angular nose-rest.

With these conclusions we agree, and therefore the decree is affirmed with costs.

EDISON MFG. CO. v. BANKS ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 164.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—VOLTAIC BATTERY.

The Dodge patent, No. 894,487, for a voltaic or primary battery, was not anticipated, and, although the elements are old, covers a novel and patentable combination; the result being a battery which is stronger and cheaper, and can be more readily renewed, than those in prior use. Also *held* infringed.

Appeal from the District Court of the United States for the Southern District of New York; George C. Holt, Judge.

Suit in equity by the Edison Manufacturing Company against the Banks Electric & Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 198 Fed. 495.

J. C. Tomlinson, Alfred C. Coxe, Jr., and A. G. N. Vermilya, all of New York City, for appellant.

Louis Hicks, of New York City (Delos Holden and Frederick Bachmann, both of Orange, N. J., of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. As stated by the District Judge, the—

"object of the invention is to simplify and cheapen the construction of primary batteries of the class in which the negative electrode consists of a plate of oxid of copper or other depolarizing agent properly molded and agglomerated, and the positive electrode of a plate or plates of zinc, so that renewals of the same would be less expensive and more readily carried out. By the invention both the electrodes are supported by one frame or hanger secured to the battery cover with one clamp. By such a construction the entire essential parts of the battery can be manufactured and put together in the factory, and, when the electrodes become exhausted, a renewal can be made by simply loosening the clamp, throwing away the old hanger with its attendant electrodes, and substituting a new set in its place by clamping the new hanger to the cover of the battery jar. * * * The result is a combination of the essential parts of the battery in one simple and rigid structure, which can be manufactured cheaply, can be easily renewed, and the use of which, when a renewal is necessary, largely avoids the danger of contact with the caustic soda solution in the jar in which the electrodes are plunged. The complainant's form of battery has gone into very extensive use, particularly for railroad signals."

The single claim in controversy, No. 5, reads as follows:

"In a voltaic battery, the combination of a sustaining contact frame, a negative plate for the battery supported in said frame, a positive plate or plates for the battery supported by said frame, and insulating means secured to said frame for securing said positive plate or plates thereto."

We concur with the District Judge in the conclusion that the invention was novel, and not anticipated by any of the patents, publications or uses of the prior art. The nearest device of the prior art is that described in United States patent No. 570,013 to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

R. W. Gordon, and embodied in a battery known as the "Gordon Recharge." In this device the negative electrode consists of a perforated metal cylindrical basket containing powdered oxid of copper or similar polarizing agent, which basket is surrounded by a broad ring of zinc, forming the positive electrode. Both electrodes are sustained by a frame, with insulating means to prevent their contact. The mere difference in form would not distinguish this structure from that of the patent. If the cylindrical perforated basket were changed into a square flat basket, and the zinc ring into a square zinc plate, as in the illustrative exhibit shown on the argument, it would still be the Gordon structure. Defendant could use such a structure without risk of infringing the Dodge patent.

The important difference is that with a perforated basket, whatever its shape, the loose copper oxid is likely to sift through the perforations and lie on the porcelain supports, thus causing a partial short circuit, which would reduce the life of the cell materially. By the use of a plate of copper, instead of the perforated basket, Dodge avoids this difficulty. The elements of the combination are old, but the particular combination is novel, and we agree with Judge Holt in finding validity and infringement.

Decree affirmed, with costs.

ELECTRO-DYNAMIC CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 92.

PATENTS (§ 328*)--ANTICIPATION--ELECTRIC MOTOR.

The Pfatischer patent, No. 775,310, for a variable speed motor, *held* void for anticipation in the prior art.

Appeal from the Circuit Court of the United States for the Southern District of New York; Charles M. Hough, Judge.

Suit in equity by the Electro-Dynamic Company against the Westinghouse Electric & Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 191 Fed. 506.

The bill was based on letters patent No. 775,310, granted to Mathias Pfatischer November 22, 1904, for improvements in variable speed motors. Claims 1, 2, 5, 6, and 7 are involved.

Norman G. Johnson, of New York City (John C. Pennie and William H. Davis, of New York City, of counsel), for appellant.

Frederick P. Fish and Charles Neave, both of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The improvements covered by the claims in question were the natural evolution of the art to meet the demand for a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

motor to drive small electric tools. The main object which the patentee had in view was the prevention of undue sparking. He says:

"My improvements are particularly applicable to direct-current shunt-wound motors; and it is an object of my invention to provide a motor of that type which will effect communication without sparking with a variable load as well as at variable speed, and which is capable of rotation in either direction."

Each of the claims in controversy states that the combination described enables the armature to rotate at variable speed and load, in either direction, without sparking and without varying the position of the brushes. This result is accomplished by the use of interpoles; but interpoles were well known in the prior art.

Ridgeway seems to us to embody all the essential features of the complainant's patent. His motor operates in the same way and accomplishes the same results. The only difference is that the interpole winding, instead of being confined to the interpole, is carried to each of the adjoining main poles and is attached to the same, though it does not encircle the main pole. Whether this be so or not is immaterial, for the reason that the Ridgeway interpole performs the functions of an interpole, and whether it performs other functions, not inconsistent with its work as an interpole, is immaterial.

Swinburne in 1890 published an article on reversing poles, in which he says it is probable that they will come into general use for keeping the electro-motive force stable at light loads. In other words, act as interpoles. The same statements are found in other prior articles.

It is unnecessary to enter further into details, as the entire subject is clearly treated in the opinion of Judge Hough, and we are fully in accord with the conclusions reached by him.

The decree is affirmed, with costs.

WALTHAM WATCH CO. v. KEENE.

(District Court, S. D. New York. February 15, 1913.)

1. PATENTS (§ 257*)—INFRINGEMENT—SALE OF ARTICLE BY PATENTEE—RIGHT TO FIX PRICE FOR RESALE.

The manufacturer of an article of merchandise, essential parts of which are covered by patents owned by him, who sells such article to the trade and receives the full consideration therefor, including his royalty or compensation for the use of the patented inventions, and who is in no event to receive any further sum therefrom, has received in full the benefit of the monopoly given him by the patent law, and it is not within his right to attach to the contract of sale a condition fixing the price at which the article shall be sold to users, to bind the purchaser so as to make a violation thereof an infringement of the patents.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 257.*]

2. CONTRACTS (§ 116*)—SALE OF ARTICLE BY PATENTEE—RIGHT TO FIX PRICE FOR RESALE.

Such a restriction is one not reasonably necessary to protect any rights of the patentee and one in which he has no direct pecuniary interest,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 202 F.—15

but is an attempt to monopolize and to control prices, and is void as in contravention of a sound public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

3. PATENTS (§ 216*)—INFRINGEMENT—SALE OF ARTICLE BY PATENTEE—RIGHT TO FIX PRICE FOR RESALE.

Such a sale is not made a conditional one which the law will recognize as such by a further provision of the contract purporting to give the seller the right to retake the article, in case it is resold at less than the price fixed, on repayment to the purchaser of the sum paid therefor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. § 216.*]

4. STATUTES (§§ 174, 175*)—CONSTRUCTION OF PATENT STATUTES—CONSIDERATIONS OF PUBLIC POLICY.

For the purpose of determining the construction, although not the validity, of a statute, recourse may be had to considerations of public policy, and a purpose to disregard a sound and settled public policy by the enactment of the patent law should not be attributed to Congress except on the most cogent evidence.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 254; Dec. Dig. §§ 174, 175.*]

In Equity. Suit by the Waltham Watch Company against Charles A. Keene. On final hearing. Decree for defendant.

For prior opinion, see 191 Fed. 855.

Suit in equity to restrain alleged infringement of certain letters patent; the alleged infringement consisting of the violation of a certain so-called license agreement or restriction as to the resale of watch movements, and which fixes the *price* at which such movements shall be sold by dealers.

Crawford, Harris & Goodwin, of New York City (Matthews, Thompson & Spring, of Boston, Mass., of counsel), for complainant. Adolph Hirsch Rosenfeld, of New York City, for defendant.

RAY, District Judge. The parties by stipulation have agreed upon the facts, which in condensed form may be stated as follows:

I. The Waltham Watch Company is a corporation of the state of Massachusetts having its place of manufacture of watch movements, etc., and its principal place of business at Waltham in that state, and the defendant, Charles A. Keene, is a citizen of the state of New York, engaged in the business of buying and selling watches and watch movements, etc., in the city of New York, state of New York.

II. The complainant is the sole owner of United States letters patent No. 527,771, to one Church for improvement in watch movement frames, United States letters patent No. 677,689, to one Ohlson, assignor to the Waltham Watch Company, for improvement in spring barrels for watch movements, and United States letters patent No. 556,303, to one Church for improvement in dial holders for watch movements, and has been since May 15, 1906. The said letters patents are good and valid, and the several inventions set forth in said letters patents are capable of conjoint use and have been so used by the Waltham Watch Company, and watch movements made and put

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

out by said Waltham Watch Company, since May 15, 1906, and known as "16 size Riverside Movements," have each embodied conjointly the inventions described in said patents. The inventions embodied in the improvements constitute a material and substantial feature thereof.

III. Subdivisions 11 to 16, inclusive, of the stipulated record, read as follows:

"(11) Among the watch movements manufactured by the complainant since the said 15th day of May, 1906, and for a long time prior thereto by the complainant's said predecessor, is and has been a model distinguished by the trade-mark 'Riverside.' Said trade-mark Riverside has been continuously, uninterruptedly, and exclusively used by the complainant and its said predecessor since October, 1876, and has been stamped or engraved in a conspicuous place on all such movements. Said watch movements so distinguished by the trade-mark Riverside have been during the whole of said period manufactured by the complainant and complainant's said predecessor in several sizes, one of said sizes being known as the 16 size Riverside movement, and containing 19 jewels. Said trade-mark Riverside has at all times since the 15th day of April, 1907, and for a long time prior thereto, been and is duly registered with the Commissioner of Patents of the United States, said registration being in all respects in compliance with the laws of the United States in that respect made and provided. A copy of said registration is hereto annexed and marked 'D.'

"(12) Since said 15th day of April, 1907, many watch movements bearing said trade-mark Riverside and known to the watch trade and to the public as Riverside watch movements, including many of said 16 size Riverside movements, have been sold and used in said Southern district of New York and elsewhere.

"(13) Since the said 15th day of April, 1907, all watch movements herein referred to as 16 size Riverside movements, and which have embodied and embody conjointly the inventions and improvements set forth in said three letters patent, as well as other movements made by the complainant and embodying other patented inventions and improvements, have been sold and delivered by the complainant at its regular established price only to wholesale dealers, known as jobbers, and by said jobbers to retail dealers, only in the following manner:

"All of said movements have been sold and delivered in boxes or packages, one movement in each box or package, each movement being inclosed in an inner metal box or container. Accompanying each movement and inserted in direct contact therewith in said metal box or container is a printed slip designated 'Waltham Contract Notice,' and in the case of each and every one of said 16 size Riverside movements embodying the said inventions made by the complainant, and which has since the said 15th day of April, 1907, been purchased by the defendant, the box or package containing such movements, when received by the defendant, as the defendant then well knew, also contained, as aforesaid, said Waltham Contract Notice, of which the following is a true copy, the blank space after the words 'Movement No.' containing the number corresponding with the number on the movement it accompanied:

" 'Waltham Contract Notice.

" '16 size Waltham movement No. bearing the trade-mark Riverside 19 jewels, essential parts of which are protected by United States letters patent, is sold subject to the following conditions, which every buyer thereof by accepting this movement agrees with the undersigned company to keep and perform, viz.: (1) Jobbers may sell this movement to established retail watch dealers, except those designated by this company, and to no other persons, and only at the price and discount authorized by this company. (The term "retail watch dealers" shall include all watch dealers other than those recognized as jobbers by this company.) (2) Jobbers must in every instance deliver this contract notice with the movement. (3) Retail dealers may dispose of this movement by sale only, and only to buyers for use and

not for resale and must not advertise nor sell this movement for less than \$25.00. A breach of any of these conditions shall revert in the company the title to this movement and upon tendering the price paid therefor to the holder thereof the company may retake possession of the same.

"These conditions will be enforced by the company.

"Waltham Watch Company,

"Waltham, Mass."

"Said contract notice being a true copy of the notice so used from April 15, 1907, down to the present time, excepting that on the 23d day of September, 1909, the price specified in said contract notice was changed from \$25 to \$28.50. The form of said box or package containing said 16 size Riverside movements being identical in every respect with the box marked 'Exhibit E,' which is hereby made a part of this stipulation and is filed herewith.

"Subsequent to the 15th day of April, 1907, in each instance where any of the said 16 size Riverside movements have been sold or furnished by the complainant or under its authority to jobbers, there has been annexed to or printed on the invoice rendered by the complainant to such jobbers in a conspicuous place a notice designated 'Conditions of Sale (Bill to Jobbers),' of which the following is a true copy, except that certain movements enumerated therein other than the said Riverside movements were not included in the notice issued on April 15, 1907, but were added thereto after said April 15, 1907; said Riverside movements having at all times been included in said notice:

"Conditions of Sale.

"(Bill to Jobbers.)

"Each Waltham movement and Waltham watch in this bill is sold subject to the following conditions and to those in the Waltham Contract Notice issued with the movement or watch, which conditions every buyer thereof by accepting said movement or watch agrees with the undersigned company to keep and perform, viz.: (1) Jobbers may sell said movements or watches, to established retail watch dealers, except those designated by said company, and to no other persons, and only at prices and discounts authorized by the said company. (2) Must bill said movements or watches only on billheads approved by said company and bearing the Condition of Sale. (3) Must not bill said movements or watches with any other goods. (4) Must not exchange said movements or watches for any other goods whatsoever. (5) The Waltham Contract Notice must be delivered with the movement or watch in every instance. These conditions govern the sale of the following movements; Vanguard, 18 size and 16 size; Crescent St., 18 size and 16 size; No. 845; Appleton, Tracy & Co., Premier; Riverside Maximus, 16 size, 12 size and 0 size; Riverside, 16 size, 12 size and 0 size; No. 645; Royal, 16 size and 12 size; all Colonial Series watches. (6) A breach of any of said conditions shall revert in the company the title to all movements of the grades named and all Colonial Series watches in the possession of the violator and of any one who shall have induced or knowingly participated in such breach; and upon tendering the price paid by the holder of such movements or watches the company may retake possession of the same. (7) Jobbers must immediately send to the company's selling agents a duplicate of every bill of the above-named movements and watches which they issue.

"The undersigned will enforce these conditions.

"Waltham Watch Company,

"Waltham, Mass."

"On the 15th day of April, 1907, the complainant established a schedule of retail prices, relating to said 16 size Riverside movements made by the complainant, which prices were contained on a printed slip or form designated 'Conditions of Sale (Bill to Retailers), of which the following is a true copy:

“‘Conditions of Sale.

“(Bill to Retailers.)

“Each Waltham movement specified in this bill is sold subject to the following conditions and to those of the Waltham Contract Notice issued with the movement, which conditions every buyer thereof by accepting said movement agrees with the undersigned company to keep and perform: (1) All watch dealers are to be considered retail dealers, except those recognized as jobbers by said company. (2) Retail dealers may dispose of said movements by sale only and only to buyers for use and not for resale. (3) And may not advertise nor sell said movements for less than the following net prices, respectively: Vanguard, 23 jewels, 18 size and 16 size, \$36.00; Vanguard, 21 jewels, 18 size, \$33.00; Vanguard, 19 jewels, 18 size and 16 size, \$30.00; Crescent St., 21 jewels, 18 and 16 size, \$27.00; Crescent St., 19 jewels, 18 size, \$24.00; No. 845, \$25.00; Appleton, Tracy & Co., Premier, \$21.00; Riverside Maximus, 16 size and 12 size, \$60.00; Riverside Maximus, 0 size, \$27.00; Riverside, 16 and 12 size, 19 jewels, \$25.00; No. 645, \$25.00; Riverside, 0 size, \$22.00; Royal, 16 size and 12 size, \$16.00. Metal dial on any of the above \$1.00 additional. (4) A breach of any of said conditions shall revest in the company the title to all movements of the grades above named which shall be in the possession of any one who shall have induced or knowingly participated in such breach, and upon tendering the price paid therefor by the holder of said movements, the company may retake possession of the same. (5) A duplicate of this bill has been sent to the undersigned, by whom these conditions will be enforced.

“Waltham Watch Company.

“Waltham, Mass.”

“During said period all of said jobbers annexed to all bills of said watch movements sold by them to retailers copies of said ‘Conditions of Sale (Bill to Retailers).’

“Said schedule of retail prices continued in force until September 23, 1909. On said September 23, 1909, a new schedule of retail prices for such movements was established by the complainant, and has continued in force down to the present time, which prices were contained on a printed slip or form which has been annexed by jobbers to all bills of said watch movements sold by them to retailers since said 23d day of September, 1909. The following is a true copy of said last-mentioned ‘Conditions of Sale (Bill to Retailers).’

“‘Conditions of Sale.

“(Bill to Retailers.)

“Each Waltham movement specified in this bill is sold subject to the following conditions and to those in the Waltham Contract Notice issued with the movement, which conditions every buyer thereof by accepting said movement agrees with the undersigned company to keep and perform: (1) All watch dealers are to be considered retail dealers, except those recognized as jobbers by said company. (2) Retail dealers may dispose of said movements by sale only and only to buyers for use and not for resale. (3) And may not advertise nor sell said movements for less than the following net prices, respectively: Vanguard, 23 jewels, 18 size and 16 size, \$40.00; Vanguard, 21 jewels, 18 size, \$37.50; Vanguard, 19 jewels, 18 size and 16 size, \$35.00; Crescent St., 21 jewels, 18 size and 16 size, \$31.50; Crescent St., 19 jewels, 18 size, \$30.00; No. 845, \$28.00; Appleton, Tracy & Co. Premier, \$21.00; Riverside Maximus, 16 size and 12 size, \$70.00; Riverside Maximus, 0 size, \$30.00; Riverside, 16 size and 12 size, 19 jewels, \$28.50; No. 645, \$28.50; Riverside, 0 size, \$24.00; Royal, 16 size and 12 size, \$18.00. Metal dial on any of the above \$1.00 additional. (4) A breach of any of said conditions shall revest in the company the title to all movements of the grades above named which shall be in the possession of the violator and in the possession of any one who shall have induced or knowingly participated in such breach, and upon tendering the price paid therefor by the holder of

said movements, the company may retake possession of the same. (5) A duplicate of this bill has been sent to the undersigned, by whom these conditions will be enforced.

"Waltham Watch Company,
"Waltham, Mass."

"From the said 15th day of April, 1907, down to the present time, the complainant has sold none of said 16 size Riverside movements embodying said patents and improvements, excepting in the manner and on the terms and conditions above set out.

"(14) That at various times since the 15th day of April, 1907, and prior to the month of April, 1910, and at various times subsequent thereto, the defendant has purchased and received a number of said 16 size Riverside movements, each contained in a box or package as described in paragraph 13 above, and identical in form with Exhibit B, herein referred to, and accompanied as aforesaid by a printed slip designated 'Waltham Contract Notice,' a true copy of which is above set forth. That, in each instance of the purchase by the defendant during the periods aforesaid of a 16 size Riverside movement, the bill or invoice received from the jobber contained in a conspicuous place on said bill a printed form designated 'Conditions of Sale (Bill to Retailers),' a true copy of which is set forth in said paragraph 13 of this stipulation. That at the respective times of the receipt of said bills and said watch movements said defendant had full knowledge of all said facts contained in said 'Waltham Contract Notice' and in said printed form designated 'Conditions of Sale (Bill to Retailers),' and at said times defendant had full knowledge of the prices in said 'Waltham Contract Notice' and in said 'Conditions of Sale (Bill to Retailers).' That, during the said months of April, May, June and July, 1910, and at various other times, with the full knowledge aforesaid, said defendant advertised, offered for sale and sold certain of said 16 size Riverside movements so purchased and received by him prior to April, 1910, at the following price, including a case, namely, the price of \$17.35, which said movements were manufactured and sold by the complainant and were purchased by the said defendant subsequent to the said 15th day of April, 1907.

"(15) That defendant threatens to purchase and procure other of said 16 size Riverside movements and to advertise, offer for sale and sell the same at prices below those specified in said 'Waltham Contract Notice' and said 'Conditions of Sale (Bill to Retailers),' set forth in paragraph 13 of this stipulation.

"(16) If, upon the foregoing facts, the court is of opinion that the plaintiff is entitled to relief, then the relief prayed for in the plaintiff's bill or any part thereof may be granted. If, upon the foregoing facts, the court is of opinion that the plaintiff is not entitled to relief, then the plaintiff's bill may be dismissed."

[1] It is noticed that the watch movement as a whole is not patented. The patents cover the frame, the spring barrel, and dial holder; but, as stated, these are material and substantial features of the movement.

There is no allegation or stipulation that the defendant has purchased any of these movements from the complainant, or that complainant has sold him any; the fair inference is that the complainant sold the movements to jobbers, and that the defendant has purchased of such jobbers in the open market, but with knowledge of the "Waltham Contract Notice" and "Conditions of Sale (Bill to Retailers)." The defendant has violated the provisions or terms of said "Conditions of Sale (Bill to Retailers)," by selling at a lower price than that fixed thereby. The question is: Has he infringed the patents or violated a valid contract binding on him in so doing? It is evident from the facts stipulated that the complainant was and is engaged in inter-

state commerce in making and selling these watch movements, and that its dealings with defendant, if any, were interstate commerce. It is also evident that every dealer who comes into the agreement or under the contract—that is, who purchases these movements of complainant with knowledge of the conditions and assents thereto—becomes a party to an agreement and combination to keep up and control prices to users and thereby restrain trade and destroy competition. If the so-called contracts are lived up to, competition between dealers is absolutely eliminated. Under the terms of this printed slip placed in a box with each movement sold, if the purchaser pays \$25 only for one of these 16 size Riverside movements, the Waltham Watch Company may take it from him on repayment of the price paid.

In *Henry v. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, it seems plain from the statement of facts in the case and the opinions that the patentee sold the articles covered by the patent for less than cost and did not reap his reward for his invention, that is, his royalty or consideration for the use of his patented invention or article by way of price charged, but by way of the limitation on the use of same, that is, the provisions that the supplies used with and on the machine should be purchased of the patentee and of his manufacture and at his price. It was in this way that the patentee protected himself or secured his reward for the use of his invention.

In the case before the court we have no such facts. It appears that the patentee has received and does receive *his royalty* or consideration for the use of the patented article—watch movement—when he sells the movement. In no event does he receive any added or further compensation or consideration for the movement. In no way is he concerned with the sales made thereafter by dealers, or with the prices they charge or receive for the movements, unless it be that he is interested to have the price of the movement maintained on the theory it would injure the standing of the movements as an article of commerce to have them sold for a lesser price than that fixed by the manufacturer. In *Adams v. Burke*, 17 Wall. 453, 456 (21 L. Ed. 700), the court said:

"That is to say, the patentee or his assignee having *in the act of sale* received *all the royalty* or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser *without further restriction* on account of the monopoly of the patentee."

It is plain that the Dick Case is not within or covered by this language for the reason stated. The case at bar is within this holding for the reason the patentee or his assignee has sold and parted with the movements on receipt of his full price or consideration. He is to reap no further profit from the transaction. Having fixed and received his consideration, including royalty, he goes further and attempts to fix and control the price at which others shall sell—part with their interest in the watch movements. He is attempting to control the *price* of these movements in the open market after parting with title and possession and after having, as to the particular articles, exercised fully the right or monopoly the patent law gives him, viz., the sole and exclusive right to vend the article. It does not seem to

me that the patent statute goes beyond this, as to vending, and confers on the patentee when he exercises the right to vend and does vend—that is, sell—the right to attach to the article in the hands of subsequent purchasers a limitation that it must be sold for a price fixed by the patentee or his assignee.

And the *Henry v. Dick Co.* Case is not at war or inconsistent with the holding in the *Keeler v. Folding Bed Co.* Case, 157 U. S. 659, 666, 15 Sup. Ct. 738, 741 (39 L. Ed. 848). The court said:

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an *absolute property* in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract and not as one under the *inherent meaning and effect of the patent laws*. The conclusion reached does not deprive a patentee of his just rights because no article can be unfettered from the claim of his monopoly *without paying its tribute*. The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration."

It will be noticed that the Supreme Court was here dealing with sales of patented articles (not licenses to use) for a price and expressly declares that "no article can be unfettered from the claim of his (the patentee's) monopoly without paying its tribute." Is not this saying that when the "tribute" is fully paid the article is freed from the monopoly of the patent? As declared in *Adams v. Burke*, and reiterated in this *Folding Bed Case*, once "*the tribute*" is paid by a purchaser, the article passes clear and unfettered of the monopoly to the purchaser. This was the sum and substance of the holding of the Supreme Court in *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, a case arising under the copyright statute. R. S. § 4952 (U. S. Comp. St. 1901, p. 3406). There the book was sold by the owner of the copyright *at the price fixed by the owner of the copyright*, and a limitation, by way of license restriction on the price at which it should be sold by the purchaser who had fully paid the "tribute," was held not binding.

In the opinion in *Henry v. Dick Co.*, supra, 224 U. S. at page 47, 32 Sup. Ct. 379, 56 L. Ed. 645, it is said:

"There is no collision *whatever* between the decision in the *Bobbs-Merrill Case* and the present opinion. Each rests upon a construction of the applicable statute, *and the special facts of the cases*."

On the preceding page (224 U. S. 46, 32 Sup. Ct. 378, 56 L. Ed. 645) the learned judge had pointed out the difference in the wording of the two statutes. It is pointed out that:

"To secure to the author an exclusive right to his writings, Congress provided that he should have 'the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and *vending* the same.' Revised Statutes, § 4952. This is, in short, *the sole right to multiply and vend* copies of his production."

The court then proceeds to say:

"To the inventor, by section 4884, Revised Statutes (U. S. Comp. St. 1901, p. 3381), there is granted the exclusive right to make, *use* ('use' italicized),

and vend the invention or discovery. This grant, as defined in *Bloomer v. McQuewan*, 14 How. 539, 549 [14 L. Ed. 532], consists altogether in the right to exclude every one from making, *using* ('using' italicized), or vending the thing patented. Thus there are several substantive rights, and each is the subject of subdivision so that one person may be permitted to make, but neither to sell nor use, the patented thing. To another may be conveyed the right to *sell, but within a limited area, or for a particular use*, while to another the patentee may grant only the right to make and use, or to use only for specific purposes."

It is noted that the court has specifically refrained from saying, when detailing the substantive rights of a patentee, that he has the right to sell and attach a binding condition for resale at a specific price fixed by him only, or that such a condition by way of contract binds the purchaser so as to make a violation thereof an infringement.

The *Bobbs-Merrill Case*, *supra*, dealt with resales at a specific price fixed by the owner of the copyright, and it is inconceivable that the learned judge, in giving the opinion in the *Henry v. Dick Co. Case*, would have refrained from stating that among the substantive rights of the patentee is that of selling for resale at a specific price fixed by him only, if it was intended to hold or intimate any such doctrine. That a patentee may create selling agencies and control the price goes without saying; but, once sold and the royalty received by the patentee, the patented thing, so far as price is concerned, should be free of the monopoly. Prescribing the mode and manner of the *use* of a patented article by the purchaser and user, as in the *Henry v. Dick Co. Case*, where the limitation on ownership not only went to the preservation of the character of the machine as an operative and useful device and a merchantable article, but to the reaping of the reward for the use of the invention, the payment of the "tribute" for the right to use is one thing, while prescribing the price at which dealers shall sell the article once sold by the patentee or his assignee *for his full price* is quite another and different thing or matter. The latter goes to the fixing and control of prices in the open market for an article of merchandise, one of common, everyday use, after it has been put on the market for sale as such and after the inventor or owner of the monopoly has received his full compensation, or consideration, or "tribute" for the sole and exclusive right to use and vend the patented thing and has fully exercised his sole and exclusive right to vend.

In *Bobbs-Merrill Co. v. Straus*, *supra*, the Supreme Court expressly refused to hold that a patentee or his assignee may sell a patented article subject to a condition that it shall not be sold by the purchaser at less than a prescribed minimum price. The court refused to even consider the question, and said:

"If we were to follow the course taken in the argument and discuss the right of a patentee, under letters patent, and then, by analogy, apply the conclusions to copyrights, we might greatly embarrass the consideration of a case under letters patent when one of that character shall be presented to this court."

See what was said on this subject in *Henry v. Dick Co.*, 224 U. S. 43, 44, 32 Sup. Ct. 377, 56 L. Ed. 645.

In *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, the court had under consideration this

very question of the manufacturer fixing prices for future sales by a purchaser from him by agreement and notice in the case of unpatented articles made according to a secret formula owned by and known to the manufacturer only. The Supreme Court refused to indicate what its decision would be on such a question in the case of a patented article, saying:

"The complainant has no statutory grant. So far as appears, there are no letters patent relating to the remedies in question. The complainant has not seen fit to make the disclosure required by the statute and thus to secure the privileges it confers. Its case lies *outside the policy of the patent law, and the extent of the right which that law secures is not here involved or determined.*"

[2] I am unable to draw any distinction between the extent of the rights which the copyright law gives to the owner of a copyright and the extent of the rights which the patent law gives to the owner of a patent *so far as sales are concerned*. Each is given the sole and exclusive right to vend. Concede that the patentee has the statutory right to protect himself by contract in the lawful enjoyment of every right which his patent confers, the exclusive right to use, and the exclusive right to vend, which includes the right to confer on another the right to use as that other sees fit or in the manner prescribed in the license granted by the owner, or to vend to another absolutely, that is, give complete title, or give to that other an interest in the thing vended only so that there is a joint ownership or tenancy in common, it goes beyond all reason, I think, to hold that, when the patentee has manufactured the patented article and fixed the value thereof including his full royalty, or consideration, a compensation for the right to use and sell the article, he may put the article on the market for sale by selling to jobbers and dealers who purchase for such purpose and pay the full price fixed, and still limit and restrict them in the price they shall charge and receive for their own property. It is an attempt to monopolize and control prices and destroy competition, and, when a jobber or dealer takes a number of such articles for sale to others under such a restriction as to sales made by himself, there is at once a combination to fix prices and restrain trade in contravention of a sound public policy.

In *Dr. Miles Med. Co. v. Park & Sons Co.*, supra, the court said:

"Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales."

In the *Bobbs-Merrill Case*, the court said:

"To *add* to the right of exclusive sale the authority to control all future retail sales by notice that such sales must be made at a fixed sum would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning when interpreted with a view to ascertaining the legislative intent in its enactment."

[3] I do not think the patent statute can be so unreasonably extended by construction, and clearly such a broad and sweeping construction is unnecessary to give the patentee full protection in the enjoyment of his exclusive right to vend. Having once vended the article and received his price and tribute, his exclusive right to vend

is exhausted and the article is freed from the monopoly. As to the exclusive right to vend, the language of the patent statute is no broader or more comprehensive than the copyright statute. And I cannot see that the alleged right under the contract to retake the watch movement, on paying to the purchaser the price paid by him in case it is less than that fixed by the patentee or his assignee, operates to make the sale in the first instance a conditional one which the law will recognize. If a wise and sound public policy forbids the affixing of a condition to the sale of an article, not patented, as it does, *Dr. Miles Medical Co. v. Park & Sons Co.*, supra, whereby the purchaser and dealer must sell at a price fixed by the manufacturer, and if the affixing such a condition to a sale is not a statutory right conferred on the patentee by the patent law, then this condition to which I have referred is not one protected by the patent law and is a mere matter of contract, even if valid under the general law of contracts which the federal courts should not enforce by injunction, and which, if invalid, will not be enforced at all. It is not an infringement or contributory infringement of the patent to violate such a contract or condition unless the right to make or impose it is conferred by the patent law. The Supreme Court of the United States has declared:

"A manufacturer of unpatented articles cannot, by rule or notice, in absence of statutory right, fix prices for future sales, even though the restriction be known to purchasers. Whatever rights the manufacturer may have in that respect must be by agreements that are lawful.

"Although the earlier common-law doctrine in regard to restraint of trade has been substantially modified, the public interest is still the first consideration; to sustain the restraint it must be reasonable as to the public and parties and limited to what is reasonably necessary, under the circumstances, for the covenant; otherwise restraints are void as against public policy.

"Agreements or combinations between dealers, having for their sole purpose the destruction of competition and fixing of prices, are injurious to the public interest and void; nor are they saved by advantages which the participants expect to derive from the enhanced price to the consumer."

If the right to fix prices for future sales of articles like a watch movement, not itself patented or covered by a patent, but which embodies in its construction two or three subordinate but essential parts which are covered by patents, and which articles have been sold by the patentee or his assignee for the full price he is to receive, is granted by the patent statute, we do not find it conferred in express terms, but by implication only. That is, we imply from the "sole right to vend" the right to fix prices for all future sales of the articles; the patentee having exercised his right to vend them and received his tribute. If the statute is so broadly construed, we impute to Congress by a statute not clear or plain and by words not ordinarily open to such construction the purpose to confer on the patentee a right in contravention and violation of a sound public policy and one not reasonably necessary to protect the patentee and which is inimical to dealers and users; that is, the general public. That the sole purpose of the owner of these patents covering certain of the parts of these watch movements (not the movement as a whole) is to destroy competition and fix retail prices cannot be questioned. The legislative grant of the right to do an act, the doing of which, in the absence of

the statute, violates public policy, should be plain and unambiguous, and couched in terms which are reasonably certain. If a statute can have no other purpose, then the language will be construed in the light of reason to make effectual such legislative intent; but when, as here, the patent statute was plainly intended to confer on the patentee the sole right to make, use, and vend his patented machine, or process, and is silent as to fixing prices for future sales by dealers, the article having been *sold* and put on the market by the patentee as an article of commerce for sale and common use, I think it goes beyond reason to say that the sole right to vend carries with it the right to fix and control prices for future sales by dealers; the patentee having exercised his right to vend and received his full consideration, or tribute, for the grant to others of the right to vend and use.

I desire to repeat and emphasize the distinction between this case and the license agreements, such as that in the *Henry v. Dick Co. Case*, relating to the use of the patented article. Here the patentee or his assignee makes and sells the article imposing no condition as to use, and reserving no interest in or claim to any part of the proceeds of a resale by dealers. He receives his full consideration or compensation or tribute for his invention, so far as each particular article is concerned, when he sells. In the *Henry v. Dick Co. Case*, and other like cases, he reserves a right and interest in the use of the article; does not receive his full consideration, compensation, or tribute for his invention, so far as that particular article is concerned, but is to receive such consideration or tribute from the user by way of profit on the supplies he is to furnish for use therewith and from which he derives his only profit, compensation, or tribute. In the first case the article, when sold, is freed from the monopoly, while in the latter it is not. And again, there is no rule of public policy, so far as I am aware, which forbids a restriction on the use to which a patented article shall be put, or the mode and manner of using it, while public policy does forbid the fixing of prices for future sales unless the right to do so be granted by legislative enactment. I am opposed to monopoly in prices, and think the rule in opposition thereto declared by the Supreme Court should be enforced. Agreements, however designed and under whatever pretense made, having in view and for their object the monopoly or control of prices to the user and consumer and the destruction of competition, are void. But, of course, the Congress of the United States can authorize a monopoly as it has done in the case of articles covered by a patent, but that monopoly has its limits, and a broad construction in contravention of public policy should be justified by the language of the patent statutes and not given when unnecessary to protect the legitimate rights of the patentee and make effectual the purpose of Congress in its enactment. If the Congress of the United States desires to authorize patentees to control and monopolize the retail prices of articles covered in part or in whole by a patent, after same have been once sold by the patentee or his assignee and placed on the market and after he has actually pocketed his full reward or tribute for the use of the monopoly by the public (as to the articles so sold), let it so say in plain terms.

In view of *Bobbs-Merrill Co. v. Straus*, *Henry v. Dick Co.*, *Dr. Miles Med. Co. v. Park & Sons Co.*, and *Standard Mfg. Co. v. U. S.*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. —, decided November 18, 1912, all recent declarations of the Supreme Court of the United States, I do not think the patent statute can be given the construction contended for, one which authorizes the patentee or his assignee to fix and control prices on resale after he has once sold, received his full consideration or tribute for the use of the patented article—in other words, after he has exhausted his sole and exclusive right to vend, as then the article is freed from the monopoly. I find nothing in *Bement v. National Harrow Co.*, 186 U. S. 70, 91, 22 Sup. Ct. 747, 752 (46 L. Ed. 1058), really inconsistent with these views. In that case Mr. Justice Peckham, who delivered the opinion of the court, said:

"The only federal question raised in the record is as to the validity of contracts A and B with regard to the act of Congress on the subject of trusts. Act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]."

There the plaintiff was the owner of certain patents relating to spring tooth harrows, and he granted licenses to the defendant to manufacture and sell the harrows embodying the inventions covered by the patents. The license to so manufacture and sell was limited and terminable and provided for the payment by the licensee to the licensor of a royalty of \$1 for each harrow or frame sold by it pursuant to the license. The licensee was not to ship harrows to any person to sell on commission or allow any rebate or reduction from the price or prices fixed in the license, except to settle with an insolvent debtor for harrows previously sold and delivered. The defendant agreed it would not sell such harrows at a less price or on more favorable terms than those prescribed in the license agreement, and which might be changed from time to time by the licensor. See 186 U. S. 72, 22 Sup. Ct. 747, 46 L. Ed. 1058. Here, it is seen, the owner of the patents did not manufacture or sell. He licensed another to do both on certain conditions and subject to certain restrictions. There was no limitation on or fixing of prices on resales. And, moreover, the owner of the patent had a direct pecuniary interest in each sale of a harrow or frame made and sold by his licensee, viz., his royalty of \$1. At page 93 of 186 U. S., at page 756 of 22 Sup. Ct. (46 L. Ed. 1058), the court said:

"In these contracts provision is expressly made, not alone for manufacture, but for the sale, of the manufactured product throughout the United States, and at prices which are particularly stated, and which the seller is not at liberty to decrease without the assent of the licensor. *Addystone Pipe & Steel Co. v. United States*, 175 U. S. 211, 238 [20 Sup. Ct. 96, 44 L. Ed. 136]. These contracts directly affected, not as a mere incident of manufacture, the sale of the implements all over the country, and the question arising is whether the contracts which thus affect such sales are void under the act of Congress.

"On looking through these licenses we have been unable to find any conditions contained therein rendering the agreement void because of a violation of that act. There had been, as the referee finds, a large amount of litigation between the many parties claiming to own various patents covering these implements. Suits for infringements and for injunction had been frequent, and it was desirable to prevent them in the future. This execution

of these contracts did in fact settle a large amount of litigation regarding the validity of many patents as found by the referee. This was a legitimate and desirable result in itself. The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

It is noted that the rights of this licensee were measured by the right granted, and hence the court said:

"The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it (the patent) or sell the right to *manufacture and sell* the article patented upon the condition that the assignee shall charge a certain amount for such article."

This was but a fixing of the price by the patentee himself at which it should go on the market at all as a product manufactured under the patent. The sale by the licensee was the original sale and but the exercise of the sole right to vend given the patentee by the patent law. It is immaterial that the patentee exercised this sole right to make and sell through his agent or his licensee. Neither the licenses, the case nor the court dealt with resales by dealers who had purchased from such licensee and paid the full price, including royalty or tribute, for the article, or the validity of agreements between manufacturers who own the patents and sell to dealers and such dealers, to sell only at prices fixed by such manufacturer.

In *Bement v. National Harrow Co.*, *supra*, Mr. Justice Peckham also said:

"The very object of these laws is monopoly, and the rule is, *with few exceptions*, that any conditions which are not *in their very nature illegal* with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the condition in the contracts keep up the monopoly or fix prices does not render them illegal."

But Mr. Justice Peckham was not speaking of license agreements or contracts whereby the patentee, on making and selling the article covered by his patent, and in which sale he receives his full compensation and royalty, goes beyond and attempts to bind purchasers and dealers, who purchase from the patentee's vendee, to sell such article only at the price fixed by the patentee. And the decision in *Dr. Miles Med. Co. v. Park & Sons Co.*, *supra*, had not then been rendered.

In *Standard Sanitary Manufacturing Co. v. United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. —, decided November 18, 1912, there was in the first place a combination of the manufacturers operating under patents and to control prices. They brought in jobbers and dealers who, in order to obtain goods at all, were compelled to submit to the condition that they sell only at the prices fixed by the combination of manufacturers. Here there is one manufacturer only, and he owns the patent, and he fixes the price at which he sells to

jobbers, which he has the right to do; but he attempts to fix and control the price at which jobbers and dealers must sell to the users or consumers. In the case last cited, *Standard Sanitary Case*, the court, per Mr. Justice McKenna, said, after stating the combination of the manufacturers:

"And the jobbers were brought into the combination and made its subsection complete and its purpose successful. Unless they entered the combination they could obtain no enamel ware from any manufacturer who was in the combination, and the condition of entry was not to resell to plumbers except at the prices determined by the manufacturers. The trade was therefore practically controlled from producer to consumer, and the potency of the scheme was established by the co-operation of 85 per cent. of the manufacturers, and their fidelity to it was secured not only by trade advantages, but by what was practically a pecuniary penalty, not inaptly termed in the argument cash bail. The royalty for each furnace was \$5, 85 per cent. of which was to be returned if the agreement was faithfully observed; it was to be forfeited as a penalty if the agreement was violated. And for faithful observance of their engagements the jobbers, too, were entitled to rebates from their purchases. It is testified that 90 per cent. of the jobbers in number and more than 90 per cent. in purchasing power joined the combination. The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman Law."

Reduced to practical operation, this was a combination of all, or substantially all, manufacturers, operating under the protection of a patent, to fix and control the prices for future sale, into which all jobbers as a condition of selling the product at all were compelled to come, and to make the combination at all effective these jobbers must be in the combination and live up to the conditions as to prices. The combination was evil and in violation of the Sherman Law for the reason it resulted in a restraint of trade, and this for the principal reason it fixed and controlled prices to the consumer and eliminated competition.

Now, in substance and effect, so far as the general public and its interests are concerned, where is the substantial difference between that combination and the one in the case at bar? If several owners of patents or licensees under patents, capable of conjoint use, and having the right to manufacture and sell or not to manufacture and sell at all, as they please, agree that they will not manufacture and sell, they have but agreed to not do that which they have a right not to do. But, when agreeing to both manufacture and sell, they go beyond, and not only fix the sale price at which they will sell, thus doing away with competition between themselves, but fix the price at which all future sales must be made by jobbers and dealers generally, thus doing away with all competition between jobbers and retail dealers as to articles which they have put on the market, they have clearly agreed and combined to restrain trade, and every jobber and dealer who comes in and assents becomes a party to such illegal combination, which is illegal principally because it has for its purpose the fixing of prices for sales to the general public, the consumers, and the destruction of competition, which, if existing, would inure to the benefit of such consumers. Can it be that a patentee, himself manufacturing under his patent and

the sole manufacturer, and thus controlling the entire output of the article, can bring into combination with himself all jobbers and dealers, or all jobbers and dealers in that article, and by agreement fix not only the price, including royalty, at which the patentee sells, but the prices on resale to consumers, and thus do away with all competition and deprive the public of the benefits of competition? If the *one* transaction or combination transcends what is "necessary to protect the use of the patent or the monopoly which the law conferred upon it," it seems to me clear that the other does. The effect on the public is precisely the same in both cases. If two patentees, or licensees of a patentee, cannot combine with each other and jobbers to control prices on the sales of articles made by such patentees or licensees, how is it that one patentee or licensee who manufactures under his patent can so combine? There is a combination in both cases, and, so far as the public is concerned, the one is as detrimental to the public interests as the other.

In the case of *D. E. Virtue and Owatonna Fanning Mill Co. v. Creamery Package Mfg. Co. et al.*, 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. —, decided by the Supreme Court of the United States January 20, 1913, the Owatonna Company was a manufacturer of churns and butter workers under various patents owned by it, and in April, 1897, it created the Creamery Package Manufacturing Company, its sales agent of them, the latter not manufacturing, which the court held it had the right to do, and that in so doing it had the right to fix the prices at which *its sales agent should sell* and the territory in which it should sell, and even the purpose for which it should sell. The court said:

"It is true they granted rights to the Creamery Package Manufacturing Company, and exclusive rights; but this was no violation of law. The owner of a patent has exclusive rights—rights of making, using, and selling. He may keep them or transfer them to another—keep some of them and transfer others. This is elementary; and, keeping it in mind, there is no trouble in estimating the character of such rights or their transfer. Of course, patents and patent rights cannot be made a cover for a violation of law, as we said in *Standard Sanitary Manufacturing Co. v. United States, ante*. But patents are not so used when the rights conferred upon them by law are only exercised."

The case just cited has nothing to do with restrictions, license agreements, or contracts attempting to fix the prices of such articles on resales when the sole right of vending has once been exercised by the sales agent. As stated, an exclusive sales agent of the manufacturer under a patent is but exercising the sole right to vend expressly conferred by the patent statute. However, attempting to fix prices at which purchasers from such sales agent shall sell—that is, controlling prices in the future for future sales—is quite a different matter, and is but recurring to the proposition, Is the right conferred by the patent law on a manufacturer under a patent owned by him, and who sells to jobbers for resale, and who on such sale receives his full price and royalty, reserving no interest in the article, unless it be to control prices on resale, one which authorizes him to make contracts with such dealers that they shall resell at prices fixed by him only? I am

aware that prior to the recent decisions of the Supreme Court on this general subject it has been several times held that such limitations on resales may be made, and that the right is conferred by the patent statute, but it seems to me clear that the decisions of the highest court of the land recently pronounced require a different conclusion in this case. I think it depends on the true construction of the patent statute (section 4884), which reads:

"Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use and vend the invention or discovery throughout the United States, and the territories thereof, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof."

Now, compare this with section 4952, relating to copyrights, which reads as follows:

"The author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the case of dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others; and authors or their assigns shall have exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States."

[4] Is there any difference between the "exclusive right to vend" applied to an article made under a patent and once sold and put on the market, and "the sole liberty of vending" as applied to a copyrighted book once sold and put on the market? So far as vending is concerned, may the owner of the one right impose a condition fixing prices on resales that the other may not? Has Congress made any distinction between the "sole liberty" of the author or proprietor of the book "to vend" and the "exclusive right" of the inventor "to vend"?

"For the purpose of determining the meaning, although not the validity, of a statute, recourse may be had to considerations of public policy." 36 Cyc. 1111; Opinion of Justices, 7 Mass. 523; Jersey City Gaslight Co. v. Consumers' Gas Co., 40 N. J. Eq. 427, 2 Atl. 922; Baxter v. Tripp, 12 R. I. 310.

In 7 Mass., supra, 524, the learned judges said:

"Two of these maxims we will mention: That the natural import of the words of any legislative act, according to the common use of them, when applied to the subject-matter of the act, is to be considered as expressing the intention of the Legislature; unless the intention, so resulting from the ordinary import of the words, be repugnant to sound, acknowledged principles of national policy. And if that intention be repugnant to such principles of national policy, then the import of the words ought to be enlarged or restrained, so that it may comport with those principles; unless the intention of the Legislature be clearly and manifestly repugnant to them. For, although it is not to be presumed that a Legislature will violate principles of public policy, yet an intention of the Legislature repugnant to those principles, clearly, manifestly, and constitutionally expressed, must have the force of law."

In *Jersey City, etc., v. Consumers', etc.*, supra, the court held:

"In construing a statute a purpose to disregard sound public policy must not be attributed to the lawmaking power, except upon the most cogent evidence."

In the opinion the court said:

"Such a purpose is so manifestly opposed to sound public policy, so contrary to the spirit of our laws, and so clearly in conflict with popular judgment, that it should not be attributed to the Legislature, except upon the most cogent evidence."

In *Baxter v. Tripp*, supra, the court held:

"The court could not declare an act of the Legislature void as against public policy, considerations of public policy being admissible in *construing* an act but not in determining its validity."

In *Bird v. U. S.*, 187 U. S. 118, 23 Sup. Ct. 42, 47 L. Ed. 100, the court held:

"The courts should avoid a construction which would render a statute ineffective or inefficient, or *which would cause a grave, public injury, or even inconvenience*, if another and more reasonable interpretation is present in the statute."

If public policy forbids such agreements as to resales—fixing prices—shall we read into the patent statute by construction words which violate that public policy? Will not that work a public injury? That which public policy demands is for the public good. That which public policy forbids, works, if done, a public injury. So a statute should never be construed to violate the law of nations. *The Betsy*, 2 Cranch, 64, 2 L. Ed. 208.

On this subject of fixing prices for resales by dealers to consumers, the Supreme Court of the United States has declared that such limitations are opposed to a sound public policy and void (*Dr. Miles Medical Co. v. Park & Sons Co.*, supra); and that a combination having that for its object is illegal (*Standard Sanitary Mfg. Co. v. U. S.*, supra); and that "the sole liberty to vend" given by the statute quoted to the author of a copyrighted book confers no right to fix prices on resales (*Bobbs-Merrill Co. v. Straus*, supra). What, in the light of these cases and the others cited, is the reasonable and inevitable conclusion in arriving at the true interpretation and meaning of the patent statute quoted?

The purpose of the one statute is to protect the author in the enjoyment of his "sole liberty," meaning right, to multiply and vend, while the purpose of the other is to protect the inventor in the enjoyment of his sole or exclusive right or liberty to vend. That "the sole liberty * * * of vending the same," as applied to a copyrighted book, is the same as the "exclusive right to vend" a patented article, is plainly stated in *Bobbs-Merrill v. Straus*, 210 U. S. 350, 351, 28 Sup. Ct. 722, 726 (52 L. Ed. 1086), where it is said:

"True, the statute also secures to make this right of multiplication effectual, *the sole right to vend copies of the book*, the production of the author's thought and conception."

To repeat, if the statute has given to the owner of the copyright "the sole right to vend" the book, the product of his thought and concep-

tion, and he may not and cannot, when he sells such book, impose conditions fixing the price that must be charged on a resale, by what process of reasoning do we arrive at the conclusion that the owner of the patent, to whom is given by statute the "sole right to vend" the machine, the product of his thought and conception, may and can impose conditions, when he sells such machine, fixing the price that must be charged on a resale. Is *the same right* given in the same legal language by statute to the inventor any more sacred than that given the author, or to be broadened in the one case and narrowed in the other? Does "the sole right to vend" in the case of a patented article confer on the patentee or his assignee the right to fix prices on resale by the patentee's vendee, when "the sole right to vend" in the case of a copyrighted book does not confer such right on the owner of the copyright? If so, why? True, a book is not a machine; but it is an article of commerce when once sold for resale the same as a machine, and in both cases, in the absence of a statute, such a restriction on resale is void as opposed to public policy. The sole right to vend is given in both cases as a reward and protection for a mental conception. The purpose and policy of the statute is the same in the one case as in the other, and I fail to discover any reason for giving a construction to the one statute different from that given the other so far as fixing prices on resales is concerned.

The principles enunciated by the Supreme Court of the United States are controlling, and there will be a decree dismissing the bill, with costs.

In re HARRISON BROS.

(District Court, M. D. Pennsylvania. October, 1912.)

1. BANKRUPTCY (§ 165*)—PREFERENCES—PAYMENT OF NOTES BEFORE MATURITY—PAYMENT THROUGH THIRD PERSON.

A partnership while insolvent and within four months prior to bankruptcy sold its interest in one of its stores for \$9,000, receiving \$3,000 in cash and the balance in purchaser's notes. The proceeds were applied to take up before maturity certain notes held by a bank which had originally been given by the bankrupt firm to a claimant creditor which had been active in bringing about the sale, which was accomplished hastily, and at a time when claimant knew of the bankrupts' insolvency. Claimant secured the discounting of the notes given for the unpaid portion of the price by a bank of which one of the members of the claimant firm was vice president and a director. The claimant's notes had been transferred to the bank after the sale; claimant having procured a sufficient amount of the purchaser's notes to pay the notes at the bank, had the purchaser's notes discounted and handed the cashier's check received therefor to one of the bankrupts with direction where the notes were that he was to pay, and he used the check to pay the claimant's notes. *Held* sufficient to constitute a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

2. BANKRUPTCY (§ 159*)—"PREFERENCES"—ESTABLISHMENT—EVIDENCE.

Under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445) as amended by Act Cong. June 25, 1910, c. 412, § 11, 36

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Stat. §42 (U. S. Comp. St. Supp. 1911, p. 1506) relating to preferences, it is not necessary in order to establish a preference to prove the existence of the debtor's intent to prefer; the cause for belief on the creditor's part, that a preference was intended, and that the debtor knew of his insolvency; the test being whether the creditor receiving the alleged preference or to be benefited thereby, or his agent acting in the transaction at the time the payment was made, had reasonable cause to believe that the bankrupt was then insolvent, and that in accepting and retaining the payment the creditor would receive a larger percentage of his debt than any other creditor of the same class.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 246, 247, 262, 268-281; Dec. Dig. § 159.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5498, 5499; vol. 8, p. 7759.]

3. BANKRUPTCY (§ 163*)—"PREFERENCES"—PAYMENT TO THIRD PERSON.

A transfer by a bankrupt indirectly or through a third person may constitute a preference if it is made for the purpose and with the intent of securing to one creditor a larger percentage of his debt than would be paid to any other creditor of the same class.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 163.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Harrison Bros. Petition to review referee's order expunging the claim of Schloss Bros. & Co., on the ground that the claimants had received a preference which they had failed to surrender. Affirmed.

The following is the report of Arthur A. Smith, referee:

The said Samuel Harrison and Benjamin Harrison were upon the 8th day of December, 1911, duly adjudicated bankrupts as individuals and as a partnership; and thereupon said cause was referred to me for further proceedings thereunder.

On the 23d day of December, 1911, at the first meeting of creditors held in pursuance to notice, A. R. Jackson, of Williamsport, and in said district, was duly elected trustee of said estate, and, upon December 26, 1911, duly qualified by filing his bond and having the same approved. At said meeting the claim of Schloss Bros. & Co., of Baltimore, Md., in the sum of \$5,810.86, was filed and allowed. On the 26th day of February, 1912, the trustee filed his petition for a rule upon said Schloss Bros. & Co. to show cause why said proof of claim should not be expunged and disallowed; and on March 1, 1912, a rule was issued upon said claimant to show cause as aforesaid, returnable March 14, 1912, at 2 o'clock in the afternoon. On March 12, 1912, claimants filed their answer to said petition or motion to expunge, whereupon testimony was taken from time to time, and upon July 5, 1912, argument was had thereon. On the 9th day of August, 1912, after duly considering said matter, the referee made an order expunging said claim from the records, which said order is as follows:

"At Williamsport, in said district, on the 9th day of August, A. D. 1912. Upon the evidence submitted to the court upon the claim of Schloss Bros. & Co., against said estate, after hearing counsel thereon, it is ordered that said claim be disallowed and expunged from the list of claims filed of record in said case."

On the 12th day of August, 1912, claimants duly excepted to said order and petitioned the referee for a review thereof.

The testimony taken on said proceeding shows the following:

Facts.

That Samuel Harrison and Benjamin Harrison, trading as Harrison Bros., were upon the 8th day of December, 1911, upon a petition filed in this court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by themselves, adjudicated bankrupts, as individuals and as a partnership. That at the time the alleged preferential payment was made, to wit, on November 17, 1911, the said Samuel Harrison and Benjamin Harrison and Harrison Bros., were insolvent within the meaning of the Bankruptcy Act of 1898 and its supplements. That at the time the adjudication was made bankrupts were the owners of two stores, one located at Williamsport, in the Middle District of Pennsylvania, the other at Pitcairn, in the Western District of Pennsylvania, both of which were conducted under the name of Harrison Bros., and prior to the 15th day of November, 1911, they owned a two-thirds interest in the store of Harrison Bros. & Co., situate at Delta, Pa., which said firm was composed of Samuel Harrison, Benjamin Harrison, and O. C. Jones, each owning a one-third interest. On November 15, 1911, Harrison Bros. sold their interest in said store to Jones for \$9,000, receiving in payment therefor \$3,000 in cash and the balance in notes. These notes were indorsed by G. F. Bortner, Jones' father-in-law, and by his father. The Williamsport store was managed by Benjamin Harrison, the Pitcairn store by a relative of bankrupts, by the name of Frank, and the Delta store by Samuel Harrison. The sale of the interest of bankrupts in the Delta store was brought about in the following manner:

Creditors of bankrupts, among whom were claimants, had been insisting for some time upon payment of their accounts. On November 12, 1911, Jones received from Samuel Harrison, who was then in Williamsport, a telegram requesting a meeting in Baltimore that evening. Jones accordingly went to Baltimore, and waited at the Union Station for Samuel Harrison to arrive, where he met Harrison and B. F. Caston, credit man for Schloss Bros. & Co., and who states that he was returning to Baltimore from Rochester, N. Y. The three took lunch together at the Union Station, where Harrison opened negotiations with Jones for purchasing Harrison Bros.' interest in the Delta store. Jones stated that he was not in a position to buy, that he would have to arrange for the money, but Caston insisted that he purchase the interest, and that, if he did not, he (Caston) had a party who was prepared to take over the interest. It was agreed that Jones return to Delta and arrange for the notes. Caston took the names of the parties whom Jones suggested as indorsers, and agreed to assist in having the same discounted. They then separated agreeing to meet in York, Pa., on the evening of the 13th, at which time and place Samuel Harrison, B. F. Caston, O. C. Jones, H. C. Brenneman, Jones' attorney, G. F. Bortner, and H. J. Evans, Jones' brother-in-law, met in a room in the Colonial Hotel for the purpose of consummating the sale. At this meeting, as at all meetings, Caston took a very active interest, and stated that he was acting in the interest of Schloss Bros. & Co. The validity of this sale was questioned as being in violation of the act of General Assembly of Pennsylvania of March 28, 1905 (P. L. 62), and known as the "Bulk Sales Act." Caston took the position that, as it was a sale of the interest of members of the firm to another member of the firm, it was not necessary to give notice as required by said act. Pending the decision of this question, the parties separated, and agreed to meet at Mr. Brenneman's office the following morning. The financial condition of Harrison Bros. was discussed at one of the meetings, and Caston stated that he had gone over their affairs; that he had dealt with them for years and knew their standing; that he regarded them as solvent; that Schloss Bros. & Co. were heavy creditors, and that he was assisting in making the sale in their interest; that the bankrupts were being hard pressed for immediate settlement; and that, as he viewed the situation, there was no danger of Harrison Bros.' failure.

On the following morning, the 14th, a meeting was held in Mr. Brenneman's office, when terms of sale were agreed upon; Jones agreeing to pay \$9,000 for the interests of bankrupts in the store, paying \$3,000 in cash and the balance in notes. Pending the securing of a power of attorney from Benjamin Harrison, the parties agreed to meet again on the 15th and close the deal, which was done and the sale consummated. The notes used in payment of the consideration were furnished by Caston, and, when they were executed and indorsed, he took \$4,500 of the notes with him to Baltimore, and delivered them to Michael Schloss, who arranged for their discount at the Western National

Bank of Baltimore, receiving a draft or cashier's check for the proceeds, which was delivered to Samuel Harrison in the office of Schloss Bros. & Co., on the 17th day of November, 1911, on which day, at the direction of Michael Schloss, Samuel Harrison used it together with sufficient cash to take up three notes aggregating \$4,664.56 at the National City Bank of Baltimore, of which bank Michael Schloss was a vice president and a director. These three notes, when paid, were destroyed by Samuel Harrison. The evidence, however, supplies sufficient facts to show their amount, date when given and when due, and the manner of their execution, viz.: One note dated July 25, 1911, for \$3,500, due November 25, 1911; two notes dated August 21, 1911, and payable December 1, 1911, one for \$773.50, the other for \$391.06. The notes were signed "Harrison Bros.," made payable to the order of "Ourselves," and indorsed "Harrison Bros.," being negotiable and payable without offset at the National City Bank of Baltimore, Md. No other indorsements appeared thereon.

The payment of these three notes are a material fact in this proceeding, and a careful review of the testimony relating to their origin, ownership, and payment is necessary.

Before the motion to expunge was filed in this case, Michael Schloss on January 9, 1912, was examined with reference to the ownership of these notes. At this examination, before Referee Willis E. Myers of Baltimore, he testified that originally the three notes belonged to him individually; that they were given for a loan which was originally for \$8,000, made about a year before; that later on he turned the loan over to the firm of Schloss Bros. & Co., receiving the funds therefor, and later on it was turned over to him, and, when they were delivered to the bank on November 13, 1911, he was the owner thereof; that there was no written evidence of the transaction except the notes themselves; that Schloss Bros. & Co. could not have rendered a complete statement of Harrison Bros.' indebtedness to them without his assistance because his private records were in very bad shape, and that the only record of his individual notes was one kept by himself in marked envelopes, and the firm's cashier slips.

After the motion to expunge this claim was filed, he was again examined before Referee Myers, on March 29, 1912, and he then stated, with the books of Schloss Bros. & Co. before him, that the two notes for \$773.50 and \$391.06 dated August 21, 1911, were the notes of Schloss Bros. & Co., and had never been his property; that the \$3,500 note was a balance due on a \$5,000 note given to Schloss Bros. & Co., October 28, 1909, and which had remained their property until May 11, 1911, when, one of his firm having objected to carrying it any longer, the note was charged to his private account on the books of the firm. The note was again renewed on July 25, 1911, for four months, at which time Harrison Bros. were informed that it would have to be paid at maturity. The bills receivable book of Schloss Bros. & Co., in which this note was entered on May 9, 1911, shows in red ink, the following: "This note was renewed for four months from 7-25-11 and taken personally by M. S. 5-11-11." The ledger of Schloss Bros. & Co., in their account with Harrison Bros. on the margin of page 172, has the following words and figures in red ink, to wit: "M. S. Pers. No. 9765, 7-25-11, \$3500.00." This number corresponding with the number of the note entered in bills receivable book on May 9, 1911. The meaning of the above indorsement, as testified to by Michael Schloss, is that on May 11, 1911, the \$3,500 note was taken personally by himself, and that on July 25, 1911, it was renewed for four months, the note still remaining his property. On May 11, 1911, there appears to have been an entry made of the \$3,500 note in a ledger containing the account of Michael Schloss with the firm of Schloss Bros. & Co., in which Michael Schloss is charged with this note. By whom or when made there is no evidence except the book itself. Michael Schloss stated in his first examination that there was no record of this transaction except the note itself, which he kept among his private papers, and the firm's cashier's slips. At the second examination, after the motion to expunge had been filed, this record turns up together with other records or notations in red ink, one of which reads, as stated above: "This note was renewed for four months from 7-25-11." The very wording of which would indicate that

the entry was made after 7-25-11. All the other evidence, except the entry made May 11, 1911, in the private account, indicates that the note was the property of Schloss Bros. & Co. The loan originated with them, and, as will hereafter appear, they received payment thereof.

On November 13, 1911, six notes, among which were these three, were placed by Schloss Bros. & Co. in the National City Bank of Baltimore, for which they received credit in their account. The notes had never before been discounted, and the reason for placing them in bank on the very day Michael Schloss learned of the sale of the Delta store is explained by him, in his first examination, as follows: That being in need of funds for use in some private affair he "sold" the notes to the bank at that time for the purpose of raising cash; but there is no evidence that the proceeds of any of these notes was ever turned over to him at that time or any subsequent time. The evidence clearly shows that Schloss Bros. & Co. received the proceeds of the notes, were credited with the same at the bank, and never turned any part over to Michael Schloss. At the time the notes were placed in bank Michael Schloss sustained a very peculiar relationship with Schloss Bros. & Co. and the National City Bank, being a member of the firm of Schloss Bros. & Co. and a vice president and director of the National City Bank.

There is consequently a very wide discrepancy in the testimony of Michael Schloss given at the two examinations. At the first hearing he claimed title to all three notes; while at the last he claimed ownership of only the \$3,500 note. The only evidence, as previously stated, corroborating his testimony as to his ownership of the \$3,500 note is the entry in the private ledger under date of May 11, 1911; but the entries in red ink appear to us to have been manufactured to meet the conditions of this case, having been inserted therein after all the other entries had been made. We cannot reconcile the testimony given by Michael Schloss at the two examinations, other than that the same was manufactured for the purpose of meeting the facts in this proceeding. We are of the opinion, and so find, that all three notes at the time they were placed in the bank were the property of Schloss Bros. & Co., in whose possession they remained until the 13th day of November, 1911, when, after learning of the proposed sale of the Delta store, they were placed in the bank, knowing that part of the proceeds from the sale was to be applied to their payment. These notes were not only deposited for the first time in bank on the 13th of November, 1911, paid November 17th, but all three were paid before maturity; the \$3,500 note not being due until the 25th of November, 1911, and the other two notes not until December 1, 1911.

In addition to the haste and unusual method employed by Caston and Samuel Harrison in raising cash with which to pay the three notes, the following facts concerning the financial condition of bankrupts were known to claimant, or could have been easily ascertained by reasonable inquiry: That they held five overdue notes aggregating \$1,850 which bankrupts could not pay when they fell due, and also owed a balance of \$100 on the sixth note, past due. The only payment which they had received from bankrupts since February 14, 1911, except payments on notes, was a payment on October 13, 1911, of \$150. The Williamsport store had never been a paying proposition, and the strike had affected the sales at Pitcairn. Bankrupts had settled their 1910 account by giving notes, many of which had not been paid when due. That the two smaller notes paid at the bank on the 17th of November were given to close up small balances then due. During the summer and fall of 1911 Benjamin Harrison wrote a number of letters asking extension of time on notes coming due, during which time claimants wrote letters insisting upon payment. Bankrupts owed notes at banks at Delta, Pitcairn, and Williamsport, which were demanding payment, and, in order to meet these payments and the notes claimants held, the sale of the Delta store was necessary. That in March, 1911, Dun & Co. gave bankrupts a rating of but \$20,000 and good credit. That Caston, before the sale was made, stated that he had investigated the affairs of bankrupts and believed that they were solvent; but, had his investigation been thorough, he would have discovered that bankrupts had taken on 25 new customers for fall shipments at the Pitcairn store, none

of whom had been paid, that they owed about 175 creditors an amount in excess of \$75,000, and that the only assets to take care of these remaining creditors were the goods in the stores at Pitcairn and Williamsport, which would not have been sufficient to pay their other creditors.

This being a proceeding brought by the trustee to expunge the claim of Schloss Bros. & Co. amounting to \$5,810.86 filed and allowed, the following conditions, or elements of a preference, must appear from the foregoing facts:

First. That the bankrupts at the time the payment was made were insolvent, both as a partnership and as individuals.

Second. That the alleged payment was made within four months of the filing of the petition, viz., four months prior to December 8, 1911.

Third. That the bankrupts made a transfer of their property—a payment of money—to Schloss Bros. & Co., or, if not to them directly, that they were the persons benefited thereby.

Fourth. That such payment enabled Schloss Bros. & Co. to receive a greater percentage of their debt than other creditors of the bankrupts of the same class, and

Fifth. That Schloss Bros. & Co., or their agent acting therein, had reasonable cause to believe that the enforcement of the payment would effect a preference.

Conclusions of Law.

1. That at the time the alleged payment was made the bankrupts were insolvent both as individuals and as a partnership.

2. That the payment was made within four months of the filing of the petition.

3. To arrive at a proper legal conclusion with respect to this element of a preferential transfer, or payment, a review of the testimony becomes necessary.

[1] That the bankrupts made a transfer of some of their property—a payment in money—thus depleting the assets of their estate, there can be no question; but the trustee bases his right to recover upon the ground that the payment to the National City Bank was a mere subterfuge, a trick, a previously conceived and fixed plan or scheme to escape the penalty of the act, in that they purposed to do by indirection that which they could not have done directly without having the transaction decided against them in case the question ever arose, and that the note of \$3,500 had to be paid on the 25th of November, 1911, when it became due, was clearly understood between Schloss Bros. & Co. and the bankrupts, and that, instead of making payment direct, it was made to the bank in order to avoid any legal question, should the same arise.

Schloss Bros. & Co. had knowledge of the fact that during the year bankrupts were hard pressed for cash, and to pay these notes or any large obligation it would mean extra exertions on their part. These notes could not have been paid if bankrupts had not sold their interests in the Delta store, which fact was known to claimants. Caston repeatedly declared when the sale was being negotiated, that he was acting for Schloss Bros. & Co., who were heavy creditors, and that they were demanding payment. At no time is it stated that the sale was being in the interest of Michael Schloss. It is a strange coincidence that the three notes should be sent to the bank on the very day that Michael Schloss learns of the sale of the Delta store. True, he states that they belonged to him, and, being in need of money for use in some private business, he sent the notes to the bank to raise some necessary cash; but the significant fact is that the notes were sent to the bank by Schloss Bros. & Co., and they, not Michael Schloss, received credit therefor, and nowhere does the testimony disclose the fact that Michael Schloss ever received the proceeds of the three notes. The notes passed by delivery, and, Schloss Bros. & Co. having received the cash therefor, the only natural presumption to draw from all the facts is that, when the notes were placed in the bank, Schloss Bros. & Co. were the owners.

The evidence shows that Michael Schloss is a member of the firm of Schloss Bros. & Co. and a vice president and director of the National City Bank. His conduct, therefore, in a transaction of this nature, ought to be above

suspicion; for when a member of a firm deals as an individual with his firm and such dealings will affect their creditors, or when, by such dealings with their own debtor, the rights of other creditors of their debtor are affected, or when the relation of the creditor and his banker are so close that the creditor has a voice and influence in both his firm and his bank, and by means of that relationship he obtains a greater advantage from his debtor than any or all the other creditors of his debtor, the transaction, though not fraudulent per se, must be scrutinized, and the rule that the burden of proving every element of a preferential transfer are upon the trustee must be relaxed.

Had these notes been placed in bank at the time they were delivered to Schloss Bros. & Co., or at any renewal thereof, and not at a time when the holder thereof knew that they were to be paid within a few days, a very different condition of facts would be presented. The whole transaction from beginning to end is very unusual, and cannot possibly be called or labeled "a transaction in the usual course of business." From beginning to end the hands of claimants are seen guiding every move, and that influence is not removed until the notes are finally paid.

It is argued that Schloss Bros. & Co. received no benefit from the payment, and, therefore, the claim must stand. Mr. Sipple of the National City Bank, who had charge of the discounts, testified that the notes were sent to the bank by Schloss Bros. & Co., and that they received credit therefor; that they were taken by the bank upon the recommendation of Michael Schloss, who, while not legally bound to take care of them if they were not paid, yet he was morally bound and that they would have looked to Schloss Bros. & Co. to make good if the notes had not been paid. Yet when three notes, which have never before been placed in bank, are placed there as these notes were and paid before they were due, there evidently was a reason for it. Schloss Bros. & Co. knew that they were to receive payment of these three notes out of the assets realized from the sale of the Delta store and placed the notes in the bank so that payment would be made to the bank instead of to them, and thus relieve themselves from an action of this very nature, which they no doubt saw coming, for they had reasonable cause to believe, at the time they placed the notes in bank, that the bankrupts were insolvent, and that a payment to them would effect a preference. No other conclusions can be drawn from the evidence. They were the active parties in the sale of the store. They secured the discounting of the notes given in payment therefor. They were careful to get in their possession sufficient of the notes to take care of their claim at the bank, having the notes discounted and handing the draft or cashier's check received therefor to Samuel Harrison with direction where the notes were that he was to pay.

Another significant fact is that at the time the payment was made to the bank bankrupts owed claimants an additional claim of \$5,810.86. Claimant no doubt had the right, in the absence of direction from his debtor, to apply the payment on any one of a number of claims; but when that application, as resulted in this case, injures other creditors, and it appears that the payment was applied in such a way that it has resulted in injury to other creditors, it bears scrutiny. Again, if this transaction bears no badge of fraud, as claimants would have us believe, why was the payment made to the bank, instead of being applied on the other indebtedness. To our mind the answer is obvious. Claimants saw the inevitable consequence of such application, for the account was due and the notes were not.

The facts herein disclosed a transaction peculiar to the Bankruptcy Act. We have been unable to find a case where the facts are identical. Loveland, (3d Ed.) § 191a, pp. 556, 557, states that a "creditor will not be permitted to obtain a preference indirectly by transfer of his account—or other colorable device or transaction intended to evade the provisions of the Bankruptcy Act." Collier (7th Ed.) p. 66, says: "A transfer may be made to a third person and still be a preference, for a creditor may be benefited thereby. Hence the phrase 'the person receiving it or to be benefited thereby,' words found in the same connection in the law of 1867. It is immaterial to whom the transfer is made, if it be for the purpose of paying the claims of one creditor in preference to those of others."

4. That the payment of the three notes enabled claimants to receive a

larger percentage of their debt than other creditors of the same class is clear from the evidence. They received a payment of \$4,664.56 on a total indebtedness of \$10,475.42 or a percentage of more than 44 per cent.; while this estate as agreed upon by counsel cannot under any circumstances pay over 40 per cent.

[2, 3] 5. The remaining element entering into the preferential transfer, or payment, viz., Did Schloss Bros. & Co. or their agent acting therein have reasonable cause to believe that the enforcement of the payment would effect a preference? requires an interpretation of the law as it stands to-day on that point, for the amendment of June 25, 1910, changes the law materially. The amendment reads as follows: "Sec. 60b. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the record or registering of the transfer if by law recording and registering thereof is required, and being within four months of the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such persons." This amendment obviates the necessity of proving (1) the existence of the debtor's intent to prefer; (2) the cause for belief on the part of the creditor that a preference was intended; and (3) that the debtor knew his insolvency. The test now is whether the person receiving the payment, or to be benefited thereby, or his agent acting therein, at the time the payment was made, had reasonable cause to believe that the bankrupt was then insolvent and that in accepting and retaining said payment, he would receive a larger percentage of his debt than any other creditor of the same class.

At the time the payment was made claimants knew that, in order to raise funds to pay the notes which they had placed in bank, it was necessary for bankrupts to dispose of a \$12,000 asset for \$9,000, namely, the Delta store; and this in violation of the Bulk Sales Act of Pennsylvania. All the circumstances surrounding this sale, the haste with which the deal was closed, the interest of claimant's agent therein, the taking of \$4,500 worth of notes to Baltimore, securing their discount, turning the proceeds therefor over to one of the bankrupts with directions where payment of the notes should be made, are all so unusual that the reason that would actuate it must have sprung from a well founded belief that the bankrupts were insolvent. In addition, a number of notes past due were not paid at maturity, the bankrupts having repeatedly asked extension of time thereon, for the payment of which they were continually dunned by claimants. The Williamsport store was never a paying proposition and business at Pitcairn was sorely affected by reason of the strike. Payment of 1910 shipments were paid in notes; the banks at Delta, Pitcairn, and Williamsport were carrying large loans, and were demanding payment; the only cash payment made by bankrupts, except the payment of notes, for eight months was a small payment of \$150, facts which were known to claimants, and, when all taken together, are of such a nature as to cause a reasonably prudent business man to believe that at the time the payment was made bankrupts were insolvent, and that a preference would be effected thereby. *Grant v. Bank*, 97 U. S. 80, 24 L. Ed. 971; *Bank v. Cook*, 95 U. S. 343, 24 L. Ed. 412; *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504, and *In re Eggert* (C. C. A., 7th Cir.), 4 Am. Bankr. Rep. 449, 102 Fed. 735, 43 C. C. A. 1. And with these facts claimants are chargeable with knowledge.

Further, the circumstances surrounding the whole transaction were of such a nature as to put claimants upon inquiry—not alone from the bankrupts as was done—but from such sources where the information obtained could be relied upon; and, having failed to inquire, they are constructively chargeable with the knowledge that such inquiry would have revealed. *Coder v. McPherson* (C. C. A. 8th Cir.) 18 Am. Bankr. Rep. 523, 152 Fed. 951, 82 C. C. A. 99; *Brewster v. Goff Lumber Co.* (D. C., Pa.) 21 Am. Bankr. Rep. 106, 164

Fed. 124; *McElvain v. Hardesty* (C. C. A., 8th Cir.) 22 Am. Bankr. Rep. 320, 169 Fed. 31, 94 C. C. A. 399. And such inquiry would have revealed such a condition of affairs that no reasonably prudent business man could have acted thereon without knowing what the inevitable result would be. Our view of the case is best expressed by Judge Holcomb in *Re Hackney v. Hargreaves Bros.*, 13 Am. Bankr. Rep. 164, 68 Neb. 624, 99 N. W. 675, wherein the court says: "If the provisions of the bankruptcy law may, by an arrangement so transparent as those under consideration, be evaded, then, indeed, has the law failed of its purpose as if it were a sieve designed to hold water. * * * A court will not hesitate to throw off the covering and ascertain the true nature of the transaction under inquiry. If the transactions are in truth and substance plans whereby creditors secure a preference, and which result in violation of the provisions of the Bankruptcy Act, a court ought not to hesitate to so characterize them. The act was designed to bring about equality between creditors of a bankrupt, and to prevent one creditor by any method, either direct or indirect, from securing an unlawful preference to the exclusion of others."

M. C. Rhone, of Williamsport, Pa. (A. R. Jackson, of Williamsport, Pa., on the brief), for trustee.

Sprout & Cupp, of Williamsport, Pa., for claimant.

WITMER, District Judge. After hearing the argument of counsel, and on examination of the opinion of the referee, and the testimony submitted, the findings, conclusions, and order of the referee are affirmed. The well-considered opinion of the learned referee is adopted as the opinion of the court.

SCOTT v. GEORGE'S CREEK COAL & IRON CO.

(District Court, D. Maryland. January 30, 1913.)

1. BANKRUPTCY (§ 292*)—JURISDICTION OF COURT—CONTROVERSY BETWEEN CITIZENS OF DIFFERENT STATES.

Where a general assignee in bankruptcy for a district of New York under the Bankruptcy Act of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 440) brings an action in the United States District Court for the district of Maryland against a Maryland corporation, which prior to the bankruptcy had issued stock to the bankrupt in trust for relief based on such stock, and there is no necessity for the interference of the court to protect the assignee in bankruptcy from any injustice or oppression, the court will assume jurisdiction only as it may be exercised over a controversy between citizens of different states.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 410, 413, 415, 416; Dec. Dig. § 292.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

2. ABATEMENT AND REVIVAL (§ 12*)—STATE AND FEDERAL COURTS—CONCURRENT JURISDICTION.

The mere pendency of a suit in a state court does not bar the institution of a subsequent suit in a federal court involving the same subject-matter and between the same parties.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87-91, 94, 95, 98; Dec. Dig. § 12.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKRUPTCY (§ 296*)—STATE AND FEDERAL COURTS—CONCURRENT JURISDICTION.

Where a suit in a state court by stockholders for the dissolution of a domestic corporation and the distribution of its assets, and the appointment of receivers to take charge of the assets and wind up the affairs of the corporation, was under the law, as laid down by the Supreme Court, a suit in rem, so that the state court acquired jurisdiction over the assets on the filing of the bill and the issuance and service of process thereon, the District Court of the United States in the state would not proceed in a subsequent suit by an assignee in bankruptcy under the Bankruptcy Act of 1841 of a bankrupt stockholder for relief based on the bankrupt's stock until the proceeding in the state court should be terminated, so far as the same referred to the stock of the bankrupt, but, after the termination of the litigation to that extent, the assignee could file an amended bill alleging that fact; the District Court reserving to itself the right to determine whether the litigation in the state court had terminated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 414; Dec. Dig. § 296.*]

Conflict of jurisdiction with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

In Equity. Suit by William Forse Scott, official or general assignee in bankruptcy for the Southern district of New York under the Bankruptcy Act of August 19, 1841, as assignee in bankruptcy of Tilly Allen, bankrupt, against the George's Creek Coal & Iron Company. Proceedings in suit suspended pending proceedings in the state court.

Leigh Bonsal, of Baltimore, Md., for complainant.
Shirley Carter, of Baltimore, Md., for defendant.

ROSE, District Judge. Under the Bankruptcy Act of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 440) the complainant is the general assignee in bankruptcy for the Southern district of New York. He sues as assignee in bankruptcy of one Tilly Allen. The defendant is the George's Creek Coal & Iron Company, a Maryland corporation. The bill was filed September 9, 1912. It alleges that on March 22, 1841, certificates for 58 shares of the stock of the defendant corporation were issued to Tilly Allen in trust. A year later, on the 21st of March, 1842, he was adjudicated a bankrupt. He did not include this stock in his schedule of assets. The bill charges that the bankrupt had the equitable as well as the legal title to it. At the time of the bankruptcy the stock was probably not worth over \$780. Until 1864 the company never paid a dividend. Since then it has been prosperous. It has distributed among its stockholders many cash dividends, in addition to a stock dividend of 100 per cent. Until recently no one has ever claimed the dividends payable on the stock standing in the name of the bankrupt in trust. Upon the books of the company the stock dividend was duly issued to Tilly Allen in trust. The defendant company has sold its tangible assets to another corporation and has taken the securities of such other corporation in payment. The accumulated dividends on the stock standing in the name of the bankrupt in trust amount to \$20,952.50, and the owner of those shares of stock is entitled to securities of the vendee corporation of the value of about \$14,-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

236.35. Complainant says that it was only within the last few months that the facts have come to his knowledge. Since then he has made demand upon the defendant for the stock or its value, and for all accumulated dividends and other property resulting from the sale of said stock by the defendant, but that the latter has declined to hand over the stock or the money or any part thereof. The bill prays that the defendant be required to issue a new certificate to the complainant in lieu of the one formerly issued to Tilly Allen in trust, which last-mentioned certificate is said to have been lost, and to account for and pay over to the complainant all accrued dividends thereon and all securities, moneys, and other property received by the defendant on account thereof, with interest thereon and the income thereof, and for a provisional or preliminary injunction restraining the defendant from transferring, assigning, or disposing of the stock and its proceeds pending a determination of the cause.

By plea the defendant challenges the jurisdiction of this court in the premises. Such plea says that on October 9, 1911, in the circuit court of Baltimore city, one of the equity courts of the state of Maryland, certain stockholders of the defendant filed a bill against the defendant and its directors. They asked the state court to assume jurisdiction over the dissolution and liquidation of defendant and that it would appoint receivers to take charge of and distribute the assets of the defendant and to wind up its affairs. Among other funds which the bill specially prayed the state court to take jurisdiction over, and for which it was asked to appoint a receiver, was the stock standing in the name of Tilly Allen in trust and the dividends and proceeds thereof.

The plea further alleges that the defendant had answered said last-mentioned bill, and had submitted itself to the jurisdiction of said state court with respect to all its assets, including the stock and proceeds mentioned in the bill of complaint in this cause. The defendant is now subject to the orders and decree of such court with respect to the same; the cause therein being still pending and undisposed of.

The complainant set the plea down for a hearing. By mutual consent a certified copy of the bill of complaint, the answer, and the docket entries in the state court suit was read at the hearing. It is to be treated as if it were a part of the plea.

The complainants in the state court say that they were the owners of 2,640 shares out of the 22,000 shares of the capital stock of the defendant. They allege that the directors were under the laws of Maryland taking certain proceeding looking to the dissolution of the corporation otherwise than by judicial proceedings. A partial distribution of the defendant's assets had been made among its stockholders. Certain sums of money still remained in the hands of the directors, acting as trustees for the creditors and stockholders of the corporation. These sums awaited distribution among the persons entitled thereto. One specifically mentioned was that standing in the name of Tilly Allen in trust. It is said that the defendant's directors have delayed and were still delaying its final dissolution and the distribution of its assets among its stockholders; that such delay was

caused by the unclaimed sum of money aforesaid, and by some other unclaimed sums arising out of somewhat similar cases; that, in addition to the unclaimed sums of money representing the Tilly Allen and other stock, the directors have in their hands about \$25,000, which could and should be speedily distributed among the defendant stockholders. The state court bill prayed the court to assume jurisdiction over the dissolution and liquidation of the defendant company. It asked for the appointment of receivers to take charge of and distribute its assets, and to wind up its affairs, and for general relief.

The answer of the defendant and its directors was filed November 20, 1911. It denied that they had taken any proceedings for the dissolution of the defendant corporation. It admitted that the latter had converted most, if not all, of its property into cash, and had distributed all the proceeds of sale, with certain exceptions, among those entitled to receive the same. The defendants had not been able to distribute about \$60,000 in money, bonds, and scrip to which shares of stock standing in the name of one Morris Robinson, agent, were entitled, nor \$35,188.85 in money, bonds, and scrip to which the shares of stock standing in the name of Tilly Allen in trust were entitled, because they had not been able to ascertain who had a rightful claim to such sums of money.

It further said that there was no necessity for the appointment of a receiver; that the work of distributing the funds of the defendant corporation might be done under the direction of the court by the defendant and their fiscal agents as well as it could possibly be done by receivers and much more cheaply. The defendants in their answer said that they would present to the court a statement of the proceedings which in their judgment should be taken to ascertain what disposition should be made of the money, bonds, and scrip now in the hands of the defendant corporation standing in the name of Tilly Allen in trust.

Nothing has been done in the state court since the filing of defendant's answer. Certain allegations in the answer doubtless explain this delay. The answer says that an administrator c. t. a. of Tilly Allen, and a receiver appointed at the instance of such administrator, was seeking by certain litigation in the state courts to obtain possession of said sums of money, bonds, and scrip, and had prayed therein for the appointment of a receiver for the proceeds of the stock standing in the name of Tilly Allen. The answer alleged that the pendency of this latter proceeding was a conclusive reason why in the stockholders' suit no receiver should be appointed for the proceeds of such Allen stock.

It was in the case of Baltimore Trust Company, Receiver, v. George's Creek Coal & Iron Company that the administrator of Tilly Allen sought to obtain possession of the stock standing in the name of Tilly Allen in trust and its proceeds. Counsel on both sides stated to the court that on the 20th of November, 1912, the Court of Appeals of Maryland handed down an opinion in such case. 85 Atl. 949. It held that the administrator of Tilly Allen

was not as of right, and in the absence of any showing as to the character in which Allen held such stock, entitled to its possession.

In the case at bar the bill shows that the controversy involved more than \$3,000 and is between citizens of different states. At the hearing it was assumed by everybody that the jurisdiction of this court was invoked upon those allegations, and upon those alone. It was taken for granted that as to the matters in dispute this court and the state court were of concurrent jurisdiction. That they certainly are, if the present case is here solely because the parties to it are citizens of different states. That, moreover, under the present Bankruptcy Act, they would be, if this court, under that enactment, would have any jurisdiction at all. The plaintiff is, however, an assignee under the Bankruptcy Act of 1841. Its repeal did not affect any case or proceeding in bankruptcy commenced before the passage of the repealing act. By the latter enactment it was expressly provided that every such proceeding should be continued to its final consummation in like manner as if the original act had never been repealed. Act March 3, 1843, c. 82, 5 Statutes at Large, 614.

[1] Under the Bankruptcy Act of 1841, as under that of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), the jurisdiction of the federal courts was much wider than it is under the act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). In some cases in which they now have no jurisdiction at all, or a jurisdiction concurrent with that of the state courts, their jurisdiction was then paramount to that of any state tribunal. *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603; *Traders' Bank v. Campbell*, 14 Wall. 95, 20 L. Ed. 832.

There is, however, some doubt whether the powers given by the acts of 1841 or 1867 could be exercised by any federal court, except that of the district in which the adjudication was made. There are decisions either way. *Jobbins v. Montague*, 13 Fed. Cas. 648; *Goodall v. Tuttle*, 10 Fed. Cas. 579; *Sherman v. Bingham*, 21 Fed. Cas. 1270; *Ex parte Martin*, 16 Fed. Cas. 874.

If, in deference to the great authority of Justices Story and Clifford, it should be held that the earlier acts did give to a federal court in one district jurisdiction over certain classes of suits brought by an assignee in bankruptcy appointed in another district, it would still be necessary to inquire whether this is a suit brought against one claiming an adverse interest in property which is the occasion of the litigation. If it is, it would seem that the act of 1841 does not give jurisdiction to this court. Act 1841, § 8; Clifford, Circuit Justice, in *Sherman v. Bingham*, 21 Fed. Cas. at page 1273.

It will not be necessary to go into any of these niceties. It will serve no good purpose to inquire whether in view of the decision in *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841, and of the comments of the court in *Carroll v. Carroll*, 16 How. 275, 14 L. Ed. 936, and in *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44

L. Ed. 1175, much that was said in *Ex parte Christy*, supra, as to the extent of the jurisdiction of a court of bankruptcy, is still law. Even in that case Justice Story, speaking for the court, said:

"That because the District Court does possess such a jurisdiction under the act, there is nothing in the act which requires that it should in all cases be absolutely exercised. * * * The prosecution or defense of any such suits in the state courts is obviously intended to be placed under the discretionary authority of the District Court."

There is, to say the least, grave doubt whether the act of 1841 gives to this court any jurisdiction over the present controversy. If it does, the authorities show that it is discretionary with this court whether such jurisdiction shall under the circumstances be exercised. It does not appear that there is any necessity for the interference of this court to protect the assignee in bankruptcy from any injustice or oppression.

In view of all the circumstances, this court will therefore not assume any jurisdiction other than that which it may and should exercise over a controversy between citizens of different states.

[2] The mere pendency of another suit in the state court over the same subject-matter, even if the parties were the same, would be no bar to the institution of a subsequent suit in a federal court. *Gordon v. Gilfoil*, 99 U. S. 168, 25 L. Ed. 383.

[3] Complainant says that in Maryland it is well settled that property may be seized by one court even after the appointment of a receiver for the same property by another court of concurrent jurisdiction, provided such seizure is made before the receiver takes possession of the property so seized. *Farmers' Bank of Delaware v. Beaton*, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; *Everett v. Neff*, 28 Md. 176.

It is unnecessary to comment on these authorities or to inquire whether they can be distinguished from the case at bar. Whether a federal court of equity is entitled to take jurisdiction under circumstances such as those disclosed by the pleadings is a question upon which the rulings of the Supreme Court are conclusive.

The proceeding in the circuit court of Baltimore city was in rem, as those words are used by the Supreme Court in *Farmers' Loan & Trust Co. v. Lake Street Elevated Railroad Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. In the bill of complaint in the state court the specific fund here in controversy was mentioned. That court was asked to take such fund into its custody through its receiver and to determine who was entitled to it. The parties to the cause in this court are not the same as the parties in the state court, but the fund and securities in controversy are precisely the same. As I understand the decision of the Supreme Court, the jurisdiction of the circuit court of Baltimore city over the thing in controversy attached when the bill was filed therein and process issued thereon, such process having been subsequently duly served. Until the proceedings in the state court are terminated this court should not attempt to take the property there in controversy into its custody either directly, or indirectly through injunctions which restrain the person who

has actual possession from disposing of that possession otherwise than is directed by this court.

At the hearing complainant said that, if this court was of opinion that it had no right to issue the writ of injunction prayed for, he would ask leave to amend his bill by striking therefrom the prayer for a provisional or preliminary injunction, and that the prayer that the defendant be required to issue a new certificate of stock to the complainant and to account for and pay over to the complainant all accrued dividends thereon and other proceeds thereof should be amended by adding thereto:

"That in said decree there shall be nothing contained which would interfere with the custody by any receiver of the certificates of stock standing in the name of Tilly Allen in trust and the property belonging thereto, if hereafter appointed by the circuit court of Baltimore city in the case of *Montell and Others v. George's Creek Coal & Iron Company*."

In *Wabash Railroad Co. v. Adelbert College*, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379, the Supreme Court said that the possession of property by one court carried with it the exclusive jurisdiction to determine all judicial questions concerning such property. Such conclusion was adhered to on a motion for rehearing. 208 U. S. 609, 28 Sup. Ct. 425, 52 L. Ed. 642. The court then declared:

"That the declaration of a lien on the property is a step towards the invasion of its possession, which we have held to be beyond the jurisdiction of the state court."

Unless this court can adjudicate the plaintiff's title to the fund and securities in controversy, it can do nothing which will be of any advantage to him. Whatever amendment he may make to his bill, its prayer will still in effect be that this court shall declare that such fund and securities belong to him. The state court has taken that property into its custody for the purpose, among others, of deciding who is entitled to it. That court, having the possession of the thing in controversy, can not only decide the case before it, but is in a position to enforce its decree.

Under such circumstances this court will best show its respect for another court of concurrent jurisdiction and for its own dignity by declining to proceed further with this case until the proceedings in the state court shall be terminated.

It remains merely to inquire what order should be made. This court would ordinarily have jurisdiction to adjudicate the controversy between the parties to this cause. The defendant has set up in its plea certain facts which show that such adjudication should not now be made—not necessarily that it should never be made. The proceedings in the state court may continue for some time. They may ultimately end in such manner as to leave the complainant free to prosecute his suit in this court, if he shall then be so advised. The ends of justice will be best subserved by decreeing that no further proceedings shall be taken in this cause until the litigation in the state court, set up in defendant's plea, has been terminated, so far as the same has reference to the certificates of stock standing in the name of Tilly Allen in trust or the proceeds thereof, and that after the

termination of such litigation, so far as it relates to such certificates of stock and their proceeds, the complainant may have 30 days to file an amended bill of complaint alleging that such litigation is at an end. This court should reserve to itself the right to determine, by an order to be entered at the foot of the decree to be now passed, or otherwise, whether the litigation in the state court with reference to such certificates of stock and the proceeds thereof has been ended, within the meaning of the decree to be passed herein.

In re SNELLING.

(District Court, D. Massachusetts. November 6, 1912.)

No. 17,768.

1. BANKRUPTCY (§ 288*)—COURTS OF BANKRUPTCY—SUMMARY PROCEEDING.

A petition to have a trustee in bankruptcy decreed to hold certain real estate standing in the name of the bankrupt in trust for petitioner, and required to convey the same, is a summary proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

2. BANKRUPTCY (§ 302*)—"SUMMARY PROCEEDING"—PROCEDURE.

"Summary procedure," in bankruptcy, implies a single hearing in each tribunal, at which the merits of the controversy are investigated and decided, without much regard to formal pleadings, and such a controversy should not be disposed of on a demurrer, unless the facts are undisputed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 456, 457; Dec. Dig. § 302.*]

For other definitions, see Words and Phrases, vol. 7, p. 6786.]

In the matter of S. Rodman Snelling, bankrupt. On review of decision of referee.

See, also, 202 Fed. 259.

Goodwin & Proctor, of Boston, Mass., for petitioner.

J. Duke Smith, of Boston, Mass., for trustee.

MORTON, District Judge. This is a petition praying that the trustee in bankruptcy of S. Rodman Snelling be decreed to hold in trust for the benefit of the petitioner, and to convey to her, the legal title to certain real estate standing in the name of the bankrupt. The trustee demurred to the petition. The referee sustained the demurrer, and the petitioner seeks to review his decision.

[1, 2] It is plainly a summary proceeding. In re Epstein, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465. I share the doubts expressed by Lowell, J., in Re Mullen (D. C.) 101 Fed. 413, and Re Berkman (U. S. District Court, Massachusetts, No. 3,266, April 11, 1901) 201 Fed. 180, as to the propriety of a demurrer in summary proceedings. Summary procedure implies, I think, a single hearing in each tribunal, at which the merits of the controversy are investigated and decided, without much regard to the formal pleadings. The use of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

demurrer carries the right to answer over, if the demurrer be overruled. There has been no final disposition of the matter before the referee. If the demurrer should be overruled, the case must go back to him to state the facts, with the possibility of a second appeal from his decision.

I infer, from what was said at the argument, that there is no real controversy over the facts as stated in the petition. The merits have been fully argued. No objection has been taken to the pleadings. If within seven days the parties file a stipulation that judgment on the demurrer shall be final, I will keep and decide the case. Otherwise, it is to be recommitted to the referee to state the facts.

In re SNELLING.

(District Court, D. Massachusetts. December 18, 1912.)

No. 17,768.

1. BANKRUPTCY (§ 140*)—ESTATE OF TRUSTEE IN BANKRUPTCY.

Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vesting in the trustee in bankruptcy the title of the bankrupt, does not prevent a purchaser in possession of real estate under an oral contract of purchase, and entitled to compel the vendor prior to his bankruptcy to convey, from compelling the trustee to convey.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 140*)—RIGHTS OF TRUSTEE—"CUSTODY."

Real estate, which has been for more than ten years prior to the bankruptcy of the vendor, and which remains, in the exclusive possession of a purchaser under a claim of right under a parol contract of purchase, is not in the "custody" of the trustee or of the court, within Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), declaring that the trustee, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with the remedies of creditors holding a lien by legal or equitable proceedings thereon, though it be assumed that the word "custody" is applicable to real as well as personal estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1800, 1801; vol. 8, p. 7625.]

3. BANKRUPTCY (§ 140*)—RIGHTS OF TRUSTEE—CONVEYANCE TO PURCHASER OF BANKRUPT.

Under Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), providing that, as to all property not in the custody of the bankruptcy court, the trustee shall be deemed vested with the rights and remedies of a judgment creditor holding an execution returned unsatisfied, and Rev. Laws, Mass. c. 178, § 1, providing that all of the land of a debtor may be taken on execution and chapter 147, § 3, providing that no trust concerning land, whether implied by law or declared by the parties, shall affect the title of a purchaser for a valuable consideration and without notice of the trust, etc., the bankruptcy of a vendor of real estate in a parol contract for the sale thereof, followed by the exclusive possession by the purchaser under a claim of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

right under the contract for ten years prior to the bankruptcy, does not give the trustee the rights of a judgment creditor who has levied without notice, and the bankruptcy court will decree that he holds the legal title in trust for the purchaser to convey to him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

In the matter of the bankruptcy of S. Rodman Snelling. Petition by Anna L. Snelling to compel the trustee in bankruptcy to convey real estate to the petitioner. Demurrer to petition overruled, and decree for petitioner ordered.

See, also, 202 Fed. 258.

Goodwin & Proctor, of Boston, Mass., for petitioner.

J. Duke Smith, of Boston, Mass., for trustee.

MORTON, District Judge. The essential facts alleged in this petition are as follows: Some ten years before Snelling's bankruptcy, the petitioner orally purchased of him certain real estate, which she has since been in exclusive possession of, and upon which she has made valuable improvements. She paid for the property in full; but by inadvertence, as alleged in the petition, no conveyance was ever made to her, so that the legal title still stands in the bankrupt's name. The prayer of the petition is that the trustee may be decreed to hold the legal title in trust for the benefit of the petitioner and to convey it to her. The trustee demurs generally to the petition and contends that the premises in question are a part of the bankrupt's estate. The parties have stipulated, in accordance with my memorandum previously filed herein, that judgment on the demurrer shall be final. The question presented is obviously of considerable interest and importance.

[1] Prior to the bankruptcy, the petitioner could, under the Massachusetts law, have compelled Snelling to make the conveyance prayed for (*Low v. Low*, 173 Mass. 580, 54 N. E. 257); and before the amendment of 1910 to the Bankruptcy Act she could unquestionably have compelled the trustee to do so (*York Mfg. Co. v. Cassell*, 201 U. S. 334, 26 Sup. Ct. 481, 50 L. Ed. 782; *In re Davis* [D. C.] 112 Fed. 129). The trustee contends, however, that the effect of the amendment, in connection with the Massachusetts law as to the rights of judgment creditors, is to cut off her equitable right. He relies on section 47a (2), and section 70 of the Bankruptcy Act. Section 70 was not changed by the amendment of 1910. It gives the trustee no greater rights or estate than the bankrupt himself had. *York Mfg. Co. v. Cassell*, *supra*; *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577.

[2] The case turns on the effect of the other section referred to, 47a (2). The rights of the trustee under that section differ, according to whether he has, or has not, "*custody*" of the property in question. There is some doubt whether this section applies to real estate. The debates over the amendment indicate that the attention of Congress was directed to personal property only; and the word "*custody*," on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which the trustee's rights are made to depend, is wholly inapplicable to real estate. However that may be, the premises in question here have been for more than ten years, and are now, in the exclusive possession of the petitioner, who holds them under a claim of right. Under such circumstances, the property is certainly not in the "custody" of the trustee, or of the court.

[3] The trustee's contention thus rests ultimately upon the last clause in section 47a (2), viz.:

"And also, as to all property not in the custody of the bankruptcy court, [the trustee] shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

The Massachusetts statutes provide that "all of the land of a debtor" may be taken on execution (Rev. Laws, c. 178, § 1), and as to unrecorded trusts of land that:

"No trust concerning land whether implied by law or created or declared by the parties shall affect the title of a purchaser for a valuable consideration and without notice of the trust, nor prevent a creditor who has no notice of the trust from attaching the land or from taking it on execution in like manner as if no such trust existed." Rev. Laws, c. 147, § 3.

The trustee contends that the effect of the bankruptcy is to give him the rights of a creditor who had levied upon the premises in question in ignorance of the petitioner's equitable rights therein.

In a number of decisions in other districts, referred to in *Re Dancy*, *infra*, it has been held that the trustee stood, as to personal property coming into the custody of the court, in the position of a creditor levying without notice; and it has been said that the burden was upon the person claiming the property to show that some or all of the creditors had notice of the claimant's rights. In *re Dancy Co.* (D. C.) 198 Fed. 336, and cases cited; In *re Bazemore* (D. C.) 26 Am. Bankr. Rep. 494, 189 Fed. 236. The latter suggestion would involve trying many questions of fact as to the knowledge of the various creditors and would make the title uncertain. It implies either that the creditors who knew about the equities are to be treated differently from those who were ignorant of them, or else that the creditors with such knowledge are to secure by the bankruptcy property which they themselves could not have reached. The trustee's rights in such cases ought, it seems to me, to be fixed by the adjudication of bankruptcy.

Moreover, decisions as to personal property turn on different principles from those here involved. Equitable estates in personal property are not recognized, as they are in real property. The petitioner is, in equity, the owner of the premises and has an enforceable interest therein; the bankrupt holds only the bare legal title, which is hardly "property" in the ordinary sense of the word. *Low v. Welch*, 139 Mass. 33, 29 N. E. 216. To enlarge this bare title, so as to include the full beneficial ownership, is to give the trustee property which the bankrupt did not own. The estoppel raised by the recording acts against the assertion of unrecorded interests (on which in the last analysis the rights of bona fide purchasers and of creditors levying without notice depend) ought not to be extended so far. *Smythe v.*

Sprague, 149 Mass. 310, 21 N. E. 383, 3 L. R. A. 822. The Bankruptcy Act gives the trustee the rights of "a creditor holding an execution," not those of "a creditor who has levied without notice." "A trustee in bankruptcy does not stand like an attaching creditor; he gets no lien by the mere fact of his appointment." Holmes, J., *Sexton v. Kessler*, 225 U. S. 90, 97, 32 Sup. Ct. 657, 659 (56 L. Ed. 995). Moreover, the equitable owner still prevails if he can show that the levying creditor had notice of the unrecorded rights. I do not see how this privilege is to be preserved if the trustee is held to be a creditor levying without notice.

The provisions of the Massachusetts Insolvency Act as to the points under discussion were substantially identical in effect with those of the present Bankruptcy Act. It provided that:

"The assignment shall vest in the assignee all the property of the debtor * * * which might have been taken on execution upon a judgment against him." Mass. Pub. Stats. c. 157, § 46.

In *Low v. Welch*, 139 Mass. 33, 29 N. E. 216, a bill in equity was brought to compel the assignee of the insolvent debtor to release to the plaintiff the legal title to certain premises which were held by the insolvent upon an unrecorded trust in favor of the plaintiff. It was contended, as here, that as the property could have been reached by a judgment creditor of the insolvent, who had no notice of the trust, it had vested in his assignee. It was held that the plaintiff was entitled to recover. Mr. Justice Holmes says in the opinion:

"The clause [in the statute] was directed primarily at least to giving the assignee the rights which all creditors had with regard to property of which the debtor had parted with the legal title, not to putting him in the position of a bona fide purchaser of property of which the debtor had the legal title and nothing else. This was not property which could be taken on execution by creditors generally, but only by creditors without notice," etc.

In *Smythe v. Sprague*, 149 Mass. 310, 21 N. E. 383, 3 L. R. A. 822, the insolvent conveyed land to a bona fide purchaser by a deed which was not recorded until after the insolvency, so that at the time of the insolvency the legal title stood in the insolvent's name. It was held that the purchaser was entitled to a conveyance from the assignee. This decision was cited and approved by the Court of Appeals for this Circuit in *Re Loveland*, 155 Fed. 838, 84 C. C. A. 72. The law of Massachusetts is settled, in accordance with these decisions, that:

"Insolvent laws do not put the assignee in the position of a bona fide purchaser of property of which the insolvent had the bare legal title." Holmes, J., *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072.

"Property held in trust does not pass to them" (trustees in bankruptcy). Holmes, C. J., *Emery v. Boston Terminal Co.*, 178 Mass. 184, 59 N. E. 763, 86 Am. St. Rep. 473.

In *Sparks v. Weatherby* (Ala.) 58 South. 280, involving the same questions presented here, the trustee was held not entitled to the premises. These decisions seem to me more in accord with the spirit of the bankruptcy law than the contrary dicta in cases on personal property.

Demurrer overruled; decree for petitioner.

PUGET SOUND TRACTION, LIGHT & POWER CO. v. LAWREY et al.

(District Court, W. D. Washington, N. D. January 23, 1913.)

No. 2,254.

1. DISMISSAL AND NONSUIT (§ 26*)—JOINT AND SEVERAL LIABILITY.

Where a bill sought an injunction forbidding tortious acts in pursuance of a conspiracy, the liability of the respondents was joint and several, so that no particular defendant was a necessary party to the suit, and the dismissal of some of them, alleged to be inhabitants of Alaska, did not affect the court's jurisdiction over the remainder.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 46, 48-59; Dec. Dig. § 26.*]

2. COURTS (§ 300*)—FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—CITIZENS AND ALIENS—JOINDER.

Where suit was brought by a Massachusetts corporation to enjoin strikers from interfering with complainant's business in Washington, the fact that both citizens of Washington and aliens were joined as defendants did not deprive the court of jurisdiction, under the statute conferring jurisdiction over controversies between "citizens of a state and foreign states, citizens or subjects."

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 847, 850; Dec. Dig. § 300.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.]

3. INJUNCTION (§ 221*)—SCOPE—VIOLATION—LIABILITY OF PARTIES.

Where an injunction against strikers restrained respondents and all other persons who had knowledge of the making of the order, persons alleged to have had knowledge of the order could be properly proceeded against for violating the writ, though they were not parties to the original bill.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 445-447; Dec. Dig. § 221.*]

4. INJUNCTION (§ 230*)—VIOLATION—CIVIL CONTEMPT.

Where a contempt order was sued out in a suit for an injunction to punish respondents for violation thereof, it would be regarded as a proceeding for civil contempt.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502-516; Dec. Dig. § 230.*]

5. CONTEMPT (§ 29*)—CIVIL CONTEMPT—PARTIES.

Civil contempt, being remedial, would ordinarily be between the original parties to the suit, but not necessarily so.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 86-90; Dec. Dig. § 29.*]

6. INJUNCTION (§ 221*)—VIOLATION—PERSONS LIABLE—KNOWLEDGE.

To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it; it being sufficient that he had actual notice thereof.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 445-447; Dec. Dig. § 221.*]

In Equity. Suit by the Puget Sound Traction, Light & Power Company against Bob Lawrey and others. On plea to the court's jurisdiction. Overruled.

James B. Howe, A. J. Falknor, and Hugh A. Tait, all of Seattle, Wash., for complainant.

Brady & Rummens, of Seattle, Wash., for respondents.

CUSHMAN, District Judge. This matter is now before the court, after hearing had, upon the sufficiency of certain pleas to the court's jurisdiction. The bill of complaint alleges that complainant is a Massachusetts corporation, and that the respondents are citizens of the United States and the state of Washington, and charges a conspiracy on the part of respondents to prevent the operation of certain coal mines belonging to the complainant; and in carrying out this design, the respondents, it is alleged, had and would, unless restrained, continue the use of violent means, including the use of coercion and systematic assaults upon and threats against complainant's workmen, in order to induce such workmen to quit their employment, and in order to force complainant to employ respondents, or men belonging to a certain union.

A restraining order was heretofore issued, directed to the respondents and "all other persons who shall have knowledge of the making of this order." Thereafter, upon the filing of affidavits accusing certain persons, not named in the original bill, with having, with knowledge of the restraining order, violated the same, an order was made requiring such persons to show cause why they should not be attached for contempt.

Pleas to the court's jurisdiction are urged, upon the grounds that certain respondents are not and were not inhabitants of the state of Washington at the time suit was begun, but were inhabitants of Alaska, and that others of respondents were and are aliens. The jurisdiction is further challenged by those parties against whom the show-cause or contempt order runs, upon the ground that such order is collateral to a suit in equity between private parties, and not authorized or prosecuted by the government of the United States.

At the time of the hearing upon the pleas, complainant was allowed to dismiss as to those respondents alleged to be inhabitants of the territory of Alaska. Such parties had not been served with process.

Complainant relies on the following authorities: *Horn v. Lockhart*, 17 Wall. 570, 21 L. Ed. 657; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Hicklin v. Marco* (9th Circuit) 56 Fed. 549, 6 C. C. A. 10; *Mason v. Dullagham*, 82 Fed. 689, 27 C. C. A. 296; *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C. C. A. 99; *Tug River Coal & Salt Co. v. Brigel*, 86 Fed. 818, 30 C. C. A. 415; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *Smith v. Consumers' Cotton Oil Co.*, 86 Fed. 359, 30 C. C. A. 103; *Re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; *Delaware, etc., R. Co. v. Frank* (C. C.) 110 Fed. 689; *North Carolina Mining Co. v. Westfeldt* (C. C.) 151 Fed. 290; *Barnes & Co. v. Berry* (C. C.) 156 Fed. 72; *Ladew v. Tennessee Copper Co.* (C. C.) 179 Fed. 245; *Irving v. Joint Dist. Council, etc.* (C. C.) 180 Fed. 896; *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; *Ex parte Richards* (C. C. W. Va.) 117 Fed. 658;

Blake v. Nesbet (D. C. Mo.) 144 Fed. 279, 282; Employers' Teaming Company v. Teamsters' Joint Council (C. C. Ill.) 141 Fed. 679; Christensen Engineering Company v. Westinghouse Air Brake Co., 135 Fed. 774, 778, 68 C. C. A. 476; Conkey Co. v. Russell (C. C.) 111 Fed. 417; O'Brien v. People, 216 Ill. 354, 75 N. E. 108.

The following authorities are relied upon by the respondents: Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; In re Reese, 107 Fed. 942, 47 C. C. A. 87; In re Nevitt, 54 C. C. A. 622-632, 117 Fed. 448-458; Bessette v. W. B. Conkey Co., 194 U. S. 324-338, 24 Sup. Ct. 665, 48 L. Ed. 997; S. Anargyros v. Anargyros & Co. (C. C.) 191 Fed. 208; 9 Cyc. 35, subd. B.

[1] The object sought by the bill being an injunction forbidding tortious acts in pursuance of a conspiracy, the liability of the respondents is several, as well as joint, and no particular defendant is a necessary party to the suit. Therefore, treating the allegations of the pleas that such parties were inhabitants of Alaska as tantamount to alleging that they were citizens thereof, as they are clearly not indispensable parties, they were properly dismissed and jurisdiction retained as to the other parties. Horn v. Lockhart, 17 Wall. 570, 21 L. Ed. 657; Hicklin v. Marco, 56 Fed. 549, 6 C. C. A. 10 (C. C. A. 9th Circuit).

[2] The mere fact that both citizens of Washington and aliens are joined as respondents will not deprive the court of jurisdiction. The court has jurisdiction under the statute of controversies between "citizens of different states" and controversies between "citizens of a state and foreign states, citizens or subjects." As the court would have jurisdiction of a suit by complainant, a Massachusetts corporation, against respondents, citizens of Washington, and would have jurisdiction of a suit by complainant against respondents who are aliens, the mere joining of the citizen and alien respondents in one suit will not deprive the court of jurisdiction. To retain jurisdiction comes within the reason of the rule. To deny it would violate the reason of the rule.

[3] Regarding the plea of those parties against whom the show-cause order runs for the alleged violation of the restraining order, they were not named in the original bill, but the restraining order was broad enough to include them, running, as it did, against all persons having knowledge of the order.

[4] It is clear that, as the contempt order was sued out in this suit by the complainants, the proceeding is one for a civil contempt. Gompers v. Buck Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. No reason has been advanced why it is not proper to proceed against such persons in the original suit. It becomes clearly an ancillary proceeding by reason of the allegation, in the affidavits upon which the show-cause order was made, that the persons against whom the order runs had knowledge of the restraining order and, with that knowledge, violated it. An expression contained in the case of Gompers v. Buck Stove & Range Co.,

it is contended, authorizes and supports these pleas. In the course of the opinion in that case, it is said:

"Proceedings for civil contempt are between the original parties, and are instituted and tried as a part of the main suit; but, on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original case."

This language must be construed in full view of the facts of the case in which it was used. In that case both the District Court and the Court of Appeals had held the proceeding to be one for criminal contempt, and the Supreme Court, in reversing this ruling of the lower courts, in using this language, was engaged in stating its reasons for holding the proceeding then under review one for a civil contempt, and that the lower court had exceeded its authority in a civil contempt proceeding in imprisoning for a definite term, a sentence only proper in a case of criminal contempt. The proceeding there was between a portion of the original parties to an equity suit, entitled and carried to conclusion in such suit. There was nothing before the court requiring it to consider all the parties who would be proper in a proceeding in a civil contempt. It was held that it was a civil contempt, because it was between the original parties. Such being the case then before the court, clearly this authority does not support the pleas.

[5, 6] Civil contempt, being remedial, would ordinarily be between the original parties, but not necessarily so. In *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110, it is expressly held:

"To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice."

In that case *Lennon* was not a party to the original suit. The proceeding against him for contempt was had in the original suit. He was fined \$50 and costs, and the judgment was affirmed by the Supreme Court. This case is not mentioned in the opinion of *Gompers v. Buck Stove & Range Co.*, *supra*. It is not at all likely that it was intended to overrule the *Lennon* Case by a decision wherein the point involved was not a controlling one in the latter case.

The pleas are insufficient.

In re CUTHBERTSON.

(District Court, D. South Dakota, S. D. December 12, 1912.)

1. BANKRUPTCY (§ 417*)—DISCHARGE—VACATION—JURISDICTION.

Jurisdiction of a judge of the bankruptcy court to set aside a discharge is limited, and can be exercised only on a petition filed by a party or parties in interest, who have not been guilty of laches, within a year after the discharge was granted, alleging that the discharge was obtained through the bankrupt's fraud, that knowledge of the fraud came to the petitioners after the granting of the discharge, and that the actual facts

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

did not warrant the discharge, as provided by Bankr. Act July 1, 1898, c. 541, § 15a, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428.)

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.*]

2. BANKRUPTCY (§ 417*)—DISCHARGE—VACATION—PETITION.

Where a petition to vacate a bankrupt's discharge for fraud did not allege when petitioner acquired knowledge of the fraud, it was demurrable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.*]

3. BANKRUPTCY (§ 417*)—DISCHARGE—VACATION—FRAUD—FAILURE TO DEMUR.

Where a petition to vacate a bankrupt's discharge was demurrable, the bankrupt's failure to demur and the filing of an answer, with no affirmative admission of jurisdictional facts omitted from the petition, did not relieve petitioner from pleading and proving each of the jurisdictional requirements.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.*]

4. BANKRUPTCY (§ 417*)—DISCHARGE—VACATION—KNOWLEDGE OF OBJECTION.

A bankrupt's discharge will not be vacated, unless the court in which the application is made is satisfied that the creditor or his representatives had no knowledge of the objection at the time of the discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.*]

5. BANKRUPTCY (§ 417*)—DISCHARGE—VACATION—"FRAUD."

"Fraud" sufficient to set aside a bankrupt's discharge means bad faith, involving moral turpitude or intentional wrong, as distinguished from fraud in law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 8, p. 7666.]

6. BANKRUPTCY (§ 417*)—DISCHARGE—VACATION—FRAUD—CONCEALMENT OF ASSETS.

Where a bankrupt, having transferred an interest in real property to a trustee to enable him to maintain suits to quiet title, called the transaction to the attention of her counsel, who was an able lawyer, at the time her bankruptcy schedules were executed, and was advised by him that she had no interest in the property, and that it should not be referred to in the bankruptcy proceedings, her omission of such interest did not constitute such actual fraud as would authorize vacation of her discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.*]

7. BANKRUPTCY (§ 417*)—DISCHARGE—VACATION—JURISDICTION.

A court of bankruptcy has general power, like any other court, to amend its decrees, in its discretion, in the furtherance of justice, in the absence of statutory prohibition, but has no power to vacate a discharge after the expiration of a year.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Emma G. Cuthbertson. Application to set aside an order of discharge. Denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

L. H. Salinger, of Carroll, Iowa, for petitioner.
Saunders & Stuart and Tinley & Mitchell, all of Council Bluffs, Iowa, for bankrupt.

ELLIOTT, District Judge. The bankrupt's voluntary petition to be adjudged a bankrupt was filed August 24, 1911. From an examination of this petition it appears that in Schedule B3 attached thereto, it is stated that she had no unliquidated claims of any nature; and it further appears that she claimed in said petition to be possessed of no property whatever.

No trustee was appointed, and no claims were filed against her estate, and thereafter, on the 9th day of October, 1911, the bankrupt filed petition for her discharge. Notice was duly given, and thereafter, on the 4th day of December, 1911, said bankrupt procured her discharge, which was duly entered upon that date.

On the 18th day of November, 1912, Ralph McLean, the petitioner herein, filed his petition as one of the creditors of said bankrupt, whereby he petitioned for a revocation of the said order of discharge, in which petition he sets forth, in substance, the date of the filing of the petition to be adjudged a bankrupt, the statement, in substance, of the contents of said petition with reference to the property of the bankrupt; that among her creditors she listed in Schedule A3 to the petition a judgment for \$108.18, dated April 2, 1901; that such judgment existed, had never been reversed or satisfied, and that the petitioner is the owner of the same; that the petition in bankruptcy was referred to the referee, and that on the 4th day of September, 1911, the bankrupt was by said referee duly adjudged and declared such; that on the 9th day of October, 1911, she filed her petition for a full discharge from all debts provable against her estate, and in said petition made oath that she had not done, or suffered or procured to be done, or been a party to, any act, matter, or thing specified in said acts as a ground for withholding her discharge thereunder, or for revoking the same if granted, and particularly that she had not committed any offense punishable by imprisonment, as in said acts provided; that thereafter, upon notice being given on the 4th day of December, 1911, said bankrupt procured her discharge; that the judgment owned by the petitioner was for a debt incurred by the bankrupt in the purchase of farm machinery, and was rendered on a note given for the purchase price thereof; that it was thus a debt provable against the estate of said bankrupt, under the acts of Congress relating to bankruptcy; that the petitioner or Sayller & Shoemaker, who at that time owned the judgment and thereafter assigned it to petitioner, never either of them proved said debt against the bankrupt estate, and no person listed as a creditor did prove a claim against the estate of the bankrupt, nor was any trustee ever appointed, and said estate has never been closed; that the judgment of the plaintiff is not a lien upon the real property of the bankrupt or any interest she may have in real property in the state of Iowa, for the reasons stated in the petition, and all remedy thereon is cut off by the bankrupt's discharge: that on the 15th day of October, 1912, the bankrupt, in an action

brought by another in the district court of Iowa, in and for Carroll county, to quiet such other's title to certain lands lying in the county, filed a pleading, asserting that she had been on the 14th day of March, 1910, and at all times since, the real owner of an undivided one-half of the lands in controversy, praying to have title quieted in her to such one-half, subject to two mortgage liens thereon and her liability to one B. I. Salinger for moneys expended in litigation over said title; that she further alleged that she had parted with the title to said premises on the 15th day of March for the sole purpose that said Salinger, as trustee, might conduct certain litigation to reduce the amount of liens then existing against said land, and that he carried on the litigation until as late as the 12th day of March, 1912, seeking a reduction of said liens, and that he succeeded and secured a new title as her trustee and agent; that said title existed and said litigation was being carried on for said purpose with her knowledge and consent at the very time she applied for her said discharge, and on the day when same was granted; that this suit to quiet title could not be tried and decided before the expiration of the year within which revocation of said bankrupt's discharge might be applied for.

The petitioner also averred that if the bankrupt's allegations in said pleadings be true her discharge should be revoked and set aside for the fraud involved in concealing the existence of said assets from the bankruptcy court.

It further alleges, if said allegations be true, the bankrupt had committed an offense punishable by imprisonment, as by said acts provided, having made a sworn oath in her said petition and in the schedules attached thereto and in her petition for discharge; that said Sayller & Shoemaker, who assigned said judgment to petitioner, did not prove their debt against the bankrupt's estate, because they were informed and believed that the bankrupt had sworn in her petition that she had no assets whatever; wherefore petitioner prayed the discharge of said bankrupt be revoked and set aside.

Thereupon an order to show cause was issued, fixing a day for her examination touching the matters therein referred to, and the same was duly served upon the bankrupt. Thereafter the bankrupt appeared with her attorneys and the petitioner appeared by his counsel, and in the absence of the judge of this court the examination of the said bankrupt was, by stipulation, taken before Anna Jost and transcribed by her; and the rights of the petitioner herein are submitted upon the written evidence of the bankrupt, so taken, the pleadings and a stipulation filed.

[1] I am of the opinion that the authority of the judge to revoke the discharge in bankruptcy is confined and limited. It can be exercised only upon a petition filed, complying with the provisions of section 15a of the Bankruptcy Law, which provides:

"The judge may, upon the application of parties in interest, who have not been guilty of undue laches, filed at any time within one year after discharge shall have been granted, revoke it upon a trial, if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge."

A mere casual analysis of this section discloses the following elements, all of which must, in my judgment, appear in the petition to give the court jurisdiction to act: (1) The application must be made by a party or parties in interest. (2) The petition must allege that the petitioner has not been guilty of undue laches. (3) The petition must be filed within one year after the discharge shall have been granted. (4) There must be allegations in effect, if true, that the discharge of the bankrupt was obtained through the fraud of the bankrupt. (5) That the knowledge of the fraud has come to the petitioner since the granting of the discharge. (6) That the actual facts did not warrant the discharge.

There is no allegation in the petition filed herein with reference to the lack of laches of the petitioner.

[2] There is no statement of facts in this petition that in any manner refers to the knowledge of the said fraud by the petitioners, or when such knowledge came to the petitioners.

It is questionable whether there is an allegation in this petition that the bankrupt has any interest in the property referred to in the petition.

I am of the opinion that this section of the law requires that the "knowledge of the fraud has come to the petitioner since the granting of the discharge," and that it is essential, and is jurisdictional. Note in *Re Marionneaux's Case*, Fed. Cas. No. 9,088.

In each and every one of the foregoing particulars the burden of proof is upon the petitioner, and every requirement of this statute is absolutely essential to be proven. In *re Mauzy* (D. C.) 163 Fed. 900.

[3] In this view of the record this petition was demurrable. The bankrupt, however, failed to demur. She failing to enter a demurrer and filing an answer herein, with no affirmative admission of these jurisdictional facts, did not relieve the petitioner from pleading and proving each of these statutory requirements.

There is absolutely nothing in the record submitted to me upon this hearing that would justify a finding upon either of the essentials above numbered 2 and 5. And in this state of the record I do not consider it necessary to make a finding with reference to No. 6.

In every one of the particulars above numbered, I repeat, the burden of proof is upon the petitioner, and every requirement of the statute is absolutely essential to the power of the court to grant the relief prayed for. All these conditions must exist. In *re Upson* (D. C.) 124 Fed. 980. The purpose of this limitation is to restrict this process to those frauds which shall be discovered after the discharge. *Collier on Bankruptcy*, 299. And the grounds on which the application rests must be strictly pleaded. In *re McIntyre*, Fed. Cas. No. 8,823; *Lathrop v. Stewart*, 6 McLean, 630, Fed. Cas. No. 8,112. Allegations should be made showing that knowledge of the facts constituting grounds for the revocation came to the petitioners since the granting of the discharge. In *re Oliver* (D. C.) 133 Fed. 832.

It has been said that the moving creditor in a proceeding upon a petition of this character, under this section of the statute, should con-

form more strictly to the pleadings in his proof than on a contested discharge. Collier on Bankruptcy, 373.

[4] A discharge will not be vacated, unless the court is satisfied that the creditor or his representatives had no knowledge of the objection at the time the discharge was granted. *In re Mauzy* (D. C.) 163 Fed. 900.

The record is entirely silent, both in the pleadings and proof, upon the material issues above set forth; and I am therefore of the opinion that I have no jurisdiction to enter affirmative findings upon such issues. There is therefore nothing here to sustain the petitioner's right to the order prayed for, and it should be denied.

[5] This disposes of this matter; but it may not be out of place at this time to intimate that, as I construe this statute, fraud is the only ground specified in this statute for which a revocation by the judge may be granted (*In re Meyers* [D. C.] 100 Fed. 775, and citations); that the fraud required to be shown means fraud in fact, involving moral turpitude, or intentional wrong. I question very much whether it includes implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. It occurs to me that "fraud," as used in this statute, is synonymous with "bad faith."

[6] Upon a review of the record presented here, I am satisfied that this bankrupt acted in the best of good faith. It appears by indisputable written evidence that she called the attention of her counsel, an able lawyer of the state of Iowa, to the situation with reference to this real property referred to in this petition filed herein, and was advised by him, in substance, that she had no interest therein, and that it should not be referred to in her bankruptcy proceedings.

[7] There is another question suggested, and that is whether or not the court of bankruptcy has general power, like any other court, to amend its decrees, in its discretion, in the furtherance of justice, in the absence of any statutory prohibition. I am satisfied the court has this power. *In re Dupee*, Fed. Cas. No. 4,183; *In re Bimberg* (D. C.) 121 Fed. 942. I am of the opinion, however, that the court is not now in a position to act upon that authority, because more than one year has passed since the discharge was entered.

Let an order be entered denying the relief demanded by the petitioner.

UNITED STATES v. THIRTY DOZEN PACKAGES OF ROACH FOOD.

(District Court, D. Maryland. January 28, 1913.)

DRUGGISTS (§ 2*)—INSECTICIDE ACT—INTERSTATE COMMERCE—"INERT."

Insecticide Act April 26, 1910, c. 191, § 8, par. 4, cl. 3, 36 Stat. 333 (U. S. Comp. St. Supp. 1911, p. 1372), provides that an insecticide shall be deemed misbranded, except in case of paris greens and lead arsenates, if it consists partially or completely of "an inert substance or substances which do not prevent, destroy, repel or mitigate insects," unless the names and percentage amounts of such inert ingredients are stated on the label, or the names and percentage amounts of every ingredient having

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

insecticidal properties and the total percentage of all inert ingredients are so stated. *Held*, that the word "inert," as so used, is not limited in meaning to a substance which serves no useful purpose in the compound, but includes any substance which is not in itself capable of killing or repelling insects, although it may be useful and used for the purpose of attracting them.

[Ed. Note.—For other cases, see *Druggists*, Cent. Dig. § 1; Dec. Dig. § 2.*]

Proceeding by the United States for condemnation of Thirty Dozen Packages of Roach Food. On exceptions to answer. Exceptions sustained.

John Philip Hill and J. Craig McLanahan, U. S. Attys., both of Baltimore, Md.

Charles McHenry Howard, of Baltimore, Md., for defendant.

ROSE, District Judge. The question for determination is the meaning of the word "inert" in clause 3, par. 4, § 8, Insecticide Act 1910. By that clause an insecticide, other than paris green or lead arsenate, is declared to be misbranded—

"if it consists partially or completely of an inert substance or substances which do not prevent, destroy, repel or mitigate insects or fungi and does not have the names and percentage amounts of each and every one of such inert ingredients plainly and correctly stated on the label: Provided, however, that in lieu of naming and stating the percentage amount of each and every inert ingredient, the producer may at his discretion state plainly upon the label the correct names and percentage amounts of each and every ingredient of the insecticide or fungicide having insecticidal or fungicidal properties, and make no mention of the inert ingredients, except in so far as to state the total percentage of inert ingredients present."

The United States is seeking to have condemned certain packages which are labeled "Peterman's Roach Food, Fatal to Roaches, Water Bugs and Beetles." These packages have been shipped in interstate commerce. Their contents are insecticides within the meaning of the act and are not either paris green or lead arsenate. The government says that the packages are misbranded, because they consist partially of certain inert substances, to wit, wheat flour and small amounts of other substances, which do not prevent, destroy, repel, or mitigate insects, and that the name and percentage amounts of each and every one of such inert ingredients is not plainly and correctly stated upon the labels of the packages, nor is there stated the correct names and percentage amounts of each and every ingredient having insecticidal properties and the total percentage of inert ingredients.

The claimant in its answer in effect says that the wheat flour and the other substances not in themselves poisonous found in its product are in the nature of food or bait attractive to the insects which it is sought to kill, and necessary to induce them to eat the poison or take it into their mouths or jaws. It asserts that these poisonous and non-poisonous substances are compounded in such proportions and incorporated together in such manner as to produce the effect of prevent-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing, destroying, repelling, and mitigating such vermin. Neither class of said substances, if used separately and without being compounded with the others, would produce the desired result. It therefore contends that its preparation contains no inert or inactive ingredients, or any substances which are not necessary to destroy, repel, or mitigate roaches and similar insect pests.

To the sufficiency of this answer the government has excepted. At the hearing of the exceptions the learned counsel for the claimant with great wit and force argued that the purpose of its preparation was to kill many roaches, that this purpose could not be attained unless the preparation was made attractive to them, that everything which drew them to it was a useful and active agent in bringing about the wished-for result, and that nothing which contributed to the end in view was "inert" within the meaning of the statute.

According to this reasoning "inert" means useless. To add intentionally and unnecessarily a useless substance to a compound sold for a specific purpose is to adulterate it. The claimant says that the provisions of the statute in question are intended to prevent adulteration—that is to say, protect the public against being led to pay its money for that which will not serve its purpose. The government admits that such is the ultimate result which Congress sought to bring about; but it says that Congress thought that the most effective, if not the only practical, way of reaching that end was to require the shippers of such insecticides to tell on their labels the quantity and kind of the elements which would actually kill or drive away insects, and the quantity and kind of the elements which were not themselves capable of killing or driving away one or many insects.

This view accepts the claimant's contention that, if you would in fact poison with something which will poison, you must oftentimes mix with it something which is in itself harmless, or even beneficial. It points out that many insecticides, to be of practical value, must be distributed rapidly and cheaply in the form of sprays and otherwise. In order that this may be successfully accomplished, the poisons or repellants may have to be diluted, and sometimes greatly diluted. In some cases in which such dilution may be required, it may also be essential that something which will induce the insects to eat the poisons shall be mixed with them. Under such circumstances it might be possible to argue that almost anything which was mixed with the poison or repellant served some useful purpose. Such contention would often be untruthfully made, and yet frequently it would be both difficult and costly to demonstrate its untruth to court or jury.

The government contends that Congress intended to get rid of such controversies by the simple expedient of requiring the shipper of the preparations to tell on the label what was in them. Whether he did so with approximate truth or not could usually be easily and certainly settled by an analysis. Neither side claims that anything in the proceedings of Congress throws any light upon the merits of their respective contentions. What the congressional intent was must be gathered altogether from the act itself and from a comparison of

its language with that of the Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]), upon which it is modeled.

The Insecticide Act contains 14 sections; the Food and Drugs Act, 13. The Insecticide Act contains a section providing that it shall be referred to as the Insecticide Act of 1910. There is no similar provision in the Food and Drugs Act. Otherwise the two enactments contain the same number of sections, in precisely the same order, and in very large part in precisely the same words. Obviously the draftsman of the Insecticide Act took the Food and Drugs Act and copied it literally, except where alterations were necessary in order to adapt it to the purpose in view, or where he wished to make a definite change in a particular provision. From the changes which were so made, it is possible to gather something of the purpose of some of the new provisions in the later act.

The claimant says that an inert substance within the meaning of the act is something which does not contribute to the effectiveness of insecticides—that is, something which serves no useful purpose therein. An insecticide containing such a substance, when compared volume for volume with another which did not, would be of inferior quality or strength. If the framer of the act had intended by the clause now under consideration to do nothing more than prevent the introduction of such valueless substances into insecticides, he had apt language before him in the model which he was using.

Section 7 of the Food and Drugs Act declares that a food shall be deemed to be adulterated if any substance has been mixed and packed with it, so as to reduce or lower or injuriously affect its quality or strength. Such a provision would apparently accomplish all that the claimant says was intended to be accomplished by the clause, the construction of which is now in controversy. The lawmakers did not think it would in the case of insecticides, other than paris green and lead arsenates. They do provide in section 7 of the Insecticide Act that a paris green or a lead arsenate shall be deemed to be adulterated if any substance has been mixed and packed with it, so as to reduce or lower or injuriously affect its quality or strength. They do not make such provision with reference to insecticides other than paris green and lead arsenates. On the other hand, they do not make applicable to the two latter any such clause as that now under discussion.

The lawmakers did not think it expedient or possible to say that any substance which, when mixed and packed with an insecticide, reduced or lowered its strength, was an adulterant. The explanation why it was not expedient or possible so to say is given by the claimant itself. In many insecticides, other than paris green and lead arsenates, substances which do reduce and lower their strength are absolutely necessary, in order that they may effectively do the work for which they are intended. Such substances could not be declared adulterants. The problem is solved by requiring the shipper of such insecticides to tell the kinds and quantities of the substances therein contained which do not themselves prevent, destroy, repel, or mitigate

insects. From the standpoint of the honest purchaser and shipper, there could be only one objection to this legislation. In some circumstances it might result in the revelation of a trade secret.

This objection was obviously taken into consideration by Congress. For the purpose of rendering such disclosures less probable or frequent, Congress gives the shipper an alternative. He may, if he will, instead of stating the kinds and proportions of inert substances so defined, confine himself to telling the total percentage of all such substances in his preparation; but, if he does, he must tell the specific kinds and proportions of the active poisons or repellants. It may be that in some cases that to do one or the other will give valuable information as to trade secrets. Claimant says that in its case such will be the result of the enforcement upon it of the construction for which the government contends. Such arguments may well be addressed to Congress. They may, where it does not appear that the intention of Congress has been called to them, affect the construction which the courts may put upon the general language of an act.

In this case, however, the clause in controversy itself shows that Congress had actually considered the extent to which it would go in compelling disclosures which might result in the revelation of trade secrets. Under its power to regulate commerce among the states, Congress had power to do what the government says it sought to do, and which I think it did do.

It follows that the exceptions of the government to the claimant's answer must be sustained.

In re EAST END MANTEL & TILE CO.

(District Court, W. D. Pennsylvania. February 5, 1913.)

No. 5,890.

1. COURTS (§ 359*)—CONTRACTS—VALIDITY—WHAT LAW GOVERNS.

The law of the state wherein a contract of sale or pledge is made and is to be performed must govern in the bankruptcy court in determining its validity.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939-949; Dec. Dig. § 359.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. BANKRUPTCY (§ 185*)—CHATTEL MORTGAGES—VALIDITY.

Where a chattel mortgage, unaccompanied by delivery of possession and not recorded, was under the law of the state where made valid as between the parties, and the rights of any creditor of the mortgagor did not attach prior to the taking possession by the mortgagee, the trustee in bankruptcy of the mortgagor, entitled under Bankruptcy Act July 1, 1898, c. 541, § 47, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), to the rights of a levying creditor, was not entitled to the mortgaged chattels.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 235, 273; Dec. Dig. § 185.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKRUPTCY (§ 161*)—"PREFERENCE"—ACTS CONSTITUTING.

Where a chattel mortgage, good as between the parties, fixed the rights of the mortgagee more than four months prior to the filing of the petition in bankruptcy of the mortgagor, the taking possession by the mortgagee of the mortgaged property within four months did not constitute a "preference," within the Bankruptcy Law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5498, 5499; vol. 8, p. 7759.]

In the matter of the bankruptcy of the East End Mantel & Tile Company. Question certified by the referee. Certified question answered in the affirmative, and decision of the referee reversed.

Seymour, Patterson & Siebeneck, of Pittsburgh, Pa., for claimant.
Morris, Walker & Allen, of Pittsburgh, Pa., for trustee in bankruptcy.

ORR, District Judge. The referee has certified to this court the question:

"Whether Mr. A. C. Robinson is entitled to the fund in the hands of the trustee as the proceeds of the bankrupt's property under a certain mortgage thereof and the facts set forth in the report and opinion of the referee hereto attached."

The referee was of opinion that Mr. Robinson is not entitled to the fund. The report of the referee contains the following findings of fact:

"On or about February 15, 1911, Mr. Robinson loaned to the East End Mantel & Tile Company, the bankrupt, the sum of \$15,000, and received from the bankrupt company a mortgage covering the real estate of the bankrupt, being a second mortgage as to the real estate, and also covering all the engines, machinery, safe, leasehold, book accounts, stock, and merchandise of the East End Mantel & Tile Company. The mortgage was recorded in the recorder's office of Allegheny county on February 17, 1911. After the execution of the mortgage a card or tag, stamped with the name of A. C. Robinson, was attached to all of the merchandise and personal property of the bankrupt, who continued, however, in possession of the property, selling the same and purchasing other stock to take its place, some of which, perhaps, was marked with the tag bearing Mr. Robinson's name, but much of it was not so marked. It also appears that in July, 1911, the book accounts, or certain of them, were stamped on the books with a rubber stamp bearing the name of A. C. Robinson. After the execution of the mortgage and the tagging of the merchandise and book accounts, as already stated, on or about July 7, 1911, Mr. Robinson went to the plant and office of the bankrupt and took possession of the same, and placed a man in charge thereof as his agent. On July 14, 1911, A. C. Ellis, the present trustee in bankruptcy, was appointed receiver of the East End Mantel & Tile Company by the court of common pleas of Allegheny county, and upon visiting the plant of the company found Mr. Robinson, through his agent, in possession thereof. It was thereupon agreed between Mr. Robinson and Mr. Ellis that Mr. Robinson should surrender possession of the premises to him as receiver of the common pleas court, and that on the sale of the assets by the receiver that it should be without prejudice to Mr. Robinson's claim to be the owner of the property and entitled to the proceeds of any such sale. Mr. Robinson testifies that it was understood by him, and agreed, that the East End Mantel & Tile Company, after the execution of the mortgage and tagging of the goods and book ac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

counts, should continue to dispose of the same as representing him, and account to him."

Nothing was realized out of the real estate. The mere recording of the mortgage gave it no validity as to chattels. The language being in *præsenti*, it was merely a particular form of a bill of sale.

In addition to the foregoing facts, it must be found that Mr. Robinson made the loan to the bankrupt in good faith. He believed it to be solvent, after financial statements purporting to show the condition of the bankrupt had been submitted to him, although he did not see the books of the bankrupt. And there is the additional fact in the case that, after the appointment by this court of Mr. Ellis as the receiver in bankruptcy, this court substantially approved the contract entered into between Mr. Robinson and Mr. Ellis as receiver appointed by the state court, and in the interests of the estate authorized the receiver to make sale of the assets of the bankrupt without prejudice to the right of Mr. Robinson to the same.

This court is constrained to differ from the referee's conclusion of law upon the foregoing facts, for the following reasons:

First. There being no evidence of bad faith on the part of Mr. Robinson, the contract of sale or of pledge, as the case may be, was good as between the parties under the law of Pennsylvania. *Hine-man v. Matthews*, 138 Pa. 204, 20 Atl. 843, 10 L. R. A. 233; *Durr v. Repogle*, 167 Pa. 347, 31 Atl. 645; *Christ v. Zehner*, 212 Pa. 188, 61 Atl. 822. These cases will be hereafter considered, not only as supporting the proposition above advanced, but as conclusive of one hereafter to be stated.

[1] Second. The law of the state wherein such contract was made and is to be performed must govern in the bankruptcy courts. The validity of a bill of sale, unaccompanied by delivery of possession, of a chattel, was under consideration in *Sawyer v. Turpin*, 91 U. S. 114, at page 118 (23 L. Ed. 235), a case arising in Massachusetts. Mr. Justice Strong, in delivering the opinion of the court, said:

"It was a frame building, erected upon leased ground; and Bacheller had, therefore, only a chattel interest in it. The conveyance was by a bill of sale, absolute in its terms; but it was understood by the parties to be a security for the debt due. It was in substantial legal effect, though not in form, a mortgage. Having been executed more than four months before the petition in bankruptcy was filed, there is nothing in the case to show that it was invalid. True, it was not recorded; and it may be doubted whether it was admissible to record. True, no possession was taken under it by the vendee; but for neither of these reasons was it the less operative between the parties. It might not have been a protection against attaching creditors, if there had been any; but there were none. It was in the power of Turpin to put it on record any day, if the recording acts apply to such an instrument, and equally within his power to take possession of the property at any time before other rights against it had accrued. These powers were conferred by the instrument itself, immediately on its execution."

In *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816, a case arising in New York, it was held that a failure to record a chattel mortgage, not accompanied by change of possession, although void as to the creditors, etc., of the mortgagors, did not impair the validity of the mortgage between the mortgagors and mortgagee.

These two cases arose under a prior bankruptcy law; but the law is the same under the bankruptcy law of 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418). See *Security Warehousing Co. v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789. See, also, the late case of *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. 610.

[2] Third. No rights of third persons intervened to affect or destroy Robinson's right to the possession of the assets. In *Hineman v. Matthews*, supra, there was a conditional sale of lumber, where for some two months the lumber remained in the possession of the conditional vendee. The vendee having become insolvent and having failed to pay, the vendor took and kept possession of the lumber. It was held that, inasmuch as the vendor had resumed exclusive possession of the lumber before any of the vendee's creditors acquired any right thereto by levy, sale, or otherwise, the lumber was beyond the reach of the vendee's creditors.

In *Durr v. Replogle*, supra, goods were delivered under an agreement calling for payment by installments. After default in payment the vendor resumed possession. On the same day, but at a later hour, an execution issued against the vendee. In a sheriff's interpleader, it was held that the vendor was entitled to possession as against the execution creditor.

Christ v. Zehner, 212 Pa. 188, 61 Atl. 822, is a case directly in point. On July 5, 1901, Kintz gave a judgment bond to Zehner, and to secure the same a bill of sale for the entire contents of the store. On January 25, 1902, Kintz delivered to Zehner possession of the store. Within four months, on May 17, 1902, a petition in involuntary bankruptcy was filed against Kintz. The trustee brought suit against Zehner to recover the value of the stock of goods which had been turned over to him. A compulsory nonsuit was entered, which was sustained by the Supreme Court. The Supreme Court of Pennsylvania in that case referred to the cases of *Sawyer v. Turpin*, supra, and *Stewart v. Platt*, supra, and affirmed the law in Pennsylvania to be that such contracts are good between the parties and until the rights of creditors have intervened.

It is not pretended in the case at bar that the rights of any creditor had attached prior to the time that Robinson took possession under his contract with the bankrupt. It was not until perhaps a week later that the rights of creditors were sought to be enforced against the property through the medium of the receiver appointed by the state court; but, as we have seen, under the authorities in Pennsylvania, no rights of creditors could interfere with Mr. Robinson's possession of the assets of the bankrupt.

Nor is there anything in the amendment of June 25, 1910, to the bankruptcy law, which would affect Mr. Robinson's possession. That amendment gives to the trustee in bankruptcy all the rights of a levying creditor; but no creditor had levied upon the property prior to Mr. Robinson's assumption of possession, and therefore the receiver in bankruptcy did not succeed to any right of any known creditor. Nor does the court see, in the absence of any prior proceeding by a

known creditor, how the rights of a receiver or trustee in bankruptcy as a levying creditor can exist prior to the time of his appointment. That amendment (Act June 25, 1910, c. 412, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1500]), by section 8, provides that such trustees—

“as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.”

It must be remembered that Robinson is not by his claim recognizing that the property was in the bankrupt's possession at the time the involuntary petition was filed, but is presenting his claim to the funds arising from the sale of his own property, which by his agreement and with the approval of the court was turned over first to the receiver of the state court and then to the same man as receiver of the court of bankruptcy.

[3] Fourth. The rights of Robinson having been fixed more than four months prior to the filing of the petition in bankruptcy by a contract good between the parties, his taking possession of the property within the four months did not constitute a preference within the meaning of the bankruptcy law. Referring again to the cases hereinabove cited, holding that an agreement like that between Robinson and the bankrupt is good between the parties, we find that they practically all (notably *Sawyer v. Turpin* and *Christ v. Zehner*) affirm the doctrine that the title to the property passed at the time of the execution and delivery of the agreements, although possession was deferred. Possession, as between the parties, could not add any strength to title, although as to creditors it might be a ground of seizure. The bankrupt could not have refused to give Mr. Robinson the control over the property which it had assigned to him. No legal proceedings were required by Robinson to give him possession, and there was clearly not a preference in permitting Robinson to come into his own when he had reason to believe that the corporation, to whom he had in good faith advanced his money, was in a precarious condition.

In support of the decision of the referee, counsel opposed to Mr. Robinson's contention have brought to the attention of the court the case of *Bank of North America v. Penn Motor Car Co.*, 235 Pa. 194, 83 Atl. 622. In that case a bank had loaned money to the owner of automobiles under an agreement to hold the title to the automobiles in the nature of a pledge as collateral security for the money loaned. It permitted the automobiles to remain for a time in the possession of the borrower; but a few days before bankruptcy proceedings were instituted against the borrower it took possession of the machines by a writ of replevin. The court held it was not entitled to retain possession of the machines as against the trustee in bankruptcy of the borrower, and that under the act of Congress of June 25, 1910, the trustee had the right to take possession of the machines. This court does not believe that that case is specially applicable to the

present. The pledgee was compelled to resort to an action at law to recover possession of the automobiles, and in that very action at law the trustee in bankruptcy intervened. In other words, his rights under the act of Congress of June 25, 1910, were asserted before the completion of the proceedings by which possession was sought by the pledgee of the pledge. If, as stated in the opinion of the Supreme Court, it was the intention of that act to give the trustee "power to assert every right which such creditors could have asserted during the period of four months immediately preceding the filing of the petition in bankruptcy," no person dealing in good faith with a bankrupt could be sure until after four months had passed that the property which he had acquired might not be the subject of some inchoate lien, to spring into existence and interfere with his possession, if bankruptcy proceedings should be begun within the statutory period.

The construction insisted upon to be given to the case last cited is so opposed to the uniform policy of the law in Pennsylvania, as expressed in all the prior cases, that this court is of the opinion that it should be distinguished, because legal proceedings were necessary to acquire possession and because the trustee of the bankrupt, before the completion of such proceedings, intervened. If such case is not so distinguished, then the trustee of the bankrupt is given higher rights than any creditor, which was plainly not the intention of the act as ascertained from its language.

In this consideration of the certified question, we have had in view as a principal fact the good faith with which Mr. Robinson entered into his contract. That, however, is not alone the ground of our decision. The decision must rest upon the proposition that the bankruptcy law does not intend that the trustee shall be vested with any greater right to subject the property of third persons to the payment of the bankrupt's debts than any creditor had at or before the time that such trustee was appointed.

The decision of the referee must be reversed, and the certified question answered in the affirmative.

McCAULEY et al. v. McCAULEY et al.

(District Court, W. D. Pennsylvania. February 5, 1913.)

No. 121.

1. COURTS (§ 280*)—JURISDICTION—LACHES.

The question of laches in filing a suit in the District Court of the United States is immaterial, in determining the question whether the court has jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816-818; Dec. Dig. § 280.*]

2. COURTS (§ 280*)—CONCURRENT JURISDICTION—PLEA TO JURISDICTION—ADMISSIONS—EVIDENCE.

Where the facts alleged in a plea questioning the jurisdiction of the District Court of the United States are admitted, no evidence in support

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

thereof is necessary to enable the court to determine the question of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816-818; Dec. Dig. § 280.*]

3. COURTS (§ 493*)—CONCURRENT JURISDICTION—PROBATE COURTS.

The orphans' court in Pennsylvania has jurisdiction of the accounts of an administrator of a decedent, and over decedent's property, and to determine the amount of the estate and distribute the balance in the hands of the administrator, and acquires jurisdiction over the person of nonresidents submitting themselves to the jurisdiction of the court and asking for affirmative relief therein; and, pending proceedings in the orphans' court, the District Court of the United States has no jurisdiction of a suit by the nonresidents, praying for an accounting by the administrator and general relief incident thereto.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1346-1353; Dec. Dig. § 493.*]

Conflict of jurisdiction with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

In Equity. Suit by Charles H. McCauley and others against Herman K. McCauley and another, administrator. Court held without jurisdiction.

Daniel W. Scanlan, of Chicago, Ill., and J. D. Hicks, of Altoona, Pa., for complainants.

Gordon & Smith, of Pittsburgh, Pa., for defendants.

ORR, District Judge. This matter comes before the court upon a plea filed by the defendants, by which the question is raised as to whether or not this court has jurisdiction of the matters contained in the bill of complaint. The bill sets forth briefly that the plaintiffs are citizens of other states and are grandchildren of one Thomas McCauley, who died intestate in the city of Altoona on April 25, 1880, leaving to survive him a widow and four children, including Charles McCauley, the father of the plaintiffs, who died August 9, 1889, leaving a widow, since deceased, and the three plaintiffs, his children, as his only heirs at law. It does not appear by the bill whether the said Charles McCauley died testate or intestate. It further appears in the bill that letters of administration on the estate of said Thomas McCauley, plaintiffs' grandfather, were granted to the defendant and the widow of said Thomas, on the 27th day of September, 1880, out of the orphans' court of Blair county, and that the said widow of Thomas died November 29, 1886, since which date the defendant has acted and is acting as the sole administrator. The bill further avers that the said Thomas McCauley, the grandfather, was seised of certain real estate, was the owner of certain shares of stock, and was the part owner of certain tracts of land, sawmills, lumber leases, etc., which were held by two partnerships in which the said Thomas at the time of his death was an equal partner with a surviving partner, and, further, that the said Charles McCauley, the father of the plaintiffs, was interested in the said partnerships with plaintiffs' grandfather, Thomas, in that the said Charles owned the one-fourth

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the one-half interest credited to the said Thomas. The bill further charges that the said Thomas had an interest in land, the title to which was held by a trustee for the use and benefit of the said Thomas, which was of great value, and, further, that the said Charles McCauley, the father of the plaintiffs, died seised and possessed of household furniture, money, and other personal property. There does not appear to be any allegation in the bill that the defendant, either as an individual or as administrator, interfered with the assets of which the bill says the father of the plaintiffs, Charles McCauley, died seised. The bill sets forth that the defendant, as administrator, collected dividends upon the stock of the said Thomas, the grandfather, and collected money from the surviving partner, as part of the estate of said Thomas, and collected money from the trustee, who held the legal title to the land, and that as such administrator the defendant did not file any inventory, and did not file any report of said estate, until the 6th of May, 1909, when a statement purporting to be his final account as administrator was filed in the orphans' court of Blair county. From the bill it appears that at the time it was filed the youngest of the plaintiffs was 26 years old, another 29, and the oldest 32 years old. The prayers of the bill are for a discovery and an accounting, and for general relief incident thereto.

[1] The bill does not set forth any matters excusing the delay by the plaintiffs in filing their bill, except that since the plaintiffs have become of age they have repeatedly demanded an accounting from the defendant, who has refused and neglected to make such accounting. This court has nothing at present to do with the question of delay and laches; but the fact that the plaintiffs waited for such a long time before instituting this proceeding cannot escape the notice of the court, although it has no effect on the decision arrived at upon the plea filed.

The plea sets up, briefly, that this court has no jurisdiction in this case, because these very plaintiffs on June 21, 1909, appeared in the orphans' court of Blair county and filed exceptions to the account of the administrator, and on June 28th following caused an auditor to be appointed by the orphans' court to hear and decide such exceptions and restate the account of the defendant, if necessary, which proceedings upon such exceptions have not been terminated, and that said exceptions are still pending and undisposed of in the orphans' court of Blair county, and include the averments: (1) That the accountant fails to show in his account all the money that came into his hands, or into the hands of his coadministrator, during her lifetime, as administratrix of said Thomas McCauley, deceased; (2) that the accountant fails to show any valuation or appraisal of the shares of stock appropriated and distributed by him, or any public sale of the same; (3) that the accountant fails to account for the moneys received by him from D. K. Ramey (the surviving partner mentioned in the bill) for and on account of the decedent, or for or on account of any settlement, or any money due or supposed to be due said decedent from said Ramey; and (4) that the distribution made by said accountant was made without authority of law, and was

not in accordance with the intestate laws of Pennsylvania, and is therefore void.

[2] The averments of fact in the plea were admitted by counsel for the plaintiffs upon the argument, and therefore no evidence in support of the plea was necessary. Moreover, the case was set down upon bill and plea.

[3] From the record as thus outlined we see that the plaintiffs in the bill submitted themselves to the orphans' court of Blair county, and there sought the relief which they ask now to have granted by this court, and that the proceedings in Blair county are still undetermined. The first question to determine is whether or not the state court has jurisdiction of the subject-matter. It is clear that it has jurisdiction of the parties, because they have submitted themselves to such jurisdiction. The evolution of the orphans' court in Pennsylvania as a result of legislative act and judicial decisions is an interesting subject of study for the curious. We have nothing to do with its limitations in the past, but only with its jurisdiction and power in the present. In *Hammett's Appeal*, 83 Pa. 392, appears the statement by Chief Justice Agnew that:

"The exclusive jurisdiction of the orphans' court to ascertain the amount of the estates of decedents, and order their distribution among those entitled, creditors, as well as legatees and distributees, is so fully settled that nothing but future legislation can alter the law. The sources of this jurisdiction, and its conclusiveness, will be found in a long line of well-considered decisions."

This statement has been approved and followed in many subsequent cases. See *Yocum v. Commercial Nat. Bank*, 195 Pa. 411, 46 Atl. 94. The orphans' court has power to prevent, by orders in the nature of writs of injunction, acts contrary to law or equity, prejudicial to property over which it has jurisdiction. *Miskimin's Appeal*, 114 Pa. 530, 6 Atl. 743. In *Tyson v. Rittenhouse*, 186 Pa. 137, 40 Atl. 476, it was held that the settlement of an estate in the orphans' court cannot be anticipated by a bill in equity or by an action in the common pleas court, and that a bill in equity will not lie to determine the ownership of a fund in course of settlement in the orphans' court. The principal legislative enactment defining the jurisdiction of the orphans' court is Act June 16, 1836, § 19 (P. L. 792), which provides that such courts shall have jurisdiction of:

"VIII. All cases within their respective counties wherein executors, administrators, guardians or trustees may be possessed of or are in any way accountable for any real or personal estate of a decedent."

There is no doubt then that the orphans' court of Blair county had jurisdiction of the accounts of the defendant, as administrator of Thomas McCauley, deceased, and had jurisdiction over the property of which Thomas McCauley died seised, and that it had jurisdiction to determine the amount of the decedent's estate, and to distribute the balance found in the hands of the defendant. It therefore had jurisdiction of the subject-matter of the present bill, and, as we have seen, it had jurisdiction over the plaintiffs in the present bill, because, if for no other reason, they submitted themselves to that jurisdiction and asked affirmative relief. The orphans' court, there-

fore, having complete jurisdiction and power to determine the matters before it, is there any principle of law that will justify this court in taking jurisdiction of the same subject-matter and the same parties? The court has been unable to find any such authority, and none has been cited in the briefs filed. On the contrary, the weight of authority is all to the proposition that a court, having once acquired jurisdiction of a person or property, cannot be deprived of its right to deal with such personal property until its jurisdiction is exhausted. This rule has been referred to time and again in the decisions of the Supreme Court, and in *Re Johnson*, 167 U. S. 120, 125, 17 Sup. Ct. 735, 42 L. Ed. 103, is recognized as one of the maxims of the law. While that case involved a conflict of jurisdiction with respect to the possession of one charged with crime, yet the opinion contains a list of cases relating to other matters as well.

The court is of the opinion, therefore, that because the proceedings pending in Blair county have not been disposed of, the plaintiffs are not entitled to maintain their bill, and the plea must be deemed to be good. This conclusion has been reached after full consideration of such cases as *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. That case appears to be authority for the interference by the federal court with the administration of a decedent's estate in the orphans' court of Pennsylvania; but a close examination of the case shows that it has no applicability to the case in hand, because the plaintiffs here submitted themselves to the jurisdiction of the orphans' court. The plaintiff in that case did not. The question there was primarily not one of accounting; the question here is one of accounting only.

In *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80, which held that a nonresident might maintain a bill under a will that had been admitted to probate in a state court to establish the right of plaintiff to share in certain legacies that had been permitted to lapse, the court considered the jurisdiction of the federal court to direct the filing of an executor's account and used this language:

"In view of the cases cited, and the rules thus established, it is evident that the bill in this case goes too far in asking to have an accounting of the estate, such as can only be had in the probate court having jurisdiction of the matter; for it is the result of the cases that in so far as the probate administration of the estate is concerned in the payment of debts, and the settlement of the accounts by the executor or administrator, the jurisdiction of the probate court may not be interfered with."

There being nothing in this bill before the court except matters of accounting, which the orphans' court of Blair county has at present within its grasp, this court has no jurisdiction to entertain the bill.

SULLIVAN v. DAMON et al.

(District Court, N. D. Iowa, W. D. January 28, 1913.)

No. 195, Equity.

1. PUBLIC LANDS (§ 106*)—CONTEST—DECISION OF LAND DEPARTMENT—CONCLUSIVENESS.

Decision of a contest for public land by the Land Department is conclusive on the courts in the absence of any claim of mistake in the Department's finding of facts, or that such finding was induced by fraud of the successful party.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. § 106.*]

Decisions of Land Department, their conclusiveness and effect, see notes to *Hartman v. Warren*, 22 C. C. A. 38; *Carson City Gold & Silver Min. Co. v. North Star Min. Co.*, 28 C. C. A. 344; *Umta Tunnel Min. & Transp. Co. v. Creede & Cripple Creek Min. & Mill. Co.*, 37 C. C. A. 207.]

2. PUBLIC LANDS (§ 89*)—PURCHASE FROM RAILROAD—HOMESTEAD CLAIMANT—CONTEST—AWARD BY LAND DEPARTMENT.

Certain land having been patented to the state of Iowa for the benefit of the Sioux City & St. Paul Railroad Company, a part of the grant was sold by the railroad company before patent in June, 1888, to defendant's ancestor. Notwithstanding the land was never patented to the railroad company, defendant's ancestor was awarded a patent therefor under the Adjustment Act (Act Cong. March 3, 1887, c. 376, § 4, 24 Stat. 557 [U. S. Comp. St. 1901, p. 1596]). It having been determined that the railroad company was not entitled to the land, complainant sought to enter it as a homestead; but on a contest it was awarded to defendant's ancestor, who had had actual possession for some seven years under his purchase from the railroad company and had cultivated more than 60 acres thereof. *Held*, that the land was not subject to homestead entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 270-272; Dec. Dig. § 89.*]

In Equity. Suit by John Sullivan against Annette Damon and others to recover certain land. On final submission. Bill dismissed.

Sullivan & Griffin, Henderson & Fribourg, and Alfred Pizey; all of Sioux City, Iowa, for complainant.

John E. Stryker, of St. Paul, Minn., for defendants.

REED, District Judge. This suit is by the complainant to require the defendants, as the widow and heirs at law of M. H. Damon, deceased, to convey to him the legal title to certain land in O'Brien county, this state, which it is alleged the defendants hold in trust for the complainant. The land is a part of that patented by the United States to the state of Iowa under the act of Congress approved May 12, 1864 (Act May 12, 1864, c. 84, 13 Stat. 72), for the benefit of the Sioux City & St. Paul Railroad Company, but which was never conveyed by the state to that company for the reasons stated in the opinion of the Supreme Court of the United States in *Sioux City & St. Paul Railroad Company v. United States*, 159 U. S. 349, 16 Sup. Ct. 17, 40 L. Ed. 177. The complainant claims the land under the homestead laws of the United States, and the defendants under a purchase thereof by their ancestor, M. H. Damon, in June,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1888, for its then fair value, from the Sioux City & St. Paul Railroad Company, and a patent to him from the United States under the act of Congress above mentioned, pursuant to that purchase, and section 4 of chapter 376 of an act approved March 3, 1887 (24 Stat. 557 [U. S. Comp. St. 1901, p. 1596]), commonly known as the "Adjustment Act" of Congress.

The rights of claimants under the homestead laws of the United States to parts of this land as against purchasers thereof from the railroad company were considered by this court in *Harvey v. Holles* (C. C.) 160 Fed. 531, and other cases following that, including the case of *Lyle v. Patterson* (C. C.) 160 Fed. 545, and *Dockendorf v. Bassett* (C. C.) 160 Fed. 543. The two cases last named were affirmed by the Court of Appeals for this circuit, at 176 Fed. 909, 100 C. C. A. 379, and 176 Fed. 917, 100 C. C. A. 387, respectively.

There was a contest between the complainant and M. H. Damon before the Land Department of the United States for the land in question, which was awarded to Damon by the local land office, and its decision was affirmed by the Commissioner of the General Land Office, and that in turn by the Secretary of the Interior, upon successive appeals of the complainant; and a patent was issued to Damon for the land pursuant to such decisions February 27, 1901. In the hearing before the local land office that tribunal found the facts to be as follows:

"The evidence submitted on behalf of M. H. Damon shows that he is a resident of the state of Minnesota; that he formerly resided in Sioux City, Iowa, and owned land adjoining the land in controversy; that in 1888, on the 18th day of June, he entered into an agreement with the Sioux City & St. Paul Railroad Company to purchase the S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, section 7, township 97, range 42, at the agreed price of \$1,200, paying \$80 on the date the contract was entered into, and on July 5, 1889, he paid \$89.60, and on November 7, 1889, he paid \$115.50. Suit being brought by the United States against the aforesaid railroad company, involving the title to this land, further payments were not required by the railroad company during the pendency of this suit. He has been in continuous and undisputed possession of said land from the date of his purchase until the decision of Supreme Court of the United States, October 21, 1895. After that the homestead claimant, Sullivan, * * * made several attempts to take possession of the land. Several years before the claimant, Damon, entered into the contract to purchase the land, he had bought three 40's of land, the title of which came through the Sioux City Railroad Company. He testifies that at the time he entered into the contract involving this case he believed the land was in the same condition as that of the three 40's he had bought prior thereto. He testified in his cross-examination that he had never heard a word about the title of the land being in question at the time he made the contract, and that he did not know that the Governor of the state of Iowa had refused to certify or patent it to the company. No part of the purchase money has been refunded, and no suit has been brought to recover the same. Under these circumstances we are of the opinion that when the purchasing claimant, Damon, bought the land, he had no actual knowledge and did not know that the title to the land was in dispute, and that he bought it believing the railroad company had good right to sell. His application is therefore approved, and, should this decision become final, he will be permitted to enter the land as provided in the fourth section of the act of March 3, 1887."

[1] It is not claimed that there was any mistake in these findings of facts, or that such findings were induced by any fraud of Damon.

They are therefore, under familiar rules, conclusive upon the court. It is the contention of complainant that the Land Department erred as matter of law in awarding the land to Damon; and he cites and relies mainly upon *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406, 39 L. Ed. 524. But in that case *Ard* settled upon the land in June, 1866, for the purpose of acquiring it as a homestead. It was then unoccupied, and open to entry as a homestead. This was some seven years before it was selected by the railway company as inuring to it under the act of Congress under which the right to the land was claimed by *Brandon*, and before it was withdrawn from market by the Land Department. *Ard* was qualified to enter it as a homestead, and did everything that was required of him by the homestead law to enter it as a homestead, but was prevented from so doing by the wrongful act of the local land office, and he remained in possession of the land, claiming it as his homestead, until the time of the trial. The map of definite location of the road was not filed, and the land was not withdrawn by the Land Department from entry and settlement, until April, 1867, nearly a year after *Ard* had entered upon it for the purpose of acquiring it as a homestead. The case was again before the Supreme Court in *Brandon v. Ard*, 211 U. S. 11, 29 Sup. Ct. 1, 53 L. Ed. 68, where it appears that the land was within the indemnity limits of the grant to the railroad company, but had not been selected by the company in lieu of land within the place limits until nearly seven years after *Ard* had settled upon the land and attempted to enter it as a homestead. The case is clearly distinguishable upon its facts from, and is not controlling of, this case.

[2] In the present case the complainant made an unsuccessful attempt to settle upon the land in question in October, 1895, a few days after the decision of the Supreme Court in the case of *Sioux City & St. Paul Railroad Company v. United States*, 159 U. S. 349, 16 Sup. Ct. 17, 40 L. Ed. 177. But at that time *Damon* had been in the actual possession of the land for some seven years, had broken up more than 60 acres of it, and had cultivated it either in person or by tenant during all of those years, claiming it under his contract of purchase with the railroad company. The case upon its facts is controlled by *Harvey v. Holles* and other cases above cited. See, also, *Campbell v. Weyerhaeuser*, 161 Fed. 332, 88 C. C. A. 412; *Id.*, 219 U. S. 424, 31 Sup. Ct. 321, 55 L. Ed. 279.

The conclusion, therefore, is that the bill should be dismissed at complainant's costs; and a decree may be prepared accordingly.

BOARD OF TRADE OF CITY OF CHICAGO v. TUCKER et al.

(District Court, W. D. New York. January 13, 1913.)

No. 201.

1. WITNESSES (§ 400*)—ADVERSE WITNESS—TESTIMONY—CONCLUSIVENESS.

Complainant was not concluded by the testimony drawn from defendant's employes, though subpoenaed by himself, but was entitled to contradict their testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 400.*]

2. EQUITY (§ 354½*)—BOOKS AND PAPERS—PRODUCTION.

In a contempt proceeding for breach of an injunction restraining defendants' use of complainant's stock quotations, the production of books and records of another exchange on which defendants claimed they were doing business should not be required merely to pry into the business affairs of such exchange or into the dealings of respondents with their customers, if no relevant testimony is to be produced with reference thereto.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 354½.*]

3. EQUITY (§ 349*)—TAKING TESTIMONY—LIMITATION.

It will not be assumed, in proceedings to limit the taking of testimony in support of contempt proceedings for violation of an injunction, that complainant's counsel is acting in bad faith and will urge the giving of extraneous testimony, or endeavor to compel a disclosure of confidential relations between respondents and their customers, or unnecessarily inquire into the affairs of a rival exchange with which defendants have been doing business.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 731, 732; Dec. Dig. § 349.*]

4. EQUITY (§ 349*)—VIOLATION OF INJUNCTION—CONTEMPT PROCEEDINGS—TAKING OF TESTIMONY.

Where an order for the taking of testimony was entered in contempt proceedings for violation of an injunction, providing for examination of witnesses in various districts, relief should be obtained against the improper conduct of such examination by application to the court in the jurisdiction where the examination is being conducted.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 731, 732; Dec. Dig. § 349.*]

5. EQUITY (§ 349*)—EXAMINATION OF WITNESSES—ORDER.

Where, in contempt proceedings for violation of an injunction against defendants' use of complainant's stock quotations, it appeared that defendants' transactions subsequent to the injunction had been made on the Pittsburg Stock Exchange, and that complainant's activities were not limited to Buffalo and Chicago, complainant was entitled to take testimony in Pittsburg under an order entered by the federal court of the western district of New York appointing a special examiner to take testimony "within and without this district."

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 731, 732; Dec. Dig. § 349.*]

In Equity. Suit by the Board of Trade of the City of Chicago against Henry C. Tucker and another. On order to show cause why an order for the taking of testimony before a special examiner should not be modified. Granted in part.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Henry S. Robbins, of Chicago, Ill., for complainant.

James O. Moore, Eugene Warner, and George Clinton, all of Buffalo, N. Y., for respondents.

HAZEL, District Judge. An order to show cause to modify the order of April 2, 1912, appointing a special examiner to take testimony within or without this district, to limit the taking of testimony to the cities of Chicago and Buffalo, was granted on the ground of the respondents' claim that they will be irreparably injured by a continuation of such examination at Pittsburgh, if the complainant is permitted to compel a disclosure of confidential relations existing between respondents and their customers, especially as many members of the complainant corporation are respondents' competitors in business, who will profit by the frivolous and prying examination of witnesses in that city.

It has been necessary for me to read the record of the examination and the proceedings to punish certain witnesses for contempt of court in failing to produce books, papers, and documents described in the subpoena duces tecum, had before Judge Orr at Pittsburgh. The testimony already taken indicates that the respondents daily receive from their customers a large number of orders for the purchase of shares of stock, necessitating the making of so-called trades, which several witnesses have testified are telegraphically communicated to the Consolidated Stock and Produce Exchange at Pittsburgh. If such trades are actually executed at Pittsburgh the respondents probably have not disobeyed the injunction of this court, for in such case the quotations or prices of sales, it might be presumed, would be the prices fixed on the floor of the Consolidated Stock and Produce Exchange of Pittsburgh. But the complainant urges that such trades are not so executed, and that there is in fact no stock exchange in Pittsburgh conducted in good faith, at which such trades can be executed or completed. It appears that respondents have telegraph wires running from Pittsburgh into their offices at Buffalo, N. Y., and have business relations relative to sales of stock with the Consolidated Stock and Produce Exchange.

[1] The testimony to the effect that the trades were consummated on said Exchange was drawn out by complainant on the examination of witnesses subpoenaed by it; but, as such witnesses were in the employ of the respondents as clerks and operators, the complainant is not precluded from contradicting such testimony, and from showing that the trades are merely wired to Pittsburgh on the pretense of their execution there, when in fact they are executed in Buffalo on complainant's quotations.

[2] Of course, the production of books and records of the Pittsburgh Exchange should not be required, if no relevant testimony is to be introduced, or if the purpose is merely to pry into the business affairs of another exchange, or into the dealings of respondents with their customers. But the relevancy or materiality of testimony does not always appear in the beginning, and it is often necessary to await the development of the case before its importance can be determined.

[3] It will not be assumed, in view of the fact that there are trade dealings between respondents and the Pittsburgh Exchange, that counsel for complainant is acting in bad faith and will necessarily urge the giving of extraneous testimony, or endeavor to compel a disclosure of confidential relations with customers, or unnecessarily inquire into the affairs of the Consolidated Stock and Produce Exchange of Pittsburgh. The case at bar, a proceeding to punish the respondents for contempt of court, is one of peculiar importance, and it is not unlikely that some improper testimony will find its way into the record; but that fact would not justify curtailing the complainant's right to continue the examination of witnesses who, as it is believed, are in a position to prove complainant's cause for grievance. There is nothing shown to indicate that the examination of the witnesses at Pittsburgh is conducted frivolously or with the improper motives asserted by respondents.

[4] If the examination be unfairly conducted, or if it should appear that the sole purpose thereof is to inquire into the personal affairs of the witnesses or of the Exchange, or if complainant does not confine itself to the issue, then relief should be sought in the jurisdiction where the examination is conducted.

[5] From my consideration of what has occurred at Pittsburgh, it does not seem to me that such examination is oppressive, unfair, or improperly conducted. While at the outset it was supposed that examinations at Buffalo and Chicago would suffice, still, in view of the disclosures relating to the execution of the trades at Pittsburgh, the complainant was not without right, under the broad order appointing the examiner, to pursue the inquiry at that place and prove the actual facts. No sufficient reasons are assigned for modifying the order heretofore made appointing the special examiner except that I think no testimony should be taken at any other places than at Chicago, Buffalo, and Pittsburgh without further order of the court.

So ordered.

Ex parte DUNAKIN.

(District Court, E. D. Kentucky. January 7, 1913.)

No. 2,140.

1. HABEAS CORPUS (§ 16*)—ENLISTING OF MINORS.

A minor, who enlisted in the army without the consent of his parent or guardian, and thereafter deserted, was not entitled to discharge from arrest for such offense on habeas corpus issued on his own behalf.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 16; Dec. Dig. § 16.*]

2. HABEAS CORPUS (§ 16*)—ENLISTMENT OF MINORS—MILITARY OFFENSE—DESERTION—DISCHARGE ON HABEAS CORPUS—APPLICATION BY PARENT.

Where a minor enlisted without the consent of his parent or guardian, and thereafter deserted, he was a de jure soldier, subject to military

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

jurisdiction, and his parent was therefore not entitled to his release from custody on habeas corpus prior to the expiration of his military offense.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 16; Dec. Dig. § 16.*]

3. ARMY AND NAVY (§ 19*)—ENLISTMENT OF MINORS—CONSENT OF PARENT.

Where a minor enlisted without the consent of his parent or guardian, and his mother, who was his surviving parent, on learning of his enlistment shortly thereafter, did nothing to repudiate the same or to secure his release, and testified that she would have been reconciled to it, had he remained in the army and not deserted, but that after his desertion she wanted to keep him out of the army, her acts constituted an implied consent to his enlistment.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 45-50; Dec. Dig. § 19.*]

Habeas corpus by Charles A. Dunakin and Eliza H. Dunakin, his mother, to obtain a release of Charles A. Dunakin from the custody of civil officers on the charge of desertion from the United States army. Denied.

J. A. Edge, of Lexington, Ky., for petitioner.

Edwin P. Morrow, U. S. Atty., of Somerset, Ky., opposed.

COCHRAN, District Judge. This cause is before me on writ of habeas corpus sued out by Charles A. Dunakin and Eliza H. Dunakin, his mother, by which they seek the release of the former from the custody of J. J. Regan, chief of police of the city of Lexington. The petitioner, Charles A. Dunakin, enlisted in the United States army on the 24th day of April, 1912, and deserted September 21, 1912. Thereupon a reward of \$50 was offered for his arrest and delivery to the military authorities at the nearest military post. To obtain this reward he was arrested by Regan, and is held by him for the purpose of so delivering him. The ground upon which his release is sought is that he was a minor at the time of his enlistment, and enlisted without the consent of his mother, the petitioner Eliza H. Dunakin.

It is conceded that such was the case. He was born April 4, 1892. His mother was his then only living parent, and he had no guardian. He made oath that he was 21 years of age, and thereafter he was transported to his station, furnished with uniform and equipment, and received pay as a soldier. The statutory provisions relevant to the inquiry whether the petitioners are entitled to his release are sections 1116, 1117, 1118, and 1342, art. 3, U. S. Rev. Statutes (U. S. Comp. St. 1901, pp. 813, 814, 944).

[1] It is certain that the minor himself is not entitled to his release. It was held otherwise in the case of *United States v. Hanchett* (C. C.) 18 Fed. 26, and the presupposition of Mr. Justice Story's opinion in the case of *United States v. Bainbridge*, Fed. Cas. No. 14,497, is to the same effect. But the following cases are against his right thereto, to wit: *In re Wall* (C. C.) 8 Fed. 85; *In re Davison* (C. C.) 21 Fed. 618; *In re Hearn* (D. C.) 32 Fed. 141; *In re Spencer* (D. C.) 40 Fed. 149; *Solomon v. Davenport*, 87 Fed. 318, 30 C. C. A. 664; *Morrissey v. Perry*, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644. The last of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

these cases, being a decision of the Supreme Court of the United States, is conclusive of the matter. In the case of *United States v. Gibbon* (D. C.) 24 Fed. 135, it was held that a minor is not entitled to a release, even though held only under his enlistment.

Then how is it as to the mother? Were her son held only under his enlistment, she would be entitled to his release. *Com. v. Downes*, 24 Pick. (Mass.) 227; *In re McDonald*, Fed. Cas. No. 8,752; *In re Perrone* (D. C.) 84 Fed. 150. And the following cases may be cited in support of the position that she is entitled to his release, even though he is held, not under his enlistment, but for the military offense of desertion: *Seavey v. Seymour*, Fed. Cas. No. 12,596; *McNulty's Case*, Fed. Cas. No. 8,917; *In re Baker* (C. C.) 23 Fed. 30; *In re Chapman* (C. C.) 37 Fed. 327, 2 L. R. A. 332; *In re Carver* (C. C.) 103 Fed. 624; *Ex parte Reaves* (C. C.) 121 Fed. 848; *Ex parte Lisk* (D. C.) 145 Fed. 860; *Ex parte Bakley* (D. C.) 148 Fed. 56; *Dillingham v. Bakley*, 152 Fed. 1022, 82 C. C. A. 659.

[2] But the overwhelming weight of authority is against her right. In the following cases it has been held that the parent or guardian of a minor 16 years of age or over, who has enlisted without consent, is not entitled to his custody when held for a military offense, and not simply under his enlistment: *In re Cosenow* (C. C.) 37 Fed. 668; *In re Kaufman* (C. C.) 41 Fed. 876; *In re Dowd* (D. C.) 90 Fed. 718; *In re Miller*, 114 Fed. 838, 52 C. C. A. 472; *United States v. Reaves*, 126 Fed. 127, 60 C. C. A. 675; *In re Lessard* (C. C.) 134 Fed. 305; *In re Carver* (C. C.) 142 Fed. 623; *In re Scott*, 144 Fed. 79, 75 C. C. A. 237; *Moore v. United States*, 159 Fed. 701, 86 C. C. A. 569; *Ex parte Lewkowitz* (C. C.) 163 Fed. 646; *Dillingham v. Booker*, 163 Fed. 696, 90 C. C. A. 280, 18 L. R. A. (N. S.) 956, 16 Ann. Cas. 127; *Ex parte Rock* (C. C.) 171 Fed. 240; *Ex parte Hubbard* (C. C.) 182 Fed. 76. Amongst these cases are decisions by the Circuit Courts of Appeal for the Fourth, Fifth, and Ninth Circuits. The case of *Dillingham v. Bakley*, cited in favor of the right, was also a decision of the Fourth Circuit Court of Appeals. The opinion therein merely adopted the opinion of Judge Waddill in *Ex parte Bakley*. It was not referred to in the later case of *Dillingham v. Booker*, and must be accepted as having been overthrown thereby.

No appellate court, therefore, can now be cited in support of the right asserted here. And it seems to me on principle she is not entitled to the custody of her son. In the case of *Morrissey v. Perry*, supra, Mr. Justice Brewer, in referring to the minor who sought his release in that case, said:

"He was not only *de facto*, but *de jure*, a soldier—amenable to military jurisdiction."

Such was the status of the minor here when he deserted. He was *de jure* a soldier, and hence could commit the military offense of desertion. Whilst, then, the mother was entitled to his custody as against the United States under his enlistment, she is not entitled to it as against his being held for such offense; for the parent has no right to his child's custody as against his being punished for such offenses as he may commit. After her son has been tried for the

alleged offense and been released, she can then assert her right to his custody if he is then a minor.

[3] But there is a special reason in this case for denying her petition. She learned of her son's enlistment a short time afterwards, and acquiesced in it. On the trial of the writ she testified as follows:

"After he left, he wrote back to me and said that he had enlisted in the army, and I thought I would reconcile myself to it, as he was so far out West. I had no means to do anything, but I thought I could get along. I had never given it a thought. His father was a soldier in the Federal army, and had served his time in the Federal army, and my father had been in John Morgan's Confederate cavalry, and I made up my mind that I would just leave him alone; but when he came back to Lexington, and was out of the army, I wanted to keep him out."

And again, in answer to a question as to whether she would have made any effort to obtain his release, had he never left the army, she testified as follows:

"Why I would have allowed him to remain in the army, and would have been reconciled and felt proud of him, because he would have been following his father's footsteps."

The petition for release is denied, and orders will be entered accordingly.

ATTLEBORO MFG. CO. v. FRANKFORT MARINE. ACCIDENT & PLATE
GLASS INS. CO.

(District Court, D. Massachusetts. January 29, 1913.)

No. 211 (C. C. No. 863).

REMOVAL OF CAUSES (§ 45*)—ACTIONS REMOVABLE—ACTION AGAINST ALIEN.

Under Removal Act March 3, 1875, c. 137, 18 Stat. 470, as amended in 1887 (Act March 3, 1887, c. 373, 24 Stat. 552) and corrected in 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509]), authorizing the removal of suits involving a controversy between citizens of a state and foreign states, citizens, or subjects, an action brought in the courts of one state by a corporation of another state against an alien corporation is removable: the alien's right not being limited, by the provision that no civil suit shall be brought before either a Circuit or District Court of the United States against any person by any original process or proceedings in any other district than that whereof he is an inhabitant, to cases where the suit is brought against an alien in the district of plaintiff's residence.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 89; Dec. Dig. § 45.*]

At Law. Action by the Attleboro Manufacturing Company against the Frankfort Marine, Accident & Plate Glass Insurance Company. On motion to remand the cause to the state court. Denied.

Whipple, Sears & Ogden, of Boston, Mass., for plaintiff.

Choate, Hall & Stewart, of Boston, Mass., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BROWN, District Judge. Plaintiff moves to remand to the superior court for the county of Bristol in the commonwealth of Massachusetts—

"for the reason that this court has no jurisdiction of the suit, since the jurisdiction is founded only on the fact that the action is between a corporation organized under the laws of the state of Rhode Island and an alien corporation."

The plaintiff is a corporation under the laws of the state of Rhode Island, and is engaged in business in Attleboro, Mass. The defendant is a corporation organized under the laws of the empire of Germany, and is engaged in the business of insurance in Massachusetts.

The action at law, described in the writ as an action of tort, was begun by writ dated May 13, 1911, and was entered in the state court June 5, 1911. The petition for removal was filed June 13, 1911, and the order for removal is dated June 14, 1911. All this was prior to the taking effect of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087 [U. S. Comp. St. Supp. 1911, p. 128]), January 1, 1912.

The plaintiff contends that the case is governed by the Removal Act dated March 3, 1875 (Act March 3, 1875, c. 137, 18 Stat. 470), as amended in 1887 (Act March 3, 1887, c. 373, 24 Stat. 552) and 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433). See U. S. Compiled Statutes, p. 507 et seq. Under section 1 of that act the Circuit Court has jurisdiction of—

"a controversy between citizens of a state and foreign states, citizens or subjects."

It is also provided that no civil suit shall be brought before either a Circuit or District Court—

"against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

In *re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211, and *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964, hold that the provisions of the act as to the district in which suits must be brought have no application to a suit against an alien or alien corporation, but that such a person or corporation may be sued by a citizen in any district in which valid service may be made.

The plaintiff seeks such a construction of the act as restricts an alien defendant's right of removal to cases in which the suit against the alien is brought in the district of the plaintiff's residence. Plaintiff cites from *Cochran v. Montgomery*, 199 U. S. 260, 273, 26 Sup. Ct. 58, 63 (50 L. Ed. 182, 4 Ann. Cas. 451), the following:

"The main purpose of the act of 1887, as has been repeatedly said, is to restrict the jurisdiction, and this was largely accomplished in the matter of removals by withholding the right from plaintiffs and only according it to defendants when sued in the plaintiff's district."

It is argued that it is not the policy of the law to give to aliens privileges not granted to citizens, and that if the defendant in the present suit, instead of being an alien, had been a citizen of one of the United States, he would not have had the privilege, against the plaintiff's objection, or having his case tried in the federal court.

The inability of a citizen to remove in such a case is due, however, to provisions of the Removal Act that relate specifically to actions between citizens of different states, meaning thereby citizens of different states of the Union.

Section 1 provides that such actions shall be brought only in the district of the residence of either the plaintiff or the defendant. Section 2 of the act provides for removal—

“by the defendant or defendants therein being nonresidents of the state.”

It follows, of course, that the words “being nonresidents” preclude a citizen defendant from removing when sued in the courts of his own state.

It by no means follows, however, that the sole purpose of the removal acts, so far as they relate to aliens, was to enable a defendant to avoid the trial of a case in the state court of the plaintiff's residence.

By article 3, § 2, of the Constitution of the United States, the judicial power was extended to controversies between a state or the citizens thereof, and foreign states, citizens, or subjects. The statutes in pursuance of this provision which grant to aliens the right to a federal tribunal have not expressly limited this right to the single case where the alien is sued in the state of the plaintiff's residence. To impose such a limitation by construction would be to go beyond the clear terms of the Removal Act, and to cut down the right of removal given to an alien through a reference to provisions which are expressly confined to an action between citizens of different states of the Union.

The suggestion that an alien should have no greater right than a citizen is not of sufficient force to justify the limitation of the right of the alien defendant.

The plaintiff cites no case which supports its contention, though it cites many cases from which it seeks to deduce the principle that the only purpose of the act is to enable a defendant to escape from the state courts of the plaintiff's residence.

The reason for affording an alien a right to a federal tribunal may be much broader than this, as indicated by the constitutional provision to which reference has been made.

The argument that a decision in favor of this defendant would practically reinstate Revised Statutes, § 629, subsec. 1 (U. S. Comp. St. 1901, p. 508), which, as stated in *O'Connor v. Texas*, 202 U. S. 501, 26 Sup. Ct. 726, 50 L. Ed. 1120, has been repealed, seems of little force. On the contrary, the fact that for a very long period of time the right of removal which the alien defendant now asserts was clear and undisputed supports a natural construction of the statute which preserves that right unimpaired, rather than a construction which, without express warrant in the terms of the act, cuts down a long recognized right.

There seems to be nothing unreasonable in giving the act a construction favorable to the defendant, and this construction is directly supported by the decision of the Circuit Court of Appeals for the

Ninth Circuit in *Wind River Lumber Co. v. Frankfort M., A. & P. G. Co.*, 196 Fed. 340. This case is directly in point and seems a satisfactory and sufficient authority.

The motion to remand is denied

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.
(and three other causes).

(District Court, S. D. New York. December 27, 1912.)

Equity 2—0, 2—33, 2—149, 3—37.

1. EQUITY (§ 401*)—REFERENCE TO MASTER—ISSUES ARISING ON PLEADINGS.

Issues arising on pleadings should be disposed of by the court in the first instance, especially where a reference would necessarily result in great delay.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 869-873; Dec. Dig. § 401.*]

2. CORPORATIONS (§ 565*)—TIME FOR FILING CLAIMS.

Where the court has fixed the time for filing claims against an insolvent corporation or its receivers, the question of allowing claims to be filed out of time should be dealt with separately in respect to each claim.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

In Equity. Suit by the Pennsylvania Steel Company and another against the New York City Railway Company and another, with three other causes. On motion to consolidate and refer to special master. Overruled.

See, also, 201 Fed. 418.

Matthew C. Fleming, of New York City, for City receiver.

Arthur H. Masten and Wm. M. Chadbourne, of New York City, for Metropolitan receiver.

James Byrne, of New York City, for Pennsylvania Steel Co.

Brainard Tolles, of New York City, for Guaranty Trust Co.

Bronson Winthrop, of New York City, for Farmers' Loan & T. Co.

Richard R. Rogers, of New York City, for N. Y. Railways Co.

Benj. S. Catchings, of New York City, for Tort Creditors.

LACOMBE, Circuit Judge. [1] It will no doubt be advantageous for many reasons to consolidate these four suits, but I think that had best be postponed until the undecided issues in each suit are disposed of. These it is understood arise mainly, if not altogether, upon the demurrers and answers to the various cross-bills. The suggestion that these be sent to the special master is distinctly disapproved. With the large number of proceedings now pending before him, such a course would necessarily result in great delay, which it is most important to avoid. All issues arising upon the pleadings should be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tried in the first instance by the court, and a special session may be arranged for—at which these issues may be taken up. They seem to be fully set forth in the petition, and are as follows:

(1) In equity suit 2—9 issues raised by demurrer and answers to cross-bill filed July 30, 1908, by contract creditors committee.

(2) In the same suit issues raised by answers to a cross-bill of the tort creditors committee filed September 23, 1908.

(3) In equity suit 2—33 issues arising upon demurrer and answers to a cross-bill filed by the contract creditors committee on July 30, 1908.

(4) In equity suit 2—149 issues arising upon answers to a cross-bill of the tort creditors committee filed September 23, 1908.

(5) In the same suit issues arising upon answers to an amended cross-bill of the Pennsylvania Steel Company filed March 9, 1909.

(6) In the same suit issues arising upon answers to a cross-bill of the contract creditors committee filed June 29, 1908.

(7) In the same suit issues arising upon answers to a cross-bill filed by the Morton Trust Company March 13, 1909.

(8) In the same suit, some of the issues arising upon the amended and supplemental bill as between complainant and certain defendants have not been tried.

(9) In equity suit 3—37 issues arising upon answers to a cross-bill filed by Guaranty Trust Company on August 18, 1908.

(10) In the same suit issues arising upon answers to a cross-bill filed by the tort creditors committee on September 23, 1908.

(11) In the same suit issues arising upon demurrer and answers to a cross-bill filed by the contract creditors committee on December 17, 1908, and joined in by the Pennsylvania Steel Company on January 16, 1909.

This enumeration may not prove as formidable as it looks. The Pennsylvania Steel Company, the contract creditors committee, and the tort creditors committee have begun, or are about to begin, proceedings to secure, if possible, a finding that they are entitled to preference in payment out of some particular fund or funds in the possession of the receiver of New York City Railway. If they should prevail in these proceedings, they have no further interest in the cross-bills referred to in items 1, 2, 3, 4, 5, 6, 10, and 11. In that event these items may be disposed of by withdrawal or dismissal of the cross-bills, or otherwise without trying the issues presented thereby. There is no apparent reason why these proceedings should not be progressed to a final disposition promptly. Therefore the trial of the issues enumerated in these items may be postponed until those arising in items 7, 8, and 9 are tried and disposed of. It is thought that much of the testimony pertinent to these three items has already been taken. Counsel know better than the court does what time will be required for taking additional testimony and hearing arguments. If they will advise the court how long a session will be required from 10:30 to 4:30 each day, the court will fix some time convenient to all, when it will sit until the issues in these three items are heard and submitted. After they are disposed of, we can determine what is the next step to take in order to hasten final disposition. The proposition to consoli-

date will be held in abeyance until all these pending separate issues are disposed of.

[2] It is also asked that all bills or cross-bills filed in any one of the above-mentioned four suits be taken as claims filed as of the date when such bills or cross-bills were filed. The court is averse to disposing of these questions as to filing claims en bloc. Each claim is separate and individual, and the question whether equitable considerations should induce the court to allow any particular claim to be filed as of some different date from that on which other claims have been allowed to be filed should be separately presented.

All other matters presented in this petition and not now disposed of may be brought up, without further papers on notice, as soon as we have disposed of the untried issues.

In re NIAGARA LEAD & BATTERY CO.

(District Court, W. D. New York, January 13, 1913.)

BANKRUPTCY (§ 189*)—LIENS—CHATTEL MORTGAGE—AFTER-ACQUIRED PROPERTY.

Where a mortgage securing a bond issue by a corporation purported to cover after-acquired property, but it appeared that the proceeds of the bonds were intermingled with other funds realized by the bankrupt from sales of manufactured articles, and that after-acquired property, consisting of machinery, tools, and office fittings, was purchased with such money, such after-acquired property was not subject to the mortgage lien as against the corporation's general creditors in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286-289, 291-295; Dec. Dig. § 189.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Niagara Lead & Battery Company. On review of a referee's decision awarding certain after-acquired property to the mortgagee. Reversed, and decision rendered in favor of trustee.

Gibbons & Pottle, of Buffalo, N. Y., for trustee.

Bushnell, Dolson & Kent and Rebadow & Ladd, all of Buffalo, N. Y., for bondholders.

HAZEL, District Judge. The question for determination is whether certain after-acquired personal property used in the business of the defendant, and consisting of machinery, tools, and office fittings, passes under an after-acquired property clause in the mortgage to secure the payment of a bond issue, so that such property can be held by the mortgagee as against the trustee in bankruptcy, who represents the general creditors. The evidence shows that the proceeds of the sale of the bonds were intermingled with other funds—funds realized from sales by the bankrupt of manufactured articles—and that the after-acquired property was bought with such money. The referee followed the decision of this court in *Re Medina Quarry Co.* (D. C.) 24 Am. Bankr. Rep. 769, 179 Fed. 929, wherein it was substantially held

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that a mortgage, reciting that the money raised by it was to purchase quarries, machinery, and equipment, covered certain after-acquired real and personal property, as from the language contained in the mortgage it appeared that the creditors had notice of the scope of the lien when their dealings with the mortgagor began. The facts of this case, however, do not show that the funds raised on the sale of the bonds were expressly reserved to buy the articles specified in Schedule B of the schedule of assets. The adjudications cited in the opinion of the court in the Medina Quarry Company Case included the case of Zartman v. First National Bank, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083, and from this and other cases the court deduced that a distinction existed between machinery, tools, and appliances which were acquired subsequent to the execution of the mortgage, and were bought with funds realized on the sale of the bonds, and supplies, products, and materials to be sold, and not in existence at the time of making the mortgage.

In determining the issue in *Re Medina Quarry Co.*, the case of *In re Dry Dock Co.*, 16 Am. Bankr. Rep. 325, 144 Fed. 649, 75 C. C. A. 451, decided by the Circuit Court of Appeals for this circuit, was overlooked, and my attention was not directed thereto by counsel. There the property in the possession of the trustee in bankruptcy consisted of a house boat constructed, for the greater part, from materials bought after the making of the mortgage, which in terms included after-acquired property. Such a mortgage, the court said, "has been held valid and effective by the federal courts (*Central Trust Company v. Kneeland*, 138 U. S. 419 [11 Sup. Ct. 357, 34 L. Ed. 1014]), but the case at bar must be disposed of in accordance with the decisions of the state courts." And in decisions by the Court of Appeals of this state it has been plainly held that generally, as against creditors who are unsecured, a mortgage does not operate as a lien upon after-acquired property or materials. In the recent case of *MacDonnell v. Buffalo L. T. & S. D. Co.*, 193 N. Y. 92, 85 N. E. 801, Judge Werner, writing for the Court of Appeals, says:

"A mortgage may be so drawn as to embrace within its lien the property that may be acquired by the mortgagor subsequent to the execution of the mortgage. * * * But such a mortgage, as to chattels not in esse when it is executed, is merely an executory contract to give a lien, which a court of equity may enforce, as between the parties, when the chattels come into existence, or which the mortgagee may, in some cases, make effective by taking actual possession of the after-acquired property. * * * While such a contract is enforceable, as suggested, between the parties thereto, it is hedged about by the limitation that it shall not affect the rights of other creditors of the mortgagor."

The attorneys for the bondholders contend that the Zartman and MacDonnell Cases are based upon different principles than the case in suit, as in the Zartman Case the property consisted of "shifting stock and materials," and in the MacDonnell Case of after-acquired choses in action, while in the case at bar the property consisted of machinery, tools, and appliances appurtenant to the plant or real estate. In the case of *Platt v. N. Y. C. & Beach R. R. Co.*, 9 App. Div. 87, 41 N. Y. Supp. 42, the after-acquired property was that of a railway com-

pany; and the court held that under the peculiar conditions regulating rights of bondholders as to railroads a mortgagee secured a lien upon such after-acquired property superior to subsequent mortgages or judgments. In *United States Mortgage & Trust Co. v. Eastern Iron Co.*, 120 App. Div. 679, 105 N. Y. Supp. 291, the mortgage covered and described lands afterwards to be acquired, in which the Iron Company already had mining rights; and the court held that the lien obtained under such a mortgage was superior to the title acquired by purchase of the same lands on the foreclosure of a mechanic's lien filed subsequent to the time that the mortgagor obtained the fee. It is emphasized in that case that at the time of the execution of the mortgage the Iron Company owned everything except the naked fee in the land, and that the bonds were issued for the express purpose of buying the real property and conducting mining operations. The gist of the decision differentiating it from other adjudications, such as the *Zartman Case*, was that the property had "actual or potential" existence at the time the mortgage was given, and that therefore it was not void as to intervening creditors. *R. D. Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 635.

It is true that in the *Zartman Case* the court, in its opinion, speaks of shifting stock, meaning thereby the musical instruments and the materials therefor furnished by the creditors, while in the case at bar the after-acquired property consisted of machinery and office fittings purchased in part with money raised on the sale of the bonds, yet the decisions herein cited do not expressly make a distinction between shifting stock and other after-acquired property; the only distinction made being in cases where the bonds were issued to buy property actually in existence, and, in the case of a railroad company, where the money obtained by the mortgage covered after-acquired property, and the creditors had notice of the extent of the lien.

The question submitted for review must be decided in favor of the trustee.

In re FRIEDL.

(District Court, E. D. Wisconsin. January 11, 1913.)

ALIENS (§ 68*)—NATURALIZATION—DECLARATION OF INTENTION—AMENDMENT.

Where, by error of the clerk in taking petitioner's declaration of intention, it was stated therein that he was a subject of the emperor of Germany and renounced allegiance to that sovereign, when in fact he had been a resident of Austria-Hungary and was a subject of the emperor of Austria and the king of Hungary, the court, on hearing the application for citizenship, had no jurisdiction to order an amendment of the application nunc pro tunc so as to state the truth, but the application should be denied without prejudice to its renewal.

[Ed. Note.—For other cases, see *Allens*, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

Application by Mathias Friedl for naturalization. Denied.

On the 13th day of July, 1912, the petitioner filed his application to be admitted as a citizen, alleging therein his allegiance, his birth in Eisenberg,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Austria-Hungary, March 20, 1866, and the other facts required by law to be set forth. Attached to and filed with such petition is a certified copy of an order of the United States District Court for the Western District of Pennsylvania, dated March 25, 1912, entitled: "In the Matter of the Petition of Mathias Friedl, a Declarant in Said Court at No. 6,655, for an order correcting said declaration," and is as follows:

"Per Curiam. Upon consideration of the petition of Mathias Friedl, it appearing to the court that he made a declaration of intention to become a citizen of the United States on the 17th day of July, 1908, numbered 6,655, as recorded in volume 19, page 255, of declaration of intention in the United States District Court for the Western District of Pennsylvania, and it further appearing that the said Mathias Friedl was born in the country of Austria and owes allegiance to Francis Joseph, emperor of Austria and apostolic king of Hungary, instead of being born in Germany and owing allegiance to the emperor of Germany, as set out in said declaration, and it further appearing that the error as to his birthplace and allegiance as given in said declaration is a clerical error and due to a misunderstanding on the part of the clerk recording said declaration: It is hereby ordered, that the clause reading, 'I was born in Eisenberg, Germany, on the 20th day of March, Anno Domini 1866,' be amended to read, 'I was born in Eisenberg, Austria-Hungary, on the 20th day of March, Anno Domini 1866,' and that the sentence, 'It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to William II, emperor of Germany, of which I am now a subject,' be amended to read, 'It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to Francis Joseph, emperor of Austria and apostolic king of Hungary, of which I am now a subject.'"

Merton A. Sturges, Chief Naturalization Examiner, of Chicago, Ill., for the United States.

GEIGER, District Judge (after stating the facts as above). The facts may be summarized thus: The petitioner's original declaration averred his place of birth to have been Eisenberg, Germany, and his intention to forever renounce allegiance particularly to "William II, emperor of Germany, of which I am now a subject." In truth he was born at Eisenberg, Austria-Hungary, and was, at the time of his attempted declaration, a subject of its sovereign. More than three years thereafter, the court receiving such declaration ordered its amendment to accord with the truth, reciting in such order that the "error as to his birthplace and allegiance as given in said declaration is a clerical error, and due to a misunderstanding on the part of the clerk recording said declaration."

There is at once suggested the basis of the government's challenge of the petitioner's right to citizenship, namely, noncompliance with the statute requiring the making and proof of a declaration of intention to become a citizen, and renunciation of allegiance to a particular foreign sovereign, and that the attempted amendment is wholly nugatory, because beyond the power of the court to grant it.

The alien's declaration of intention and its reception by a court, as prescribed in the statute, in no sense constitute a judicial proceeding, incident to which there resides in or is reserved control over either the declarant or the declaration. Nor is the power to receive the declaration to be considered as a grant of jurisdiction. It enables the alien to take a step imperatively prerequisite to a later special judicial pro-

ceeding. If the power of substantive amendment exist, then it must follow that naturalization can be effected in any case without amending an insufficient declaration; that is, if the declaration is insufficient, as not complying with the statute, the court, having the power to amend, may proceed to naturalize without amendment, and, while its judgment may be erroneous, it would not be void. It seems to me that such view would frustrate the whole act, because it would place the power of the court above the terms of the act. In a sense it may be said that, before the applicant can invoke the subsequent jurisdiction for an order of naturalization based upon the petition prescribed by the act, he must at his peril have complied with the exact terms of the section respecting his declaration of intention, and must also have seen to it that the precise and true declaration is received by the court and evidenced of record. It is a step embodying, not only the substantive elements specified, but one which, to avail, must be taken at or before a particular time. If a declarant or a petitioner may obtain the benefit of the act upon parole proof of his compliance with its terms respecting his declaration, then the latter become merely advisory, and the act as it has been construed in practice is really superseded and nullified.

The hardship resulting to the petitioner cannot be relieved against merely because it may appear that the error is clerical, and not his own. If the power to amend is to be recognized at all, its exercise may well be invoked in every case where facts are presented disclosing reasonable excuse or meritorious grounds for the exercise of a discretion. It may be noted, however, that in the present case the applicant can hardly claim to be wholly free from fault. As a matter of practice, a copy of the declaration has always been delivered to the declarant. It appears here that such copy, and doubtless disclosing upon its face the error complained of, was retained by declarant for about three years; and, if the merits of the amendment could be considered, declarant could not well claim to have been diligent.

I am well satisfied that the power to amend the declaration does not exist, and hence the government's objections, being based as they are upon a defect disclosed in a petition, are well taken. The views above expressed are fully sustained in other districts, notably *In re Lewkowicz* (D. C.) 169 Fed. 927, and *In re Lange* (D. C.) 197 Fed. 769, as well as *In re Stack* (U. S. District Court, Western District of Missouri) 200 Fed. 330.

The application for naturalization is denied, but without prejudice to its renewal.

Ex parte LYMAN.

(District Court, W. D. Washington, S. D. January 28, 1913.)

No. 1,245.

CONSPIRACY (§ 28*)—ESCAPE—NATURE OF OFFENSE—"ANY PRISONER"—"ANOTHER."

Pen. Code, § 37 (Act March 4, 1909, c. 321, 35 Stat. 1096 [U. S. Comp. St. Supp. 1911, p. 1600]), provides that if two or more persons conspire to commit an offense against the United States, and one or more of them do any act to effect the object of the conspiracy, each shall be fined and imprisoned, etc. Section 138 declares that whenever any marshal, deputy marshal, ministerial officer, or other person has in his custody any prisoner by virtue of process issued under the laws of the United States, and such marshal or other officer voluntarily suffers such prisoner to escape, he shall be fined or imprisoned, etc. *Held*, that the words "any prisoner," in section 138, were sufficiently broad to include a prisoner conspiring with his official custodian to permit him to escape, though the word "another" excludes from its meaning oneself, and hence an indictment charging petitioner with conspiring with his guard and another to permit petitioner to escape from custody stated an offense against the United States.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 40, 41; Dec. Dig. § 28.*]

For other definitions, see Words and Phrases, vol. 1, pp. 406, 407, 412-433; vol. 8, pp. 7575-7577.]

On demurrer to a petition by John Grant Lyman for a writ of habeas corpus. Demurrer sustained.

L. E. Kirkpatrick, of Seattle, Wash., for petitioner.

B. W. Coiner, U. S. Atty., of Tacoma, Wash., and C. F. Riddell, Asst. U. S. Atty., of Seattle, Wash., for respondent.

CUSHMAN, District Judge. This matter is before the court upon the demurrer to the petition for a writ of habeas corpus. The petitioner is imprisoned in the United States penitentiary at McNeil Island, upon conviction by the District Court for the Northern District of California, of conspiracy, under section 37 of the Penal Code.

The indictment, upon which he was convicted, charges that, while the petitioner was held by the United States marshal for the Northern district of California, under a commitment issued by a United States commissioner, charging him with the violation of section 215 of the Criminal Code, and while he was in the custody of a certain guard, appointed by said marshal, he conspired with said guard and another to aid, assist, and permit the petitioner to escape from such custody. Among the overt acts charged, it is alleged that the guard assisted petitioner to get into an automobile, secured for the purpose, and permitted him to leave his custody and escape.

The following authorities are relied upon by the petitioner: *United States v. Dietrick* (Circuit Court for the District of Nebraska) 126 Fed. 676; *United States v. N. Y. Central & H. R. R. Co.* (C. C.) 146 Fed. 303; *Ex parte Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

118; *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 21 L. Ed. 872; *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *Ash v. State*, 81 Ala. 76, 1 South. 558; Wharton, Criminal Law, § 1339; *Sessions v. State*, 37 Tex. Cr. R. 62, 38 S. W. 623; *Conant v. State*, 51 Tex. Cr. R. 610, 103 S. W. 897.

Respondent relies upon the following authorities: *In re Eckart*, 166 U. S. 481, 17 Sup. Ct. 638, 41 L. Ed. 1085; *U. S. v. Morse*, 218 U. S. 493, 505, 506, 31 Sup. Ct. 37, 54 L. Ed. 1123-1128.

Section 37 of the Penal Code provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

Section 138 of the Penal Code provides:

"Whenever any marshal, deputy marshal, ministerial officer, or other person has in his custody any prisoner by virtue of process issued under the laws of the United States, by any court, judge, or commissioner, and such marshal, deputy marshal, ministerial officer, or other person voluntarily suffers such prisoner to escape, he shall be fined not more than two thousand dollars, or imprisoned not more than two years, or both."

It is contended by petitioner that there is no federal statute punishing a prisoner for escaping, and that, as the petitioner was the escaping prisoner, he was incapable of conspiring with the officer to permit his escape. The cases cited do not support the contention. Cases of bribery, dueling, adultery, and bigamy are not analogous.

The reasoning that supports certain of those decisions does not apply to the case now before the court. The participants in a crime, that in its execution requires two actors, as dueling, before it can be a crime, it may be plausible to consider, so far as conspiracy is concerned, the same as one person in ordinary crime, and that there can be no conspiracy in such case with less than three, and that, if a punishment was provided for the consummated offense, less severe in its nature than that provided for conspiracy, that a legislative intent was thereby shown to exclude the same from the scope of conspiracy.

To voluntarily permit a prisoner to escape does not, necessarily, require a common purpose between the officer and the prisoner. For example: The prisoner escapes through what he deems the "neglect" of the guard, when, in fact, the officer has been induced by a third person to suffer or permit the escape. In such case, the officer and the third person would be conspirators, and the prisoner not. That a prisoner might conspire with the jail guard for the escape of all of his fellow prisoners, but that, the moment the prisoner himself becomes a benefiting party to the scheme, the conspiracy is destroyed, seems a lame conclusion.

Ash v. State, 81 Ala. 76, 1 South. 558, cited, was a case in which the statute before the court condemned one for "aiding the escape of another," wherein it was held that the prisoner who was aided to escape was not an accomplice. He could not have been prosecuted

as a principal or accessory, because he had not aided "another," but himself.

The statute now before the court condemns the officer who voluntarily suffers "any prisoner" in his custody, under process, to escape. The words "any prisoner" are of sufficient scope to include the petitioner, though the word "another" excludes from its meaning one-self. The prisoner is not condemned for regaining his liberty, but for conspiring with, and thereby causing, the guard to be false to his duty, in voluntarily suffering him to escape.

In any event, the judgment of conviction would not be questioned by this court on habeas corpus. The prisoner was convicted of conspiracy, an offense of which the lower court had undoubted jurisdiction. The offense against the United States, defined by section 138, *supra*, is clearly one that persons may conspire to commit. If petitioner could not be held as a party to such a conspiracy, that question is one that could only be corrected on a writ of error, sued out regularly to review the judgment of conviction.

In *Ex parte Coy*, 127 U. S. 731, 758, 8 Sup. Ct. 1263, 1272 (32 L. Ed. 274), it is said:

"In all such cases, when the question of jurisdiction is raised, the point to be decided is whether the court has jurisdiction of that class of offenses. If the statute has invested the court which tried the prisoner with jurisdiction to punish a well-defined class of offenses, as forgery of its bond, or perjury in its courts, its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of habeas corpus."

Demurrer sustained.

WILSON CASE LUMBER CO. v. MOUNTAIN TIMBER CO. et al.

(District Court, W. D. Washington, S. D. January 27, 1913.)

No. 1,740.

PRINCIPAL AND AGENT (§ 183*)—CONTRACT MADE BY AGENT—ACTION BY PRINCIPAL FOR BREACH.

A corporation, whose property was sold by another corporation as its agent, together with property owned by the agent, where the agency was disclosed to the purchaser and a separate price agreed on for each property, may maintain an action on the contract to recover its own share of such price, and especially where the purchaser under the contract has acquired all of the capital stock of the agent.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 691-700; Dec. Dig. § 183.*]

At Law. Action by the Wilson Case Lumber Company against the Mountain Timber Company and the Willard Case Lumber Company. On demurrer to second amended complaint. Overruled.

For former opinion, see 200 Fed. 181.

Miller, Crass & Wilkinson, of Vancouver, Wash., and Fletcher & Evans, of Tacoma, Wash., for plaintiff.

E. C. Strode, of Portland, Or., A. H. Imus, of Kalama, Wash., and Coy Burnett, of Portland, Or., for defendant Mountain Timber Co.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 202 F.—20

CUSHMAN, District Judge. The right of the plaintiff to maintain a suit upon the contract now set out in plaintiff's second amended complaint has heretofore (November 6, 1912) been upheld by this court on consideration of a former complaint. Upon the defendant's demurrer to the present complaint, a reconsideration of that ruling is asked.

The contract is set out in the former opinion. By it the defendant Willard Case Lumber Company sold the defendant Mountain Timber Company certain property, including property which plaintiff alleges belonged to it, and in the sale of which it is alleged the Willard Case Lumber Company was acting for plaintiff, and that defendant Mountain Timber Company knew these facts, and knew that the consideration for the purchase of the property claimed by plaintiff should be paid the plaintiff. That part of the property so claimed to have been sold consisted of standing timber. It is provided in the contract that it should be paid for at the rate of \$4 per thousand feet, stumpage.

Defendant Mountain Timber Company relies on the following authorities: *Talcott v. Wabash R. R. Co.*, 159 N. Y. 461, 54 N. E. 1; *Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 356; *Midwood Sons v. Alaska-Portland Packers' Ass'n*, 28 R. I. 303, 67 Atl. 61, 13 Ann. Cas. 954; *Tiffany on Agency* (Hornbook Series) 306. The cases cited hold, in effect, that an undisclosed principal, whose goods have been mingled with those of a factor and sold for a gross sum, to be paid the latter, cannot maintain a separate suit for the value of his goods.

The complaint in this case alleges that plaintiff's interest in the contract was disclosed to the defendant, and that the sale price was not for a gross sum, but that the contract segregated the property claimed by plaintiff and fixed a price upon it, separate from the remaining property sold. The Willard Case Lumber Company, the agent in this sale, has been made a party defendant, all of its stock having been acquired by the Mountain Timber Company, the other defendant, thereby passing entirely into the control of the latter company, which fact would, in any event, obviate the requirement of a suit in the name of the former company, as much so as would fraud or collusion between the defendant companies.

Demurrer overruled.

THE HENRY W. OLIVER. THE JOHN ERICSSON. THE MANILA.

(District Court, N. D. Ohio, Eastern Division. December 30, 1912.)

No. 2,450.

1. COLLISION (§ 51*)—OVERTAKING VESSELS—SUCTION.

Suction is a force recognized by the courts, and to be recognized and guarded against by an overtaking vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 57-61; Dec. Dig. § 51.*]

2. COLLISION (§ 56*)—OVERTAKING VESSELS—RULES GOVERNING.

Under the navigation rules 20 and 22 for the Great Lakes (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 645 [U. S. Comp. St. 1901, p. 2891]), it is the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

duty of an overtaken vessel to keep her course and speed, and of the overtaking vessel to keep out of her way; and, if a collision occurs, the burden of proof rests on the overtaking vessel.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 56.*]

3. COLLISION (§ 53*)—OVERTAKING VESSELS—FAULT.

A collision between a steamship with a barge in tow, passing down through the lower channel in Lake St. Clair at night, and an overtaking steamship, and a resulting collision between the latter and the barge, *held* due to the suction of the overtaking vessel, for which she was in fault for crowding too close to the overtaken vessel and her tow.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 53.*]

Collision, overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.]

In Admiralty. Suit for collision by the Pittsburg Steamship Company, owner of the steamship John Ericsson, against the steamer Henry W. Oliver, the Wilson Transit Company, claimant, with cross-libel by claimant against the Ericsson and the barge Manila. Decree for libellant.

Hoyt, Dustin & Kelley, of Cleveland, Ohio, for libellant.

Goulder, Holding & Masten, of Cleveland, Ohio, for respondents.

DAY, District Judge. This case arises out of a collision, or rather a series of collisions, which occurred shortly after midnight of August 20, 1907, in the Grosse Pointe Cut, near the lower end of Lake St. Clair. The vessels involved were the steamer John Ericsson, the tow barge Manila, belonging to the Pittsburg Steamship Company, and the steamer Henry W. Oliver, belonging to the Wilson Transit Company. The steamer Ericsson was a steam vessel of 390 feet keel, 48 feet beam, and had in tow on a line about 200 feet long the barge Manila, 136 feet long, about 50 feet beam. The steamer Oliver was 444 feet long, beam of 50 feet. The night was clear, although the captain of the Oliver says there was some smoke from a steamer, the Fitzgerald, passing down the river ahead of the Oliver. The collision occurred near the lower end of Grosse Pointe Cut. The Oliver was the overtaking boat.

Grosse Pointe Cut is a channel about 6 miles long, and 800 feet wide, dredged in the sandy bottom of Lake St. Clair to a depth of 20 to 21 feet. The waters of the lake, on either side of the cut, average from 15 to 22 feet deep. The upper end of the channel is marked on its easterly side by a lightship. The sides of the cut are marked at night by a series of white gas buoys on the west side, and red gas buoys on the east side. These gas buoys are about a mile and a half apart; there being four of them on each side of the six miles of this channel. The center line of the channel is indicated by range lights, known as the Isle aux Peches ranges. The rear light of these ranges is a mile and a half below the lower entrance to the cut, and the front light within the neighborhood of half a mile below its lower entrance.

The disaster occurred a little below the first pair of gas buoys, above the south entrance buoys, which would be about a mile and a quarter or a mile and a half from the south entrance of the cut. The time of the collision was a little after midnight.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The Ericsson and the Manila were proceeding down Grosse Pointe Cut at a speed of about seven miles an hour. After entering the cut, the Ericsson and the Manila fixed their course in the center, and maintained that position until the steamer Fitzgerald blew them a two-blast signal, asking permission to pass them on their port side. The signal was answered by two blasts from the Ericsson, who thereupon ported and hauled over to the westerly side of the channel. The Fitzgerald then passed to the port side. No vessels passed from this time until the Oliver appeared upon the scene. The Ericsson and Manila proceeded on their course in the westerly half of the channel. It is not plain whether the Oliver asked and obtained permission by exchange of signals to overtake and pass the Ericsson and tow. It is, however, of not very much importance. In any event, the Oliver was the overtaking vessel. There was no difficulty until the Oliver came abreast of these two boats. The course of the Oliver, the speed of the Oliver, and the distance at which she passed the Manila are important parts of the suit, as are the courses of the Ericsson and the Manila and their conduct during this time.

It appears from the testimony that the Oliver undertook to pass the Ericsson and the Manila, and as the Oliver came or was coming abreast of the Manila the Manila took a violent sheer off to starboard against her hard-astarboard helm; that, when the Oliver's stern reached a point abreast of the forward part of the Ericsson, the Ericsson took a sheer to port toward the Oliver, and collided with the Oliver. The result of the sheer of the Ericsson to port was to bring her port side forward near the head into collision with the Oliver's starboard side aft near the latter's boiler house. After the first contact the steamers swung apart and point. These contacts had a tendency to cause the Oliver's bow to swing to starboard, and to throw the Oliver and the Ericsson athwartships the channel and over toward the west side of the bank. After these occurrences, the Oliver lay in such a manner that her stern projected out into the channel eastward to and beyond the stern of the Ericsson. Meanwhile the Manila drifted down towards these two boats, and, after clearing the Ericsson's stern by a distance variously estimated at from 50 to 220 feet, came into collision with the Oliver near the corner of her cabin. When those in charge of the Manila noticed the predicament of the Oliver and the Ericsson, the helm of the Manila was promptly put hard astarboard in an effort to clear the sterns of the steamers, and her master running forward succeeded in letting go her anchor just as the Manila came in contact with the Oliver.

The testimony of the officers and men upon these two boats is diverse and somewhat confusing in an endeavor to get at the truth of these occurrences and ascertain the liability of these various boats. It is the claim of the Ericsson, briefly stated, that the Oliver was navigated in such a negligent manner as to create a suction which caused her to sheer into the Oliver, thereby furnishing the basis of these collisions. It is claimed on behalf of the Oliver that the Ericsson did not maintain her course and speed, but steered across the river into the Oliver in such a manner as to cause these collisions. The distance

at which these boats approached is of little importance. It is quite apparent that whatever the speed of the two boats, or the several boats was, the Oliver was going faster than either the Ericsson or the Manila. The distance between these boats at the time of passing has been variously estimated and testified to at from 500 feet on the one hand to 50 feet on the other, so that it would be a little difficult, if not impossible, to reconcile this testimony. It is quite probable that the vessels were closer than 500 feet, and in all probability they were close enough together so that the force of suction had an opportunity to operate. There is no motive or no good reason given why the course of the Ericsson should have been influenced in any other way than by this suction. If the boats were as far apart as has been testified to by the crew of the Oliver, there could not have been a collision. It is quite apparent that some force did operate to bring about this result. The record indicates that, when the Oliver passed the Manila, the force of suction operated on the Manila. From the account of the occurrences it is highly improbable that the action of the Manila on her tow line operating upon the Ericsson, considering the depth of the channel, could have caused the result which is argued by proctors for the Oliver. It must be remembered that the Manila sheered to starboard at the exact moment of the accident, when the after part of the Oliver was abreast of her bow. It would seem that this action was due to the suction of the Oliver in passing. If the Oliver's suction did not affect these vessels, then the maneuvers on behalf of these two vessels, if voluntary, must have been without any purpose whatever or must have been made in a manner which would indicate that the masters of these vessels were desirous of colliding with the Oliver, which position, of course, is not reasonable. *The Syracuse*, 9 Wall. 672, 676, 19 L. Ed. 783.

[1] It is apparent to me that the Ericsson was acted upon by the suction of the Oliver. It was a contingency which should have been calculated upon by the master of the Oliver. This suction, although it operates in many ways, is recognized by the courts, and is recognized by navigators in charge of ships. It has caused many collisions, and it has been said by Judge Lurton in the case of *The Ohio*, 91 Fed. 551, 33 C. C. A. 671: "Suction is a force to be reckoned with, and guarded against when vessels pass in too close proximity." *The Atlantis*, 119 Fed. 570, 56 C. C. A. 134; *The Alexander Folsom*, 52 Fed. 403, 3 C. C. A. 165; *The City of Cleveland* (D. C.) 56 Fed. 729; *The Mesaba* (D. C.) 111 Fed. 215; *The Aureole*, 113 Fed. 224, 51 C. C. A. 181. There is nothing to indicate that the Manila confronted in the darkness of the night by these two steamers was not properly navigated. The maneuvers of the Oliver in passing these boats and in backing after the collision caused the damages complained of.

From the cases cited, and from the arguments and record in this case, I think it is established that there is a tendency of the overtaken vessel to sheer away from the overtaking vessel when the afterpart of the latter vessel comes abreast of the forward part of the former. A large steamer of the type of the steamers involved in these occurrences displaces with her hull an enormous volume of water, and the

effect of these displacements augmented by the action under the way of the steamer tends to produce this suction, whereas, the steamer passing along, the water rushes in to fill the space thus vacated by the hull and thrown out by the propeller, and it is obvious that any object which is within reach is forcibly drawn toward the stern of the passing vessel. Thus, if the overtaken vessel's stern is within range of the influence, it is sucked in, and her bow is swung violently off in the opposite direction. If, on the other hand, the bow of the overtaken vessel comes within this influence, it is sucked in towards the stern of the overtaking vessel. That this force of suction is very powerful is undoubted. That it is particularly true in shallow water, I think, is also established. Now it was the duty of the *Oliver*, the overtaking vessel, to keep out of the way and to choose a place for passing which would not imperil the *Ericsson* and the *Manila*. *Spencer on Collisions*, § 71.

[2] Rule 22 (28 Stat. 645) provides:

"That notwithstanding anything contained in these rules, every vessel overtaking another vessel shall keep out of the way of the overtaken vessel."

It was the duty of the *Ericsson* and of the *Manila* to hold their course. This is provided by rule 20, and also recognized by the courts. The *Ericsson* and *Manila* did hold the course they were on except in so far as they were drawn from that course by the navigation of the *Oliver* and the incident suction. It was not the duty of the *Ericsson* and the *Manila* to keep away from the *Oliver*. The *Atlantis*, 119 Fed. 571, 56 C. C. A. 134. After the collision these boats were required to do all that prudent seamanship required to avoid a collision. I think this was done. The master was in extremis, placed there by the wrongful conduct of the *Oliver* in unduly crowding upon the course of this boat. Under such circumstances, a master may be excused if he does not maneuver with perfect skill, or even if he acts mistakenly under such pressure or omits to do all that ought to be done. The *Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. 468, 28 L. Ed. 812; The *Maggie J. Smith*, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175.

The testimony of the captain of the *Ericsson* given in the record in this case and before the steamboat inspectors I think can be reconciled, and truly express the situation as it appeared to him. The *Oliver* as the overtaking vessel was required to keep out of the way of the overtaken vessel, and it was her duty to pass at a safe distance on a safe course. There having been a resulting collision, the *Oliver* has the burden of proof to show that it was occasioned by no fault on her part, but through some fault or neglect of duty on the part of the overtaken vessel; that is, the *Ericsson*. The *Sif* (D. C.) 181 Fed. 412; The *Aureole*, 113 Fed. 224, 51 C. C. A. 181; The *Atlantis*, 119 Fed. 568, 56 C. C. A. 134.

[3] I am of the opinion that the *Oliver* alone was at fault for these several collisions.

NEW YORK & O. S. S. CO., Limited, v. UNITED STATES.

(District Court, S. D. New York. December 6, 1912.)

1. COURTS (§ 426*)—CONCURRENT JURISDICTION—TUCKER ACT.

Rev. St. § 1068 [U. S. Comp. St. 1901, p. 740], provides that aliens who are citizens or subjects of any government which accords to the citizens of the United States the right to prosecute claims against such government in its courts shall have the privilege of prosecuting claims against the United States in the Court of Claims wherever such court by reason of the subject-matter might take jurisdiction. Tucker Act (Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752]) authorizes suits against the United States, and section 2 provides that the Circuit Courts of the United States shall have concurrent jurisdiction with the Court of Claims in all cases where the amount exceeds \$1,000 and does not exceed \$10,000. Held that, where an alien was entitled to sue the United States in the Court of Claims under section 1068, a federal Circuit Court had, and the District Court now has, concurrent jurisdiction of the subject-matter.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1131; Dec. Dig. § 426.*]

2. COURTS (§ 276*)—DISTRICT IN WHICH SUIT MUST BE BROUGHT—WAIVER.

Tucker Act (Act March 3, 1887, c. 359, § 5, 24 Stat. 506 [U. S. Comp. St. 1901, p. 754]), authorizing suits against the United States, in so far as it requires that the same be brought in the federal district where the plaintiff resides, is for the plaintiff's benefit, having nothing to do with the court's jurisdiction; and hence an objection that the petition was not filed in the proper district might be and was waived by the general appearance of the District Attorney and his appearing at the examination of witnesses without raising such objection.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

Waiver of right as to district in which suit may be brought, see notes to *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 192; *McPhee & McGinny Co. v. Union Pac. R. Co.*, 87 C. C. A. 634.]

Petition by the New York & Oriental Steamship Company, Limited, against the United States. Demurrer to petition overruled.

John M. Woolsey and Convers & Kirlin, all of New York City, for petitioner.

H. A. Wise, U. S. Atty., and A. S. Pratt, Asst. U. S. Atty., both of New York City.

COXE, Circuit Judge. This action was commenced in November, 1906, by the petitioner, a corporation organized under the laws of the United Kingdom of Great Britain and Ireland, to recover the sum of \$1,199.42, the unpaid balance due the Steamship Company for transporting merchandise from New York to Manila in October, 1902. On December 28, 1906, Henry L. Stimson, United States Attorney, filed a general appearance. Previous to this the defendant's time to answer or demur had been extended by stipulation.

On January 24, 1907, a demurrer was filed on the grounds, first, that the petition does not state facts sufficient to constitute a cause of action and, second, that the court has no jurisdiction of the subject of the action.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On February 15, 1907, the testimony of the master of the steamship which carried the goods to Manila was taken. The defendant was represented by two assistants of the United States Attorney and no objection was entered upon the record to the taking of the testimony.

These facts are taken from the briefs and the pleadings, no other papers having been submitted. If this demurrer be sustained, the petitioner will be remediless, as his cause of action will be barred by the statute of limitations.

The suit is brought under the so-called "Tucker Act" entitled "An act to provide for bringing suits against the government of the United States." Act March 3, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752).

[1] The act, so far as it is applicable to the present controversy, provides that the Court of Claims shall have jurisdiction to hear and determine all claims upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable.

Section 2 provides that the Circuit Courts of the United States shall have concurrent jurisdiction with the Court of Claims in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. Section 5 of the act is as follows:

"Sec. 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

It seems to me that the evident purpose and intent of this law was to give to persons having claims against the United States for comparatively small amounts the right to bring suits in the courts of the United States in districts where they and their witnesses reside, without subjecting them to the expense and annoyance of litigating in a court located at Washington.

The District Attorney concedes that the Court of Claims has jurisdiction of the present controversy. In his brief he says:

"The petitioner is not without a forum in which it may sue, for it has the right to bring suit in the Court of Claims. Section 1068 of the Revised Statutes [U. S. Comp. St. 1901, p. 740] provides:

"Aliens, who are citizens or subjects of any government which accords to the citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction."

"In two cases the Supreme Court has held that under this section citizens of Great Britain could sue the United States in the Court of Claims. See *U. S. v. O'Keefe*, 11 Wall. 178 [20 L. Ed. 131]; *Carlisle v. U. S.*, 16 Wall. 147 [21 L. Ed. 426]."

If, then, the Court of Claims has jurisdiction of this controversy, notwithstanding the fact that the petitioner is a foreign corporation, it would seem clear that the provision of the "Tucker Act" giving to the Circuit Court "concurrent jurisdiction with the Court of Claims" leaves little room to doubt that the Circuit Court had, and the District Court now has, jurisdiction of the action. It was not the purpose of Congress to exclude aliens who have valid claims against the government.

[2] The provision of the act that the petition be filed in the district of the residence of the plaintiff would seem to be intended for his benefit, but in any event his failure to file it there does not go to the jurisdiction of the court and may be waived by the District Attorney. There is no statutory reason why the Circuit Court at the time the action was commenced could not have tried and determined the controversy if the United States consented that it should do so. That it did consent I have no doubt. If filing a general appearance and appearing at the examination of witnesses without objection did not amount to a waiver of the contention that the petitioner had selected the wrong district, it is difficult to conceive of any act of the United States Attorney that would have that effect.

The contention that the petitioner must be a resident of the district where the suit is commenced and that this condition cannot be waived by the government necessarily excludes corporations organized in foreign countries from the provisions of the "Tucker Act," even though engaged in business in this country. I cannot believe that this was the intention of Congress. Such a construction is in direct conflict with section 1068 of the Revised Statutes quoted above and is contrary to the rule of comity which should govern the relations between friendly powers.

I think it is clear that the "Tucker Act" is applicable to this controversy and that the provisions as to the district do not go to the jurisdiction of the court, but is a privilege of exemption which the government could waive and did waive when it consented to the taking of testimony and entered a general appearance. These conclusions are in harmony with the following authorities: *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *In re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991; *Murray v. United States* (C. C.) 52 Fed. 172.

The demurrer is overruled, respondent to answer within 20 days.

REID WRECKING CO. v. UNITED STATES.

REID WRECKING CO., Limited, v. SAME.

(District Court, N. D. Ohio, E. D. January 16, 1913.)

Nos. 2,567, 2,566.

1. UNITED STATES (§ 125*)—ACTIONS AGAINST—CONSENT TO BE SUED—STATUTES.

The United States cannot be sued in their courts without their consent, and in granting such consent either by the Tucker Act (Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752]), or otherwise, the right cannot be extended by the courts, but is strictly limited by the statute.

[Ed. Note.—For other cases, see United States, Cent. Dig. §§ 113, 114; Dec. Dig. § 125.*]

2. COURTS (§ 449*)—COURT OF CLAIMS.

A Canadian corporation having an admiralty claim against the United States may sue in the Court of Claims under Rev. St. U. S. § 1068 (U. S. Comp. St. 1901, p. 740), providing that aliens who are citizens or subjects of any government which accords to the citizens of the United States the right to prosecute claims in its courts may prosecute claims against the United States in the Court of Claims whereof such court, by reason of their subject-matter and character, might have jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1163-1169, 1172, 1173, 1175, 1180, 1181; Dec. Dig. § 449.*]

3. COURTS (§ 268*)—DISTRICT IN WHICH SUIT MUST BE BROUGHT.

Tucker Act March 3, 1887, c. 359, § 5, 24 Stat. 506 (U. S. Comp. St. 1901, p. 754), provides that the plaintiff in any suit brought against the United States under the provisions of the act shall file a petition with the clerk of the respective court having jurisdiction of the case and in the district wherein the plaintiff resides, which petition shall state the name and residence of the plaintiff, the nature of his claim, and a statement of the facts on which it was based, etc. *Held*, that such section was mandatory, and that a federal court in a district in which the plaintiff did not reside had no jurisdiction of a suit under such act against the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806, 807, 812; Dec. Dig. § 268.*]

4. UNITED STATES (§ 136*)—ACTION—PROCESS—SERVICE.

Tucker Act March 3, 1887, c. 359, § 6, 24 Stat. 506 (U. S. Comp. St. 1901, p. 755), providing that service on the United States in suits authorized by such act should be by causing a copy of the petition filed in a cause to be served on the district attorney of the district where the suit was brought, and mailing a copy by registered letter to the Attorney General of the United States, is mandatory, and service cannot be obtained by any other method.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 131; Dec. Dig. § 136.*]

In Admiralty. Libels by the Reid Wrecking Company and the Reid Wrecking Company, Limited, against the United States. Motion to quash the monition in each case. Granted.

Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, for libelants.

U. G. Denman, U. S. Atty., and John A. Hadden, Asst. U. S. Atty., of Cleveland, Ohio.

DAY, District Judge. The United States, disclaiming intention to enter appearance in either of these two cases, moves to quash the motion or process in case No. 2,567, as the libellant therein shows that it is a corporation and resident of the state of Michigan; in case No. 2,566, because the libel therein shows that the corporation, libellant, is a corporation of the Dominion of Canada, and a resident thereof. In both cases the cause of action is based upon a contract entered into between the libellant and the War Department of the United States government. The contracts were marine in their nature.

Objection is raised to the right of the Reid Wrecking Company of Michigan to sue in any other district than that of which it is an inhabitant, and of the Canadian Company to sue in this court.

Practically the same question was raised in the case of *Hijo v. United States*, 194 U. S. 322, 24 Sup. Ct. 729, 48 L. Ed. 994, where the Supreme Court said, "We express no opinion on the question," wherein the court was referring to the requirement in the act that the petition shall be filed in the district where the plaintiff resides, and the case was decided upon other grounds. A similar question was presented in the case of *N. Y. & O. S. S. Co. v. United States*, 202 Fed. 311, decided by Judge Cox of the Southern District of New York on December 6, 1912. It is apparent, from an examination of that decision, that the United States government waived its rights to object to the suit being brought in that jurisdiction; so that the question presented by these motions is practically a new one, so far as I can find from an investigation of the decisions of the various federal courts.

Although the actions are in admiralty, the authority to bring them is found in the so-called "Tucker Act," entitled "An act to provide for bringing suits against the government of the United States." Act March 3, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752). The act, so far as it is applicable to the present situation, provides that the Court of Claims shall have jurisdiction to hear and determine all claims upon any contract, express or implied, with the government of the United States, or for damages liquidated or unliquidated, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable.

Section 2 of the act provides:

"That the Circuit Courts of the United States shall have concurrent jurisdiction with the Court of Claims in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars."

This is essentially the provision of the new Judiciary Act, referring to the District Court jurisdiction.

Section 5 of the act is as follows:

"That the plaintiff in any suit brought under the provisions of the second section of this act, shall file a petition duly verified, with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which his claim is based, the money or any other thing claimed, or the

damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

Section 6 of this act describes the manner of service or process which must be followed by plaintiffs in suits against the government in the District Court. The service must be by causing a copy of the petition filed in the cause to be served upon the district attorney of the district where the suit is brought, mailing a copy of the same by registered letter to the Attorney General of the United States, and thereafter causing to be filed with the clerk of the court wherein the suit is instituted an affidavit of such service and the mailing of such letter.

[1] The United States cannot be sued in their courts without their consent. In granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for their judicial determination, and the courts may not go beyond the letter of such consent. In *Schillinger v. United States*, 155 U. S. 163, 166, 15 Sup. Ct. 85, 86 (39 L. Ed. 108), Justice Brewer, in announcing the opinion of the court, said:

"Beyond the letter of such consent the courts may not go, no matter how beneficial they may be, or in fact might be their possession of a larger jurisdiction over the liabilities of the government."

The Supreme Court, in *Reid v. United States*, 211 U. S. 529, 29 Sup. Ct. 171, 53 L. Ed. 313, said:

"Suits against the United States can be maintained, of course, only by permission of the United States and in the manner and subject to the restrictions that it may see fit to impose."

It is evident from the holdings in these cases that the permission to bring suit against the United States as a sovereign power must be granted by Congress, and that the courts cannot enlarge upon the permission which has been granted by legislative authority. This being the law, the responsibility rests upon Congress, and the law as announced by Congress must be followed, regardless of the opinion of this court regarding its wisdom or its efficiency to meet certain conditions.

[2] The Canadian Company can bring suit in the Court of Claims under the provisions of section 1068 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 740), which provides:

"Aliens who are citizens or subjects of any government which accords to the citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction."

[3] Being of the opinion that section 5 of the Tucker Act is mandatory and that it applies to the cases under consideration, and it plainly appearing that neither of the libelants is bringing this action in the district of its residence, it is plain that these actions cannot be maintained here. It was the evident intention of Congress, in granting the right to sue the government in the classes of cases specified by the act, to include cases at law and in equity, as well as in ad-

miralty. The provision "that the suits shall be brought in the district of the residence of the plaintiff" might be beneficial to the party bringing the suit, and, on the other hand, it might be beneficial to the United States government, as it would give the local government authorities an opportunity for speedy and immediate investigation of the merits of the claims involved. While courts of admiralty are courts open to all the world in proper cases, I am not aware of any decisions which hold that the sovereign government of the United States can be sued in a court of admiralty without its consent.

[4] Section 6 of the Tucker Act, the substance of which is quoted above, provides the exact method of getting service upon the government. This method has not been complied with in the two suits herein involved. Had the United States government waived the permissive requirements of the act and proceeded with the trial of these actions, a different question might be presented; but inasmuch as the United States attorney has made prompt objection to the prosecution of these suits in this jurisdiction, for the reasons stated in this memorandum, the motion in each case will be sustained.

Orders may be entered accordingly.

UNITED STATES v. COWLISHAW et al.

(District Court, D. Oregon. January 13, 1913.)

No. 3,866.

1. PUBLIC LANDS (§ 51*)—SCHOOL LANDS—GRANT—PASSING OF TITLE—TIME.

Oregon Enabling Act Feb. 14, 1859, c. 33, 11 Stat. 383, provides that sections 16 and 36 in every township of public lands in the state, and where such sections, or any part thereof, have been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the state for school purposes. *Held*, that such provision was not a grant of the lands in present, and that the title did not pass to the state until the lands were identified by official survey and location.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 138, 146; Dec. Dig. § 51.*]

2. PUBLIC LANDS (§ 51*)—SCHOOL LANDS—IDENTIFICATION—SURVEY.

Since Surveyors General are forbidden to file duplicate plats in the local land offices until after the plats have been examined in the General Land Office and approved, a field survey of public land in a township is not sufficient to designate the location of school sections, so as to vest title thereto in the state; such designation not being complete until the duplicate plats approved by the land office have been duly filed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 138, 146; Dec. Dig. § 51.*]

In Equity. Suit by the United States against E. J. Cowlshaw and others. Judgment for plaintiff.

John McCourt, U. S. Atty., and Robert F. Maguire, Asst. U. S. Atty.

R. Sleight, of Portland, Or., for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WOLVERTON, District Judge. This is a suit to quiet the title to certain lands in the plaintiff against the claim of ownership and right to possession of the defendants. The lands are a part of school section No. 16, in township 3 S., range 6 E., of the Willamette meridian.

The facts as stipulated by counsel are as follows: Prior to May 27, 1902, the lands were unsurveyed lands of the United States. On that date a field survey of the east boundary of said lands was made, and on June 2d the north, west, and south boundaries were surveyed, and section 16 subdivided according to the rules of the Land Office in surveying the lands of the government. This field survey was approved by the United States Surveyor General of the state of Oregon June 2, 1903, and on June 8th that officer transmitted copies of the plat of survey and field notes to the Commissioner of the General Land Office at Washington, D. C., and the survey was accepted by the Commissioner January 31, 1906. On November 16, 1907, the Commissioner directed the Surveyor General to place a plat of the survey in the field in the local land office of the United States at Portland, Or., which was on the same date accordingly filed in that office. On December 16, 1905, the Secretary of the Interior, by order, temporarily withdrew for forestry purposes, from all forms of disposition whatsoever, except under the mineral laws of the United States, all vacant and unappropriated public lands within a certain specifically described area, including said township 3 S., range 6 E., W. M., and the local land office was duly notified of such order. On January 25, 1907, the President of the United States issued a proclamation enlarging the Cascade Range Forest Reserve to include such lands, which, among other things, provided that all lands which at said date were embraced within any withdrawal or reservation for any use or purpose to which said reservation for forest uses was inconsistent were excepted from the force and effect of such proclamation.

On October 10, 1906, the state of Oregon, in pursuance of the laws for the disposal of lands owned by it, executed a certificate of sale to Robert F. Loudon for the S. E. $\frac{1}{4}$ of said section 16, and to Alvina S. Loudon a certificate for the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section; and they thereafter assigned and transferred said certificates of sale to Finley and W. J. Morrison. On January 9, 1907, the state of Oregon, on surrender of the certificates of sale, executed to these latter purchasers a deed granting and conveying to them the lands described. On July 12, 1910, Finley and W. J. Morrison conveyed to the defendant Sligh Furniture Company.

[1] Under the facts as thus stipulated, it is claimed by the government that at the time the state exercised authority to sell and dispose of such lands they were not school lands, but were the property of the government, and not subject to sale by the state. The defendants controvert this position, and claim to have acquired the fee-simple title in regular course. The question thus presented depends upon the proper construction of the clause in the enabling act of Congress for the admission of the state of Oregon into the Union, approved Febru-

ary 14, 1859 (Act Feb. 14, 1859, c. 33, 11 Stat. 383), pertaining to school lands, which reads as follows:

"That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools."

The grant was accepted by the Legislative Assembly of the state June 3, 1859. The language of the act is "shall be granted." This has never been construed, that I am aware of, as a grant in present, but it rather looks to the future, as depending on some future act or event, and as not to become effective until such act or event has taken place or happened. It is manifest that the act is not a grant of all sections 16 and 36 within the territorial limits of the state; for it provides that if such sections, or any part thereof, have been sold or otherwise disposed of other lands equivalent thereto, and as contiguous as may be, shall be granted. This again raises the inquiry as to when the grant is to become effective as an actual transfer of the lands to the state. As to the lands to be granted in the place of the school sections, or any part thereof, sold or otherwise disposed of, it is very plain that there could be no passing of title until they were identified by some approved method of selection from the public domain. In construing a similar statute (the enabling act of the state of Nevada, which employed the words "shall be and are hereby granted"), the Supreme Court was led to observe that:

"Her people were not interested in getting the identical sections 16 and 36 in every township. Indeed, it could not be known until after a survey where they would fall, and a grant of quantity put her in as good a condition as the other states which had received the benefit of this bounty. A grant, operating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada until they were segregated from those granted." *Heydenfeldt v. Daney Gold, etc., Co.*, 93 U. S. 634, 638 (23 L. Ed. 995).

In that case the state of Nevada issued a patent to plaintiff's predecessor July 14, 1868. The defendant claimed under a patent from the United States, issued March 2, 1874, under the act of Congress of July 26, 1866, as amended by an act approved July 9, 1870, and the act of May 10, 1872, relating to the development of the mining resources of the United States. The land in controversy was mineral land, and the defendant's grantors and predecessors had entered upon the same for mining purposes in 1867, prior to the survey or approval of the survey of the school section in which it was located, and had claimed the same in conformity with the laws and customs of miners in that locality. The enabling act for the admission of the state into the Union was adopted March 21, 1864. So it appears in that case that the land in dispute was entered upon for mining purposes subsequent to the adoption of the enabling act, at a time prior to a survey of the school section, but before the grant by the state to plaintiff's predecessor; and the question was fairly presented whether the title passed to the state at the time of its admission into

the Union, or at some future time, namely, the time of its identification in place by a proper survey. And it was held that:

"Until the status of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a sixteenth or thirty-sixth section had been disposed of the state was to be compensated by other lands equal in quantity, and as near as may be in quality."

In an earlier case it was said, the court speaking with reference to the enabling act of the state of Michigan, almost identical in language with that of Oregon:

"We agree that until the survey of the township and the designation of the specific section the right of the state rests in compact, binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty the compact has an object, upon which it can attach; and if there is no legal impediment the title of the state becomes a legal title. The *jus ad rem*, by the performance of that executive act, becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others." *Cooper v. Roberts*, 18 How. 173, 179 (15 L. Ed. 338).

In a later case, *Minnesota v. Hitchcock*, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954, the court treated of the significance of the words "public lands," and quoted as authoritative the language of the court in *Newhall v. Sanger*, 92 U. S. 761, 763 (23 L. Ed. 769), as follows:

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

It then, after citing other authorities bearing upon the subject, proceeded to say:

"Again, the language of the section [referring to the Minnesota enabling act, identical with that of Oregon as to the grant of school lands] does not imply a grant in present. It is 'shall be granted.' Doubtless, under that promise, whenever lands became public lands they came within the scope of the grant."

Later the court further commented:

"But while this is true it is also true that Congress does not, by the section making the school land grant, either in letter or spirit, bind itself to remove all burdens which may rest upon lands belonging to the government within the state, or to transform all from their existing status to that of public lands, strictly so called, in order that the school grant may operate upon the sections named. It is, of course, to be presumed that Congress will act in good faith; that it will not attempt to impair the scope of the school grant; that it intends that the state shall receive the particular sections or their equivalent in aid of its public school system. But considerations may arise which will justify an appropriation of a body of lands within the state to other purposes; and if those lands have never become public lands the power of Congress to deal with them is not restricted by the school grant, and the state must seek relief in the clause which gives it equivalent sections."

This was followed further in the opinion by a citation of the *Heydenfeldt Case*, indicating its holding, namely, "that the United States had full power to dispose of the land until after a survey and the identification thereby." Then, after referring to a joint resolution adopted by Congress on March 3, 1857, prompted by a memorial from the territory of Minnesota, the court concluded that:

"The act of admission, with its clause in respect to school lands, was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the state. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for a selection of other lands in lieu thereof."

It would seem to be a logical deduction from these authorities, therefore, that the grant of the school sections does not vest the title thereof in the state until they have become identified through a survey determining their location. In further support of this view, see, also, *Hibberd v. Slack* (C. C.) 84 Fed. 571, and *State of Oregon, L. D.*, decided July 5, 1912.

As to the case of *Beecher v. Wetherby*, 95 U. S. 517, 24 L. Ed. 440, there may be found expressions in the opinion seemingly opposed to this view; but the case itself does not appear to have been so considered by the Supreme Court in the *Hitchcock Case*, although commented upon at some length. Furthermore the case was decided subsequent to the *Heydenfeldt Case*, with but a year intervening, and, although cited in the briefs of counsel, it was not referred to in the opinion of the court, so that we cannot infer that it was the intention to overrule that case.

[2] The next question presented is whether a survey in the field is sufficient to meet the requirements of an identification of school sections by survey. That the Land Department has authority to make rules and regulations, subject to law, in all matters pertaining to the disposition of public lands, will not be questioned. And it is said that:

"From the earliest days matters appertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior"—citing *Rev. Stat. § 453* (U. S. Comp. St. 1901, p. 257); *Cragin v. Powell*, 128 U. S. 691, 697, 9 Sup. Ct. 203, 206 (32 L. Ed. 566).

See, also, *Knight v. U. S. Land Association*, 142 U. S. 161, 177, 12 Sup. Ct. 258, 35 L. Ed. 974.

In the exercise of this power the Land Department on April 17, 1879, issued instructions to the Surveyors General that they should not file the duplicate plats in the local land offices until the duplicates had been examined in the General Land Office and approved, and the Surveyors General officially notified of that fact. Since such regulation, it has been held by the Secretary of the Interior, and it has become the practice of the Land Department, that public lands are not to be deemed surveyed or identified until approval of the plat of survey and filing thereof by direction of the Commissioner of the General Land Office in the local land office. *F. A. Hyde & Co.*, 37 Land Dec. Dept. Int. 164, 165. This ruling has been specifically reaffirmed in a later case. *Anderson v. State of Minnesota*, 37 Land Dec. Dept. Int. 390, 392. See, also, *State of Oregon, L. D.* 259, *supra*.

The Land Department having adopted such a rule under clear authority of law, and having so interpreted it, and it having the stamp of reason and sound policy, there is little left for the courts to do but to apply it.

In the case at bar the stipulation shows that, measured by this rule, there was no survey or proper identification of school section No. 16, township 3 S., 6 E., at the time the land was incorporated into the Cascade Reserve through withdrawal by the Commissioner, followed later by the proclamation of the President. Nor do I think that the lands in dispute were excepted from the operation of the proclamation.

The plaintiff is entitled to the relief as prayed; and it is so ordered.

THE ROKEBY.

(District Court, S. D. New York. October 29, 1911.)

1. SHIPPING (§ 132*)—ACTION FOR LOSS OF CARGO—BURDEN OF PROOF—PRIVATE CARRIER—"COMMON CARRIER."

A vessel loaded entirely with the cargo of one shipper is not a "common carrier," and proof of loss of cargo alone does not cast upon her the burden of proof to show proper stowage; but the cargo owner must prove the negligence affirmatively.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471-487; Dec. Dig. § 132.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1313-1319; vol. 8, p. 7607.]

2. SHIPPING (§ 123*)—LOSS OF CARGO—NEGLIGENCE—STOWAGE.

A deck load of coke placed in two bins at either end of a steamer was in part lost during a gale in the Gulf of Mexico. The sides of the bins were constructed with stanchions of gumwood, 18 feet long and 2½ feet apart, supported at the bottom against the bulwarks. The tops of the stanchions were not at first lashed together across the bins, but some of them were so lashed after the rolling of the vessel had caused them to spread outward a few inches; and afterward parts of the bulwarks gave way, allowing some of the coke to be lost overboard. *Held*, on the evidence, that there was no negligence in the stowage which rendered the vessel liable for the loss as a private carrier, either because of the use of gum instead of pine for the stanchions, which was customary, or because they were not lashed, which was not usual, and it further appearing that the bins as made were more than usually strong.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 454, 455, 466; Dec. Dig. § 123.*]

In Admiralty. Suit by the Pocahontas Coal Company against the steamship Rokeby and the Munson Steamship Company, charterer. Decree for respondents.

This is a libel in admiralty against the steamship Rokeby, brought by the Pocahontas Coal Company for the loss of part of a deck cargo of coke on the 7th of December, 1908, in the Gulf of Mexico, on a voyage from Newport News to Tampico, Mexico. The Munson Steamship Company was the charterer of the steamship Rokeby, and had accepted a cargo of coke from the libellant to occupy the whole of the vessel upon the voyage in question; the bill of lading especially providing that the coke should be stored both under and on deck. The Rokeby is what is known as a "three-island ship." She has two wells, forward and aft, upon which the deck cargo may be stored. The method adopted in the case at bar was as follows: Along the side of each well were located stanchions of gumwood, 4 by 6 inches in width and thickness and about 18 feet in height. These were 2 feet 6 inches apart; the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

longer dimension of the section of the stanchion being set athwartships. The base of each stanchion was set some 6 inches inboard from the inner side of the bulwark, and the stanchion was fastened by a wooden cleat to the top of the bulwark at a height of 3 feet from the deck; the remainder going free into the air. Inch planking was nailed horizontally on the inside of the stanchions, so that two sides of a bin were formed on either side of the ship. The forward and aft sides of the bin were made in the same way, thus inclosing the whole space of the well. The winches and mast in the forward and after wells were protected by a smaller bin inclosed within the larger, and the coke was piled into a space between the outer and inner bins so made. The total deck cargo was 1,120 tons, piled to a height of about 15 feet above the deck. The stanchions were held at the base by the weight and compactness of the coke itself, and the whole side was kept from going overboard by the steel bulwarks of the ship. The bulwarks were secured by braces, 3 feet 6 inches long, which were of steel, about 5 feet apart, or less, riveted into the steel deck.

The vessel had fair weather after leaving Newport News until Sunday, the 6th of December, when she was in the Gulf of Mexico on a course somewhat south of west, at which time she encountered a moderate breeze and heavy beam seas from the north. This caused her to roll heavily in the trough of the sea, and some of the stanchions on the port side of the after well began to bulge over the bulwark to the amount of 6 inches at the top. In order to prevent this from going any further, these were lashed with wire lashings across the top athwartships, using the winches to make them tight. On Monday the breeze freshened into a gale, and on the evening of that day, at about 8 o'clock, the wind became a whole gale, causing the steamer still more to roll. At about 8:30 the port bulwark on the after deck gave way altogether, and let overboard about 30 per cent. of the coke, carrying away the stanchions and coke together, and tearing the entire bulwark, so that it was well over the side of the vessel. This caused the vessel to list heavily to starboard, which broke the bulwark on the forward starboard well, throwing out about the same proportion of coke on that side. The steamer then righted herself and proceeded to Tampico, where she discharged the rest of her cargo.

Blodgett, Jones & Burnham, of Boston, Mass., for libellant.

Haight, Sanford & Smith, of New York City, for Munson Steamship Co.

Convers & Kirlin, of New York City, for claimant.

HAND, District Judge (after stating the facts as above). [1] The libel seeks to charge both the charterer and the ship, on the theory that the cargo was improperly stowed. As this is a case where the whole ship was occupied by the shipper, she is not a common carrier (*The Fri*, 154 Fed. 333, 83 C. C. A. 205), and the proof of loss alone does not throw any burden upon her to show there was no negligence in the stowage, but the libellant must show the negligence affirmatively. To meet this the libellant asserts that the stanchions were made of improper wood, and that they should have been lashed before the steamer started. On the first point it appears that gumwood is a very tough and springy kind of wood, which has not the same stiffness as pine, but will not break under the same pressure. The theory of the libel is that, had pine been used and the stanchions lashed across the ship, the stanchions could not have bent out and so produced a breaking strain on the bulwarks. Either one of two kinds of lashing should have been used, it is urged. First, the top should have been lashed across, which is usually done by running on the outside of the stanchions a piece of timber, forward and aft, on either side, and

then lashing between them several times across the top of the cargo. The other, known as the "soul and body" method, puts the lashings through the cargo and halfway up on the unsupported and exposed portions of the stanchions. As to this "soul and body" method, it was not devised or used until some time after the accident in question, and it cannot be within the precautions properly to be expected. I shall dismiss it, therefore, from the case.

[2] The first question, therefore, to be answered is whether, assuming gum stanchions to be used, and to be set two feet six inches apart, they should have been top-lashed when the master left port. It is quite true that the bin sides were unusually strong in the Rokeby; for the stanchions were nearer together than usual. As they were made of tough wood and were so re-enforced, they were much less likely to give way than pine stanchions spaced at four feet. Thus they placed an unusual strain upon the bulwarks, and it is, perhaps, on that account that they gave way. Hargreaves, the libelant's witness, thinks that either the stanchions should have been lashed, or should have been spaced more widely, so as to insure their breaking before the bulwark. The question of the character of the wood I shall come to later. It may be that to do either of these things would have saved the bulwark; but to let the bin sides break would have spilled some of the cargo anyway, and it is impossible to say how much more the libelant has lost than it would have lost in that case. Therefore the only complaint in the least material here is for the failure to top-lash the stanchions; for, as I have said, "soul and body" lashing is out of the case. This is no more than to ask how far the master should have anticipated danger to his bulwarks from the unusually strong bin sides which he carried. I do not find that Hargreaves suggests that he always top-lashed, before he used his "soul and body" lashing. Rather I infer that he preferred to make his bins weak enough to go by the board. It is true that he now thinks top-lashings desirable in the interest of the bulwarks, and upon the fact, if the case turned upon it, I should agree with him; for it seems pretty clear that they would help the bulwark, whether or not there was a bulge between the lashing and rail. However, the question is not whether they would help the bulwarks, but whether any one ought to have been afraid for the bulwarks. Their cargo was not a large one; it was smaller than had been intended, and smaller than many others that had been safely carried with similar fittings. Theretofore the only apparent danger had been to the stanchions, and it was on that account that they had been more closely spaced. No bulwark had ever broken; and, while that is, of course, not conclusive, it is a very important consideration when the question is only of ordinary human caution. Moreover, many cargoes, perhaps a majority of the cargoes, had gone out unlashed. I think it is a fair inference that such as were lashed were lashed rather with a view to protecting the stanchions than the bulwarks. Some of the witnesses still think that is the chief purpose of top-lashings. If so, when the Rokeby went out with such strong bin sides, she had already provided against the danger against which top-lashing was meant to protect; and her master

should not be held liable for not thinking of his bulwarks. If he had, he would have been, perhaps, peculiarly commendable; but all the law requires of him is ordinary caution, and that he certainly showed.

The libellant urges that from any point of view gum was an improper wood to use, because it is pliable and will throw a thrust upon the bulwarks, even if it be top-lashed. There is some dispute as to whether or not its pliancy does not serve to accommodate the bulwark to the shock of the momentum of the cargo in a rolling sea; but I do not find it necessary to determine that question, which is somewhat obscure. It is enough that gumwood was in the most general, if not universal, use for precisely this purpose at Newport News, and, indeed, at times elsewhere. It was extremely tough, and had a much higher breaking strength than pine. From the point of view of past experience with breaking stanchions, it was especially desirable, since pine would break. Here, again, Hargreaves thinks that its toughness made it dangerous to the bulwarks, even when lashed; but his judgment upon that, like his judgment upon arranging and securing the stanchions, either arises after the event, or was not generally shared by mariners. In the face of such a general usage, I cannot find that the wood was inherently dangerous.

Finally arises the question of the master's conduct after the stanchions showed signs of weakness on December 6th. He then lashed together the threatened stanchions, leaving the rest. No one knows at what point the bulwarks broke; but we must suppose that none of the stanchions did, else the bulwarks would have been relieved. At least, that was the most likely way in which the accident happened. If the bulwarks broke at the point of the lashed stanchions, then it was an accident quite unavoidable; for Hargreaves himself concedes that a bulge of six inches at the top of the stanchions is not serious, if checked by lashings, and if the coke does not work down to bulge out the stanchions below. Now, if the bulging stanchions were lashed, in so far as they bulged below, if at all, it was due to the character of the wood, which, as I have said, it was nevertheless reasonably suitable to employ. Therefore, as to those stanchions, the captain had done all that could in any case be expected of him, and had done it before any serious change had taken place to his detriment. If, on the other hand, the bulwarks broke at the point of the unlashed stanchions, at least they had shown no signs of bulging; and there was no more reason to apprehend danger from them than there had been at the commencement of the voyage.

The accident appears to have happened either because, from some unknown cause, the bulwarks were weaker than is usual in such ships, or because there was, as Judge Wallace says in *The Frey*, 106 Fed. 319, 324, 45 C. C. A. 309, 313, "an unlucky twist" in seas not extraordinarily rough." If a shipper wishes to protect himself against such accidents, he must insure; for they are not fairly a subject for the assessment of damages upon the basis of some one's negligence.

Libel dismissed.

In re BENWOOD BREWING CO.

(District Court, N. D. West Virginia. Jan. 28, 1913.)

1. RECEIVERS (§ 211*)—APPOINTMENT—COLLATERAL ATTACK.

The appointment of a receiver for a private corporation by a state court of general jurisdiction having power under the state statutes to make such appointment in a proper case is a judicial act, which cannot be questioned collaterally by any other court.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 421; Dec. Dig. § 211.*]

2. BANKRUPTCY (§ 211*)—POWERS OF COURT—ACTS OF STATE RECEIVERS.

A court of bankruptcy being vested with exclusive jurisdiction to administer estates of insolvents when such jurisdiction is properly invoked cannot refuse to exercise it by determining the validity of indebtedness created by a state receiver for a bankrupt prior to the bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. § 211.*]

3. CORPORATIONS (§ 560*)—PRIVATE CORPORATIONS—CREATION OF INDEBTEDNESS—PRIORITIES.

A court of equity is without power to authorize a receiver for a private corporation to incur indebtedness to the displacement of prior vested liens without the consent of the lienholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253-2260, 2262; Dec. Dig. § 560.*]

In Bankruptcy. In the matter of the Benwood Brewing Company, bankrupt. On distribution of assets.

The bankrupt corporation issued bonds for \$60,000, and secured the same by deed of trust upon all its real estate plant and fixtures. Nineteen thousand dollars of these bonds were sold for value. The remainder of them were hypothecated to secure sums borrowed at 50 cents on the dollar. The company became largely indebted to unsecured creditors, who were threatening suits. In this condition of affairs, Michael Agnic, in fact a stockholder, bondholder, creditor, and president of the company, presented to the circuit court of Marshall county, W. Va., his bill as an unsecured creditor only against the corporation, its bondholders, and numerous creditors, setting forth the bond issue, the debts outstanding, the threatened suits on the part of creditors, that the business was and would be profitable if creditors were stayed and a receiver appointed to conduct the business. Upon this bill and notice to the parties of the application, on November 16, 1909, the circuit court of Marshall county appointed G. D. Ridenour a special receiver, and directed him "to take charge of the real and personal property, business, and assets of the defendant, the Benwood Brewing Company, and conduct said business until the further order of this court, and collect the debts due said company, and apply and dispose of the assets of said company in accordance with the orders of said court, with the right to such receiver to employ such counsel, clerks, and other assistants as may be necessary to enable him to properly discharge his duties hereunder." Ridenour, under this appointment, did take charge of and conduct the business. In his management he incurred large indebtedness as receiver. No appearance to this bill was made until February 18, 1911, when a creditor tendered a demurrer thereto, and on February 16, 1912, certain bondholders also demurred. On the same day these demurrers were sustained, notice given by plaintiff of his purpose to file an amended bill which was filed the next day. Meanwhile, in October, 1911, this proceeding in bankruptcy was instituted, and Chas. J. Stuck was appointed receiver. In November following the company was adjudged bankrupt, the cause was referred to a referee, and Stuck elected trustee. A bitter controversy at once arose between

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the three classes of creditors, the bondholders, the creditors of Ridenour, receiver, and the unsecured creditors. A petition was presented to this court objecting to the referee, and asking that the cause be referred to another. Upon consideration of this petition an order was entered, agreeable to all parties, that the referee should take the evidence, and refer the matters in dispute direct to this court for its adjudication. This he has done.

John P. Arbenz and Caldwell & Caldwell, all of Wheeling, W. Va., for bondholders.

J. B. Sommerville, of Wheeling, W. Va., for Ridenour, state receiver, and his creditors.

McCamie & Clarke, of Wheeling, W. Va., for creditors of state court receivers.

Erskine & Allison, of Wheeling, W. Va., for other creditors of state receiver.

J. H. Brennan, of Wheeling, W. Va., for bankrupt's receiver.

DAYTON, District Judge (after stating the facts as above). The main controversy here is between the bondholders and the state receiver and creditors representing debts incurred by him as such receiver.

The bondholders insist that their prior vested lien upon the corpus of the property cannot be impaired or diminished by payment of the state receiver's compensation for services rendered by him, his counsel fees, and debts incurred by him. They base this contention upon substantially two grounds: First, because the circuit court of Marshall county had no jurisdiction to appoint Ridenour receiver because of lack of equity apparent on the face of the bill, that it has itself so held by sustaining the demurrer thereto; second, because a court of equity has no power, without the consent of all lien creditors, to authorize the receiver of an insolvent private corporation, whose business is not affected with any public interest, to incur indebtedness which will be a paramount lien upon its property, for the purpose of carrying on its business, unless it be necessary to do so to preserve the existence of the property or franchises.

[1] In determining the first proposition it seems to me necessary to bear in mind that this state court was one of general jurisdiction; that the property and the parties in interest were within its judicial limits and control; that it had under proper conditions the right and power to appoint a receiver for the company for all legal purposes and not otherwise.

[2] It seems to me, therefore, that the determination of whether the bill presented such equity as warranted the exercise of its admitted power to appoint was a judicial act such as could be, if not revoked by the court itself, only reversed by appeal to the proper appellate court, and, until so reversed, cannot be questioned collaterally by this or any other court. This bankruptcy court cannot under any circumstances exercise such appellate powers over the judicial acts of state tribunals. Where the act of such state court is absolutely null and void by reason of want of jurisdiction over the subject-matter or parties, then such act can be attacked collaterally in this as in

all other courts. The fact that this state court has sustained a demurrer to the original bill under which it appointed the receiver is strongly indicative of its doubt after maturer consideration of the propriety of appointing such receiver, but it is to be remembered that it has not reversed the appointment and discharged him, but, on the other hand, has, in effect, continued him and permitted the plaintiff in the proceeding to file an amended bill, a demurrer to which, the record discloses, it has now under advisement. The filing of such amended bill is expressly authorized by statute in this state, and, if the amendment is proper, it is held to relate back in effect to the time of the filing of the original bill. I am therefore convinced that these bondholders cannot maintain here their first contention. The second one presents far more difficulty. Its solution cannot be solved upon the same grounds as the first, in my judgment, for two reasons: First, because the state court has not passed upon or approved in any manner the legality of its receiver's expenditures, has not decreed payment of any of the debts contracted by him nor determined whether they were authorized legally to be incurred by him; second, the jurisdiction of this court in bankruptcy is essentially exclusive in administering the affairs of insolvent individuals and corporations. *New River Coal Land Co. v. Ruffner Bros.*, 165 Fed. 881, 91 C. C. A. 559. It cannot, when properly applied to, refuse to take jurisdiction because a proceeding to the same end and purpose is pending in a state court, but, per contra, it may stay all action in the state court in such proceeding. This for the reason, among others, that the Bankrupt Act as the supreme law of the land must see that the insolvent's assets are administered in accord with its requirements, and not in accord with state laws that may be in antagonism to it. I have pointed out in *Re Hurst* (D. C.) 188 Fed. 707, at bottom page 709, the antagonism existing between the Bankrupt Act and the law of this state relating to preferences, which very well illustrates the reason for this exclusive jurisdiction. It therefore becomes necessary for this court to determine the validity of these debts incurred by the receiver and their claim of priority over the bondholders.

[3] The first inevitable conclusion to be drawn from the evidence is that these debts were incurred by the receiver not in preserving the property, but in operating and adding to it. They were incurred for coal, grain, hops, malt, bottles, boxes, and other articles necessary to the manufacture, shipping, and sale of beer. It goes without saying that this corporation was a purely private one. Under such circumstances, could any court of equity allow its receiver to incur such debts and charge them against the corpus of the corporation's estate in preference to vested prior liens without the consent of such lienholders? There may be some confusion of authority upon this question, but it seems to me that the great weight of such authority, as well as sound reason and morals, favor the negative answer to it. In the first place, a sound distinction is to be drawn between these purely private corporations and quasi public ones, such as railroad, telegraph, and telephone ones. In the latter the public at large has interest, in the former none whatever. Yet in *Kneeland v.*

American Loan Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, involving a railroad receivership, the Supreme Court says:

"Upon these facts we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of a contract lien, for the reason that there seems to be growing an idea that the chancellor in the exercise of his equitable powers has unlimited discretion in this matter of the displacement of vested liens."

This ruling has been approved in *Thomas v. Western Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663; *Southern Ry. v. Carnegie Steel Co.*, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458; *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717. It has been very clearly considered in the case of *International Trust Co. v. United Coal Co.*, 27 Colo. 246, 60 Pac. 621, 83 Am. St. Rep. 59, and in a very clear and valuable note thereto found in this last cited report thereof. See, also, *Atchison, T. & S. F. Ry. Co. v. Osborn*, 78 C. C. A. 378, 148 Fed. 606. These cases are cited to show that in the cases of quasi public corporations receiverships must be limited in their power to affect vested liens, and therefore for stronger reasons private ones must be so limited. It is not the province of a court of equity, except under most extraordinary conditions, to establish and maintain a stay of collection by creditors of their debts against individuals or private corporations, nor is it its province to embark in and conduct private business enterprises. In *U. S. Investment Corporation v. Portland Hospital*, 40 Or. 523, 64 Pac. 644, 67 Pac. 194, 56 L. R. A. 627, it was held:

"A court cannot in appointing a receiver for a hospital authorize him to continue its operation, and contract debts which shall, without the consent of prior contract lienholders, take precedence over their claims. Mere failure of holders of prior contract liens on a hospital to object to the carrying on of the business by a receiver of the property, not appointed at their request, will not estop them from denying that debts thereby contracted shall take precedence of their claims, where nothing in the proceedings indicates an intention to charge the property with preferred liens for debts contracted by him."

In *Dalliba v. Winschell*, 11 Idaho, 372, 82 Pac. 109, 114 Am. St. Rep. 267, it was held that a court cannot direct a receiver in charge of placer mines to carry on mining business and make expenses thereof preferred over prior mortgage. In *Fisher v. Southern Loan & Trust Co.*, 138 N. C. 103, 50 S. E. 592, at page 597, it was held that the court cannot authorize issuance of receiver's certificates to pay expenses of administrator in discharging mortgages, paying funeral expenses, attorney's fees, and expense of support of family.

In *Fidelity Insurance, Trust & Safe Deposit Co. v. Roanoke Iron Co.* (C. C.) 68 Fed. 623, the late Judge Paul of the Western District of Virginia, within this circuit, very clearly discusses the question, holding that:

"A court of equity has no power without the consent of all lien creditors to authorize the receiver of an insolvent private corporation, whose business is not affected with any public interest, to issue certificates which will be a paramount lien upon its property, for the purpose of carrying on its business, unless it be necessary to do so in order to preserve the existence of the property or franchises."

And, finally, it has been held by the Circuit Court of Appeals for this circuit in *Baltimore Building & Loan Ass'n v. Alderson*, 32 C. C. A. 542, 90 Fed. 142, that:

"A court cannot authorize the issuance of receiver's certificates for the purpose of improving or adding to the property of a private corporation, or of carrying on its business, without the consent of creditors whose liens would be affected thereby."

In accord with these principles, I hold that neither the claims of the receiver for personal compensation and counsel fees nor the debts incurred by him as receiver can be allowed to take precedence over the bond lienors, save and except the bonds held by Agnic, who sought and applied for the receiver's appointment, and must be held to have fully consented to his expenditures incurred in carrying on the business. Those bondholders, except Agnic, who purchased bonds outright for value, must be paid in full. Those who took bonds as collateral security must be paid the amounts of their debts so secured by said bonds before any of these state receiver obligations. As regards any surplus remaining, it is entitled to be applied to the payment of reasonable compensation and counsel fees of such receiver, and then to his receivership debts ratably, then Agnic's bonds will be next payable, and finally simple contract debts of the bankrupt.

The cause will therefore be remanded to the referee with instructions to direct Stuck, trustee, to pay out of the funds arising from other sources than the incumbered property: (a) The costs and expenses of this proceeding, including an attorney's fee of \$150 to the attorney for the petitioning creditors; (b) the costs of the receivership in this court, including that for the appraisal made, the fee for his attorney of \$250, and for his personal compensation \$600 (it is clear from the record that the matters were so involved and complicated and legal services were so necessary, as to make these allowances reasonable); (c) any residue of such funds arising from other sources than the mortgaged property he shall apply to the payment of a rea-

sonable counsel fee for services rendered to Ridenour the state receiver to a reasonable allowance to him for his services, then to the debts incurred by him to be paid ratably, and then any residue ratably to the unsecured creditors of the bankrupt. The proceeds of the sale of the mortgaged property he shall apply first to the payment of the bonds as herein above indicated, and as to any residue he shall direct the payment thereof to be made in the same order as above directed to be made of the fund arising from the unincumbered property.

WEST SIDE R. CO. v. CALIFORNIA PAC. R. CO. et al.

(District Court, N. D. California, Second Division. January 13, 1913.)

1. REMOVAL OF CAUSES (§ 107*)—PROCEEDINGS FOR REMAND—SCOPE OF INQUIRY.

The question of the removability of a cause must be determined on the record at the time of removal, and cannot be affected by affidavits filed in support of a motion to remand.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 220, 225-234; Dec. Dig. § 107.*]

2. REMOVAL OF CAUSES (§ 46*)—GROUNDS—DIVERSITY OF CITIZENSHIP.

A cause in which several defendants are joined is not removable, on the ground of diversity of citizenship, unless it appears from the record that the defendant seeking it is the sole proper or necessary party defendant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 90, 91; Dec. Dig. § 46.*]

3. REMOVAL OF CAUSES (§§ 46, 52*)—GROUNDS—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.

A proceeding for condemnation of property, brought by a California corporation under Code Civ. Proc. Cal. § 1244, which requires all owners or claimants of the property to be made parties, is not removable, on the ground of diversity of citizenship, by one of a number of defendants, where the complaint alleges that other defendants, who are citizens of the state, claim an interest in the property; nor is it removable, on the ground of a separable controversy, where it appears that the claims of the defendants are to the same property.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 90, 91, 102, 103, 105; Dec. Dig. §§ 46, 52.*]

Removal of causes, separable controversy, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valletown Mineral Co., 35 C. C. A. 155; Pollitz v. Wabash R. Co., 100 C. C. A. 4.]

Action for condemnation of property by the West Side Railroad Company against the California Pacific Railroad Company, the Southern Pacific Company, and others. On motion to remand to state court. Motion sustained.

This is a motion to remand. The action was brought in the state court by the plaintiff, a railroad corporation of this state, against the California Pacific Railroad Company, also alleged to be a corporation organized and existing under the laws of this state, the Southern Pacific Company, a corporation having its creation and existence under the laws of Kentucky, and other defendants, sued by fictitious names, to condemn property for use as a right of way for plaintiff's railroad—the complaint alleging that "the owners and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claimants of the property herein sought to be condemned and herein described, so far as the same are known to the plaintiff, are: California Pacific Railroad Company, a corporation, Southern Pacific Company, a corporation," and the fictitious defendants; and after a description of the property sought to be taken it is alleged "that the defendant California Pacific Railroad Company claims to own said real property hereinbefore described, and required by plaintiff, being the entire parcels or tracts of land, of which the real property sought to be taken is the whole."

The defendant Southern Pacific Company, within due time after service of summons upon it, procured an order of the state court removing the cause to this court upon a petition the material averments of which, after stating formal jurisdictional matters, are:

"That the California Pacific Railroad Company, named as a defendant in plaintiff's said complaint, ever since the 12th day of April, 1898, has been and now is a defunct and extinct corporation, and has no right, title, or interest in or to the property therein sought to be condemned, or in or to the alleged cause of action therein stated. That the defendants John Doe Company, a corporation, Richard Roe, Thomas Coe, Mary Moe, and John Brown are fictitious, nominal, and formal parties, and have no interest whatsoever in or to said property or said alleged cause of action as stated in plaintiff's complaint. That defendant Southern Pacific Company has a substantial and material interest in and to the property described in the complaint, and is the only proper party defendant appearing on the face of said complaint. That at the time of the commencement of this suit there was, ever since has been, and still is therein a controversy wholly between citizens of different states, which can be fully determined between them; that is to say, between plaintiff, West Side Railroad Company, and said defendant, Southern Pacific Company, your petitioner."

Plaintiff's motion to remand proceeds upon the ground that, upon the facts disclosed in the record, the cause is one not subject to removal. In its formal motion filed for that purpose, in addition to such general ground, it is stated:

"That said action is an action in eminent domain, wherein and whereby said plaintiff seeks to condemn for the uses and purposes of the plaintiff a certain lot of land situate in said county of Yolo, state of California, and that under and by virtue of the statutes of the said state of California relating to eminent domain, to wit, subdivision 2 of section 1244 of the Code of Civil Procedure of state of California, all persons who are owners or claimants of the property sought to be condemned are necessary parties to said action. That the Southern Pacific Company, a corporation, claims to be in possession and entitled to possession of said property. That, so far as the records of said county of Yolo show the ownership of said property, the Pacific Improvement Company, a corporation, by deed of grant, bargain, and sale, made and executed by Pacific Improvement Company, dated May 29, 1894, conveyed said property to defendant California Pacific Railroad Company, a corporation. That said California Pacific Railroad Company, a corporation, was organized and existing under and by virtue of the laws of the state of California, and that its principal place of business was at all times in the said city and county of San Francisco, state of California, and that therefore it was at all times a resident and citizen of the said state of California. That on the 12th day of April, 1898, certain articles of incorporation and amalgamation were executed between the said California Pacific Railroad Company, a corporation, and the Southern Pacific Railroad Company and other corporations, wherein and whereby said corporations were amalgamated and incorporated under the laws of the state of California as the Southern Pacific Railroad Company, and that the Southern Pacific Railroad Company is organized and existing under and by virtue of the laws of the state of California, and has its principal place of business in the city and county of San Francisco, state of California, and is a resident and citizen of said state of California. That in and by the said articles of amalgamation and incorporation all of the property of the said California Pacific Railroad Company, a corporation, is transferred to and vested in the said Southern Pacific Railroad Company."

The motion is accompanied by an affidavit purporting to disclose and set forth the present state of the title, so far as appears on the records of the county where situated, to the premises in controversy, in accordance with the statements above recited in the plaintiff's motion.

Mastick & Partridge, of San Francisco, Cal., for the motion.
Devlin & Devlin, of Sacramento, Cal., opposed.

VAN FLEET, District Judge (after stating the facts as above).

[1] The facts set forth in the plaintiff's motion to remand and the accompanying affidavit in their support, as to the present state of the title to the premises, must be laid out of view and disregarded in determining the removability of the case, since that question must depend upon the state of the record in the state court when the cause was removed here. *Louisville, etc., R. R. Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474; *Alabama G. S. Ry. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147.

[2] As appears from the facts stated the removal was sought on the two grounds of diversity of citizenship and the existence of a separable controversy as between the removing defendant and the plaintiff. Upon the first ground where there are several defendants joined, a removal cannot be had, unless it appear from the record that the defendant seeking it is the sole, proper, or necessary party defendant in the action.

[3] Under the law of California (section 1244, subd. 2, Code of Civil Procedure) all owners or claimants of property sought to be condemned are necessary parties to the action. In this respect the complaint (ignoring the nominal or fictitious defendants) proceeds upon the theory, and alleges, that both the Southern Pacific Company, the defendant bringing the cause here, and the California Pacific Railroad Company, alleged to be a corporation organized and existing under the laws of this state, are claimants of the property sought to be condemned. For present purposes, these allegations of the complaint are conclusive on the court; there being no averment in the petition for removal that the local corporation was wrongfully joined as a defendant for the purpose of preventing a removal. The averments in the petition that the latter corporation is "defunct and extinct," and "has no right, title, or interest in the property," and that the Southern Pacific Company "is the only proper party defendant appearing on the face of said complaint," are unavailing to change the aspects of the case, as those averments only tend to raise issues which may not be competently inquired into on this motion. Whether the alleged local corporation defendant is now in existence, and, if so, has title to the property, are questions involved in the merits of the cause of action stated, and upon which the plaintiff is entitled to have issue joined in the formal pleadings and regularly tried with the other issues in the case by a jury. *Louisville, etc., R. R. Co. v. Wangelin*, supra, 132 U. S. 603, 10 Sup. Ct. 203, 33 L. Ed. 474. Upon the record, therefore, the case is not one subject to removal upon the ground of diversity of citizenship.

Does the record disclose the existence of a separable controversy? In this regard the averments of the petition are very general and

meager. In effect, the bald averment above stated that a separable controversy exists is no more than the averment of a conclusion of law. On the requirements of the petition in this respect, Mr. Moon says:

"Although the plaintiff's complaint must be looked to as the evidence from which to determine whether a suit contains a separable controversy, a petition for removal on such ground should itself 'distinctly show and point out the separable controversy, name the parties to it, and state all the grounds upon which the petitioner relies.'" Removal of Causes, § 159.

As plaintiff, however, makes no point based on the paucity of the petition in this respect, the court will examine the allegations of the complaint to see if such ground is disclosed.

The complaint, as we have seen, alleges, and, so far as appears, in perfect good faith, that ownership in the premises involved is asserted by both of the two corporations named as defendants, the California Pacific Railroad Company and the Southern Pacific Company. The specific character of the ownership of each is not attempted to be stated, and it was not necessary that it should be, that being more properly subject-matter for an answer. The pleading is therefore to be taken, notwithstanding it describes the property as consisting of separate lots, as proceeding upon the theory that each of these two defendants makes claim of ownership in the entire property sought to be condemned treated as a single parcel, and that the pleading is so understood by the removing defendant is disclosed by the allegations in its petition that the California Pacific Railroad Company "has no right, title, or interest in or to the property therein sought to be condemned," and that the defendant Southern Pacific Company "has a substantial and material interest in the property described in the complaint." It is not a case, then, of two defendants claiming separate and distinct interests in different parcels of property, but where the two defendants are asserting title to one and the same property. This being so, no separable controversy is made to appear.

Upon the theory upon which the action proceeds, each of the two defendants named is under the statute of the state a necessary party to the proceedings; and, as stated by Mr. Moon, in an action against several defendants—

"to appropriate a single tract of land the controversy between the plaintiff and one defendant is not separable from that between the plaintiff and any other defendant." Removal of Causes, § 144.

In this respect it can make no difference that the action may turn out to have been brought upon an erroneous theory and that plaintiff may on the trial fail to sustain his cause of action as laid. The truth of the facts as above stated cannot be tried in this proceeding. The court is circumscribed by the record before it, and the plaintiff has the right to proceed upon the theory outlined in his complaint, notwithstanding that theory may prove erroneous.

In *Alabama G. S. Ry. Co. v. Thompson*, supra, where plaintiff had sued two defendants jointly upon what was contended to be an erroneous theory, the court, after a review of all the authorities on the subject, say:

"Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed, unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the federal court."

Under the principles thus obtaining it can make no difference to the rights of the parties on this motion if it be true, as asserted at the argument, that since the action was commenced the entire title to this property has passed by deed from the successor of the California Pacific Railroad Company to the defendant Southern Pacific Company. That fact may affect the eventual rights of the parties to the action, but it adds nothing to the record which may be considered here.

It may be added that, should the case upon going back assume a different aspect by amendment of the pleadings or otherwise, so as to present for the first time a cause for removal by the defendant now seeking it, it will not then be too late to assert that right. *Bagenas v. Southern Pacific Co.* (C. C.) 180 Fed. 887, and cases there cited. As the case now stands, the right of removal does not exist.

The motion to remand will be granted.

BRENT v. CHAS. H. LILLY CO.

(District Court, W. D. Washington, N. D. January 30, 1913.)

No. 1,760.

1. NEW TRIAL (§ 114*)—RESIGNATION OF JUDGE PENDING MOTION—AUTHORITY OF SUCCESSOR.

Where the District Judge resigned without ruling on a petition for new trial and settlement of the bill of exceptions, but there was a full stenographic report of the proceedings of the trial, the notes of which were extended, the defeated party was not entitled to a new trial as a matter of right, under Act June 5, 1900, c. 717, 31 Stat. 270 (U. S. Comp. St. 1901, p. 696), providing that, where the trial judge by reason of disability is unable to pass on a motion for new trial and allow a bill of exceptions, his successor shall do so, where the evidence has been taken in stenographic notes.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 234-236; Dec. Dig. § 114.*]

2. COURTS (§ 329*)—JURISDICTION—AMOUNT IN CONTROVERSY.

Where plaintiff, suing in the District Court, demanded in good faith judgment for over \$3,000, and defendant pleaded the general issue and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an affirmative defense, the evidence under which disclosed the real controversy, the District Court had jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. § 329.*]

Jurisdiction as determined by amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent Stribling Shoe Co. v. Roper*, 36 C. C. A. 459; *O. J. Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 288.]

3. APPEAL AND ERROR (§ 1099*)—LAW OF THE CASE—DECISION OF COURT ON APPEAL.

A decision of the Circuit Court of Appeals that a contract of sale of blue grass seed, entered into between a seller in Kentucky and a buyer in Washington, is ambiguous as to the number of pounds to be delivered for a bushel, and remanding the case for the jury to determine the meaning of the contract, in view of the facts of the case, conclusively determines the materiality of evidence of custom in Kentucky that 14 pounds constituted a bushel admitted on the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

4. CUSTOMS AND USAGES (§ 15*)—EVIDENCE—ADMISSIBILITY.

Where a seller in Kentucky sold to a buyer in Washington blue grass seed, but the contract of sale was ambiguous as to the number of pounds to be delivered for a bushel, evidence of the custom in Kentucky that 14 pounds constituted a bushel was admissible, provided the buyer knew of the custom and contracted with reference to it, whether the sale took place in Kentucky or in Washington.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 30-33; Dec. Dig. § 15.*]

5. APPEAL AND ERROR (§ 1212*)—REMAND OF CAUSE—ISSUES IN LOWER COURT.

Where, in an action for the price of blue grass seed, the issue was restricted by the Circuit Court of Appeals to the question as to what the contract between the parties was, and the court on a new trial clearly limited the issue submitted to the jury to the question whether the contract called for blue grass seed at 14 pounds per bushel, or 21 pounds, the action of the court in ruling that the jury could not find on a quantum meruit was proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4713; Dec. Dig. § 1212.*]

6. TRIAL (§ 273*)—INSTRUCTIONS—EXCEPTIONS.

A party complaining of the instructions must, as required by court rule 58, except thereto before the return of the verdict, so that the trial court may have an opportunity to correct any mistake or more fully advise the jury as to the law; and the matter is not controlled by rule 75, which applies to bills of exception generally and their settlement, and not to the announcement or taking of exceptions to the instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 680-682; Dec. Dig. § 273.*]

At Law. Action by N. Ford Brent, doing business under the firm name of Charles S. Brent & Bros., against the Charles H. Lilly Company. Petition for new trial denied.

See, also, 174 Fed. 877.

Preston & Thorgrimson, of Seattle, Wash., for plaintiff.

J. H. Allen, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. This cause is before the court upon defendant's petition for a new trial. The plaintiff, a Kentucky seed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dealer, sued to recover \$3,024 for a shipment of Kentucky blue grass seed sold the defendant, a large seed dealer of Seattle, Wash. The contract is evidenced by certain letters and telegrams between the parties. These are set out in the former opinions in this case of the Circuit Court and the Circuit Court of Appeals. (C. C.) 174 Fed. 882; 186 Fed. 700, 108 C. C. A. 518.

The real dispute between the parties is whether, under the contract, the seed was to be measured at 14 pounds to the bushel, as claimed by the plaintiff, or 21 pounds, as claimed by the defendant. Upon the first trial, the court held that the written contract was not ambiguous, and that under it 14 pounds was to constitute a bushel, and instructed the jury to return a verdict accordingly. 174 Fed. 882.

Upon writ of error, the Court of Appeals held that the Circuit Court had erred, that one of the writings constituting the contract was ambiguous, and that its meaning, taken in connection with the balance of the correspondence, should have been left to the determination of the jury under appropriate instructions from the court. A second trial was had, and a verdict returned in accordance with plaintiff's contention. The trial judge having resigned without a ruling had upon the petition for a new trial, the same is now before the court.

The following authorities are relied upon by the plaintiff: *Nelson v. Imper. Trad. Co.* (Wash.) 125 Pac. 777; 22 Am. & Eng. Enc. of Law, p. 1339; *Hamilton v. Schlitz Brewing Co.*, 129 Iowa, 172, 105 N. W. 438, 2 L. R. A. (N. S.) 1078; *Clark v. Shannon & Mott Co.*, 117 Iowa, 645, 91 N. W. 923; *Aerheart v. St. Louis, I. M. & S. Ry. Co.*, 99 Fed. 907, 40 C. C. A. 171; *Doyle v. Union Pac. Ry. Co.*, 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223; *Baltimore & P. R. Co. v. Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. Ed. 784; *Simmons v. U. S.*, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968.

The defendant relies upon the following authorities: *Portland Flouring Mills Co. v. British F. & M. Ins. Co.*, 130 Fed. 862, 65 C. C. A. 344; *Phoenix Co. v. Humphrey-Ball*, 58 Wash. 401, 108 Pac. 952; *Hopkins v. Cowen*, 90 Md. 152, 44 Atl. 1062, 47 L. R. A. 124; *Treadwell v. Anglo American* (C. C.) 13 Fed. 23, 5 Ann. Cas. 263; 22 Am. & Eng. Enc. of Law (2d Ed.) 1340; *Dow v. Gould*, 31 Cal. 629; *Mead v. Dayton*, 28 Conn. 33; *Lewis v. McCabe*, 49 Conn. 155, 44 Am. Rep. 217; *Weil v. Golden*, 141 Mass. 364, 6 N. E. 229; *Camwell v. Sewell*, 5 H. & N. 728; *Rhode Island Locomotive Works v. South Eastern R. Co.*, 31 L. C. Jur. 86; *G. A. Gray Co. v. Taylor Bros. Iron Works Co.*, 66 Fed. 686, 14 C. C. A. 56; *Koster v. Merritt*, 32 Conn. 248; *Brinker v. Scheunemann*, 43 Ill. App. 662; *Diether v. Ferguson Lbr. Co.*, 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765; *Fred Miller Brewing Co. v. De France*, 90 Iowa, 395, 57 N. W. 959; *Finch v. Mansfield*, 97 Mass. 89; *Kline v. Baker*, 99 Mass. 253; *Brockway v. Maloney*, 102 Mass. 308; *Dolan v. Green*, 110 Mass. 322; *Ames v. McCamber*, 124 Mass. 85; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Portsmouth Brewing Co. v. Smith*, 155 Mass. 100, 28 N. E. 1130; *Tarbox v. Childs*, 165 Mass. 408, 43 N. E. 124; *Orcutt v. Nelson*, 1 Gray (Mass.) 536; *Kling v. Fries*, 33 Mich. 275; *Sullivan v. Sullivan*, 70 Mich. 583, 38 N. W. 472; *Webber v. Howe*, 36 Mich.

150, 24 Am. Rep. 590; *In re Kahn*, 55 Minn. 509, 57 N. W. 154; *Lynch v. Stott*, 67 N. H. 589, 30 Atl. 420; *French v. Hall*, 9 N. H. 137, 32 Am. Dec. 341; *Sessions v. Little*, 9 N. H. 271; *Lauten v. Rowman*, 59 N. H. 215; *Fuller v. Leet*, 59 N. H. 163; *Backman v. Jenks*, 55 Barb. (N. Y.) 468; *D'Ivernois v. Leavitt*, 23 Barb. (N. Y.) 63; *Jaffray v. Wolf*, 4 Okl. 303, 47 Pac. 496; *Born v. Show*, 29 Pa. 288, 72 Am. Dec. 633; *Baltimore & O. R. Co. v. Hoge*, 34 Pa. 214; *Henry v. Philadelphia Warehouse Co.*, 81 Pa. 76; *Braunn v. Keally*, 146 Pa. 519, 23 Atl. 389, 28 Am. St. Rep. 811; *Perlman v. Sartorius*, 162 Pa. 325, 29 Atl. 852, 42 Am. St. Rep. 834; *Arnold v. Shade*, 3 Phila. (Pa.) 82, 15 Leg. Int. 75; *Lowrey v. Ulmer*, 1 Pa. Super. Ct. 425; *Whiting Mfg. Co. v. Fourth St. Nat. Bank*, 15 Pa. Super. Ct. 419; *Mack v. Lee*, 13 R. I. 293; *Beverwick Brewing Co. v. Oliver*, 69 Vt. 323, 37 Atl. 1110; *State v. O'Neil*, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557.

[1] There was a full stenographic report of the proceedings of the trial, the notes of which have now been extended. The defendant is therefore not entitled, on account of the resignation of the trial judge prior to the ruling on the motion for a new trial and settlement of the bill of exceptions, to a new trial as a matter of right. Act June 5, 1900, c. 717, 31 Stat. at Large, 270, 4 Fed. Stat. Ann. 594, § 953 (U. S. Comp. St. 1901, p. 696); *Penn Mut. Life Ins. Co. v. Ashe*, 145 Fed. 593, 76 C. C. A. 283, 7 Ann. Cas. 491.

[2] Defendant contends that, the effect of the dispute between the parties being the difference between the price of the seed at 14 pounds to the bushel and 21 pounds to the bushel, which difference would amount to \$1,008, therefore the amount in controversy is not sufficient to give the court jurisdiction. This error was urged before the Court of Appeals, but not sustained. The defendant, though admitting it owed the plaintiff \$2,016, an amount in excess of that then required to give the court jurisdiction, did not pay the amount, and suit was brought to recover \$3,024. The jurisdiction is fixed by the amount sought, in good faith, to be recovered by the complaint. Under the pleadings there could be, and was, a judgment recovered in excess of the jurisdictional amount. Nothing more is required. *Vance v. W. A. Vandercook*, 170 U. S. 468, at 472, 18 Sup. Ct. 645, 42 L. Ed. 1111.

The defendant, in its answer, pleaded the general issue, as well as an affirmative defense, in which latter the real nature of the differences between the parties, as afterward developed by the evidence, was disclosed. It is considered that, other questions apart, this general denial, putting in issue plaintiff's right to recover, would show the jurisdictional amount to be in controversy, for by that denial plaintiff's right to recover anything was disputed.

[3] The defendant further contends that the court erred in admitting evidence tending to show that in Kentucky there was a custom that 14 pounds of blue grass seed constituted a bushel. This evidence was admitted on the first trial, over defendant's objection—an objection noted, but not sustained, by the appellate court on the writ of error. The objection then made by the defendant was that the

written contract was not ambiguous, and that, therefore, evidence of the custom in Kentucky was inadmissible. The appellate court held that the contract was ambiguous, and said concerning the evidence as to the alleged custom:

"The only ground for the admission of such evidence was that it might aid in the true construction of the contract. If needed for that purpose, it was clearly a matter for the jury, since the evidence upon the subject was conflicting; and such could only have been the theory upon which the alleged custom was set up in the complaint."

The cause was remanded for the jury to determine the meaning of the ambiguous writing, "in view of all the facts and circumstances of the case." The materiality of this testimony is, therefore, no longer an open question in this case.

[4] As a part of this contention, the defendant claims that, in the sale, title passed at Seattle, and not at Paris, Ky.; that, therefore, the custom of Washington and neighboring states was alone material. Without deciding whether the sale took place at Seattle or Paris—a point not covered by the instructions—the evidence is, in either event, material. In Washington, and the West generally, blue grass and other seeds and grains are sold by the pound, or 100 pounds, and there cannot be said to be an established custom here as to the number of pounds constituting a bushel.

Kentucky is recognized as the leading market and producing section for blue grass seed, and, in the absence of an established custom at the place of sale, in case of doubt concerning the meaning of the parties to a contract in this particular, evidence of the custom in Kentucky would be admissible, provided the jury found that the defendant knew of the custom and contracted with reference to it, all of which questions were submitted to the jury under appropriate instructions, to which no exception was taken.

A large number of other errors are assigned—over 70. These relate to rulings made upon the admission and rejection of evidence, and remarks by the court in the presence of the jury, alleged to have been prejudicial to the defendant. Error is also assigned upon various of the court's instructions. These assignments are too great in number to receive separate mention, but an examination fails to disclose any deemed to have prejudiced the defendant. None of the comments of the court concerning the evidence exceeded the latitude allowed in such cases. *Aerheart v. St. Louis, I. M. & S. Ry. Co.*, 99 Fed. 907, 40 C. C. A. 171; *Doyle v. Union Pac. Ry. Co.*, 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223; *Baltimore & P. R. Co. v. Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. Ed. 784; *Simmons v. U. S.*, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968.

In the court's charge to the jury they were told:

"In calling your attention to the particular features of the evidence, you will bear in mind that I am simply doing that to illustrate and make plain the points I am going over, and not as in any way controlling you in your judgment upon any question of fact."

[5] Error is assigned because the trial judge ruled that the jury could not find upon the quantum meruit. Such ruling was manifestly

correct. The only issues raised by the pleadings were as to what the contract between the parties really was. It was to determine that question that the cause was remanded by the Circuit Court of Appeals. The court clearly limited the issues, submitted to the jury for their determination by its instructions, to the question whether the contract was for blue grass seed at 14 pounds, or 21 pounds, to the bushel, and no exception was taken to this part of the charge.

[6] A number of errors are assigned concerning the charge to the jury, but they nearly all are concerning matters to which no exception was taken while the jury was at the bar or before the return of the verdict. Nothing is found in the charge prejudicial to the defendant; but it is considered a substantial right of litigants that their adversary be required to take all exceptions to the charge before the return of the verdict, in order that the trial judge may have the opportunity to correct any mistake concerning, or more fully advise the jury as to, the law. Rule No. 58 of the rules of this court provides:

"Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court, after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same."

Nothing appears in the record or upon the argument to take this case out of the rule. The defendant contends that this matter is controlled by rule numbered 75, and not by rule 58; but it is clear that rule 75 applies to bills of exception generally and their settlement, and has no application to the announcement or taking of exceptions to the charge to the jury.

Petition for a new trial denied.

HAWKINS v. BARBER ASPHALT PAVING CO.

(District Court, D. Oregon. January 20, 1913.)

No. 5,700.

DEATH (§ 31*)—ACTION FOR DEATH—EMPLOYER'S LIABILITY ACT—RIGHT OF ADMINISTRATRIX.

Employer's Liability Act Or. (Laws 1911, p. 17) § 4, provides that if there shall be any loss of life by reason of the neglects or violations of the provisions of the act by any owner, contractor, or subcontractor, or any person liable under the provisions of the act, the widow of the decedent, his lineal heirs, or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action, without any limit as to the amount of damages. *Held*, that such section gives but one action for the death of an employé, which survives to the widow of the person killed, his lineal descendants, or adopted children; and an action by the widow as the decedent's administratrix cannot be maintained.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. § 31.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Action by Margaret C. Hawkins, as administratrix of the estate of Delford S. Hawkins, deceased, against the Barber Asphalt Paving Company. On demurrer to the complaint on the ground of another action pending. Denied.

John F. Logan and I. N. Smith, both of Portland, Or., for plaintiff.
Rauch & Senn, of Portland, Or., for defendant.

WOLVERTON, District Judge. This is a case which, from a reading of the complaint, it would appear was brought under the Employer's Liability Act (Laws 1911, p. 16) passed in the state of Oregon by initiative on November 8, 1910. The purpose of the suit is to recover damages for the death of Delford S. Hawkins, which, it is alleged, was caused by the negligence of the defendant and its foreman. Subsequent to the institution of this action another was instituted by Margaret C. Hawkins against the paving company and Tom Sloane, its foreman, apparently under the same statute, to recover damages for the death of Delford S. Hawkins, alleging negligence arising out of the same state of facts.

The defendant now demurs to the complaint in the case instituted by Margaret S. Hawkins as administratrix, on the ground that it appears from the complaint and the records of the court that there is another action pending in this court by the plaintiff against the defendant paving company for the same cause of action set forth in the complaint herein. This presents the question whether or not, under the said Employer's Liability Act, more than one cause of action exists for alleged injuries sustained by reason of the negligent acts of the employer, his foreman or agent, while acting in pursuance of that particular statute, or within its purview, where loss of life has been sustained. Section 4 of the act provides that:

"If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother, or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded."

It would seem that this statute gives an action for negligence arising from particular acts, and so far as it gives a right of action for the death of a person it is akin to Lord Campbell's Act. This may be termed a survival action. At common law there was no right of action for the death of a person, but it is the purpose of this act to give to certain individuals such a right.

In my view of the statute, it gives but one action, which is not cumulative in its purpose or character. This action survives to the widow of the person killed, his lineal descendants or adopted children, etc., and the right of action is without limit as to the amount of damages. California has a statute (section 377, Pomeroy's Code of Civil Procedure of California) which provides that:

"When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such per-

son is employed by another who is responsible for his conduct, then also against such other person."

This statute has been construed by the Supreme Court of the state of California to give but one action, which action may be brought either by the heirs of the deceased or by his personal representatives, and when one action is instituted, the court having competent jurisdiction of it, that is the only action which the statute permits, "as, for instance," quoting from the opinion of the court, "when the personal representative of the deceased brings an action to recover damages for the act or neglect causing death, if another action is afterward brought by the heirs of the deceased, the pendency of the prior action may be well pleaded in abatement of it; or if a judgment has been rendered in the first, such judgment may be well pleaded in bar of the second action." *Munro v. Dredging, etc., Co.*, 84 Cal. 515, 522, 24 Pac. 303, 305 (18 Am. St. Rep. 248).

In the case of *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. 139, the court said:

"The relatives, or the representative in their behalf, can recover the value of that which they have lost through the wrongful act of the defendant, and nothing more. It is true, in the case of a mother or a wife, the jury have been allowed to consider the fact that they were deprived of the comfort, society, and protection of a son or husband; but it has been always held that this was in strict accordance with the rule that only the pecuniary value of the life to the relations could be recovered."

In a later case, *Burk v. Arcata & M. R. R. Co.*, 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52, it is held that:

"In an action for damages for the death of plaintiff's brother, only nominal damages can be recovered, where it does not appear that plaintiff derived, or could reasonably expect to derive, pecuniary benefit from deceased, nor that deceased was accumulating, or was likely to accumulate, any estate, so that plaintiff, as his heir, would suffer pecuniary loss."

And in a still later case, *Webster v. Norwegian Min. Co.*, 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181, construing the same statute, that the administrator can sue—

"only where there are heirs, the right of action being for their benefit, and therefore their existence must be pleaded and proved."

So it is with the statute now under consideration. The wife, the lineal descendants, or the adopted children, as the case may be, are given the right of action for injuries sustained by reason of the negligence of employers or their servants, acting under or in pursuance of the act in question, and in that right of action they may recover for all loss sustained by reason of the death of the employé. This includes, if the widow is suing, her loss of society and protection, as well as the injury which she or the heirs of the deceased may have sustained; so that no right of action is left to be instituted in the name of the wife as administratrix.

The adoption of this law was suggested, no doubt, with a view to giving a special action for death in all cases arising under the statute; and it precludes the institution of an action by any other persons than those enumerated therein. Nor is this conclusion in con-

flict with the decision of the Supreme Court of the state of Oregon in *Staats v. Twohy Bros. Co.* (Or.) 123 Pac. 909, because in that case it would seem that the suit was instituted, not under this statute, but under the ordinary right of action arising upon facts not within the statute, for Mr. Justice Moore, announcing the decision of the court, says:

"An examination of the averments of the complaint, when read in connection with the prayer for judgment, leads to the conclusion that the cause of action thus set forth is founded on the section of the Code adverted to (namely, section 380, Lord's Oregon Laws), and not upon the statute mentioned."

It follows, therefore, that the case of Margaret C. Hawkins, as administratrix, the one we are now considering, does not lie under the statute, while the case of Margaret C. Hawkins, suing in her individual capacity, is properly brought. The demurrer, based as it is upon the ground that there is another action pending for the same cause, should be denied. The complaint, however, does not state a cause of action in the right of the administratrix.

THE EMPIRE CITY.

THE SONOMA.

(District Court, N. D. Ohio, E. D. January 14, 1913.)

No. 2,544.

COLLISION (§ 83*)—STEAM VESSELS MEETING IN FOG—MUTUAL FAULTS.

A collision occurred in a dense fog near the south end of Lake Huron between the steel steamships *Empire City*, downbound loaded with ore, and *Sonoma*, upbound, light. There was quite a procession of boats in both directions on that morning, and both vessels were proceeding at moderate speed. The collision occurred about 400 feet east of the ideal range line in the center of the channel, after the *Sonoma* had given a passing signal of one whistle, which had not been answered. *Held*, that the fault was primarily that of the *Empire City* in being on the wrong side of the channel, and because her lookout was inattentive and failed to hear the *Sonoma's* signal, although the *Empire City* was believed to be out of her course, and was preparing to anchor; also, that the *Sonoma* was in fault for proceeding after failing to receive an answer to her signal, although she continued to hear the fog signals of the *Empire City*, instead of stopping and sounding alarm signals.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 156, 167, 175; Dec. Dig. § 83.*]

Signals of meeting vessels, see note to 30 C. C. A. 630.]

In Admiralty. Suit for collision by the Duluth Steamship Company, owner of the steamship *Sonoma*, against the steamship *Empire City*, the Pittsburgh Steamship Company, claimant, and cross-libel by such company against the *Sonoma*. Decree dividing damages.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio (Kelley & Cottrell, of Cleveland, Ohio, of counsel), for libellant.

Goulder, Day, White, Garry & Duncan, of Cleveland, Ohio (Harvey D. Goulder, O. D. Duncan, and Robert G. McCreary, all of Cleveland, Ohio, of counsel), for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DAY, District Judge. On the morning of May 21, 1910, during a dense fog, the steamer Empire City and the steamer Sonoma collided at the foot of Lake Huron, somewhere between the Point Edward Range lights and the light ship. The Empire City is a steel steamer 406 feet keel, 48 feet beam, and the Sonoma is a steel steamer 416 feet long and 50 feet beam. The Empire City was loaded with iron ore, downbound from Duluth to Cleveland, and the Sonoma was upbound, light. In running out of the St. Clair river, at a point near this collision, the range known as the Ft. Gratiot Range is used, and this is followed and run out until the Ft. Gratiot light is passed, where the turn of about two points is made onto the course marked the Point Edward Ranges, and this course leads out past the light ship. From the turn onto the Point Edward Ranges, to a point abreast the light ship, is a distance of about a mile and a half. The turn referred to is distant from the front range of the Point Edward Ranges a little less than one-half mile. The ideal course marked on the government charts by the Point Edward Ranges divides the channel available at this point in the middle, and there is good water a distance of a thousand feet or more to the eastward and westward of the ideal range course.

On the morning of the collision there was a procession of boats proceeding upwards and downwards near these ranges, just described. The fog lifted somewhat, and the procession of boats had started, heading down on the one hand to the St. Clair river, heading up on the other, to Lake Huron, when the fog again settled. Proceeding ahead of the Sonoma was a small, heavily laden, slow-going vessel, named the Ionia. The Sonoma blew a signal indicating that she wished to pass the Ionia, and, after receiving an alarm signal from the Ionia, dropped to the stern of her, and followed the Ionia up the Ranges at a distance of about a half a mile astern. The course taken by the Sonoma was some 400 or 500 feet to the east of the ideal range line. This is fixed from testimony of the Sonoma's crew, and from the testimony of the captain of the Ionia, and from the captains of the Algonquin and the Goulder, boats which passed in the downward course. The Sonoma was passing through this fog, proceeding slowly. She would proceed a short distance under this speed, blowing fog signals. It is not indicated by the testimony of the witnesses who testified in open court that either of these boats was going at excessive speed. The current was probably about two miles an hour, according to the estimate of witnesses on board the Empire City, and the Empire City was drifting down with the current. Although the witnesses on the deck of the Empire City place the speed of the Sonoma at seven or eight miles an hour, I do not believe that the Sonoma was going at more than moderate speed. It was quite natural that, when those on the deck of the Empire City first saw the Sonoma, they would judge she was coming at great speed by reason of her sudden appearance and their realization of their peril at the approach of this other boat which unexpectedly came to view.

As the Sonoma proceeded upwards on the morning of this disaster, she passed the Algonquin and the Goulder, downbound, under one-

blast signals. There was nothing unusual about these maneuvers, and the testimony from the captain of the Algonquin and Goulder indicates that the Sonoma was proceeding at moderate speed well to the eastward of the ideal range line. After passing the Algonquin and the Goulder, the Sonoma next picked up the fog whistle of the Empire City, blew one blast, followed by the usual fog signals at intervals of less than a minute. Next a fog signal was heard from the Empire City, and again other fog signals were heard from the Empire City, making three fog signals in the interval of time, dating from the blowing of the one-blast passing signal on the Sonoma. I think it is established by the testimony that the collision happened a little less than half way up on the line, between the light ship and the Point Edward Ranges, and some 400 feet to the eastward of the ideal range line. In the course of her voyage down, the Empire City had arrived in the vicinity of the light ship during the night preceding the collision. On the morning of the 21st, the fog lifting, the fleet started down, several vessels going into the river ahead of the Empire City and a number of vessels coming behind.

Considering the testimony of all the witnesses, including the witnesses on the Ionia, the Algonquin, and the Goulder, it is apparent to me that the Empire City was several hundred feet to the eastward of the ideal range line at the time of this collision. The Empire City at the time of the collision was going ahead very slowly. As was indicated by the testimony of her second mate, she had made no progress ahead otherwise than that furnished by the current of the water at this place which was estimated at some two miles an hour. At the time of the collision, the Empire City was getting ready to anchor. The second mate was putting over the lead in order to ascertain whether the Empire City had lost her way. The second mate was reporting that the Empire City had lost her way, and the others were evidently paying some attention to the matter of anchoring.

It is evident that the outlook, which was absolutely complete in numbers, failed to hear the passing signal, or the fog signals blown by the Sonoma. And it is plain to me that the attention of the navigating officers and those on lookout on the Empire City was engaged more in the process of anchorage than it was in the process of ascertaining the whereabouts of other boats on this very foggy morning as other boats in this vicinity heard the Sonoma signals. Inasmuch as the navigators of the Empire City must have appreciated the fact that there was great danger, and inasmuch as they were in the path of vessels upwardbound, the lookout was not paying the attention which should have been paid on this occasion. Without reviewing the decisions, the Empire City was inattentive in reference to its lookout. The Sonoma, in violation of proper navigation, after she had blown the one-blast passing signal, and heard the three fog signals from the Empire City, in this very thick weather, was at fault in proceeding ahead, and not sounding an alarm signal. All of the pilot rules and all of the courts' decisions indicate that in a dense fog those charged with the navigation of boats should exercise the greatest caution. Neither of these boats were proceeding at any more than

moderate speed. The prudent navigation of the Sonoma would have compelled her captain after having blown passing signals, and heard the three fog signals from the Empire City to slow down his speed to a standstill and blow an alarm signal until the position of the Empire City was ascertained. This was rendered all the more necessary by reason of the fact that he was aware that boats would be proceeding down on this morning, and, under the circumstances, it was most necessary to locate the positions of these boats. Had the Empire City been navigated properly, she would have had a lookout which would have paid attention to the presence of other vessels and their signals, and not have been apparently absorbed with the anchoring of that boat while the boat was on a course much pursued by vessels upwardbound, in procession that morning, and at a position greatly to the eastward of the course usually followed by downwardbound boats at that time.

I accordingly find that both of these boats were at fault.

UNITED STATES v. THOMPSON.

(District Court, N. D. California, First Division. December 30, 1912.)

No. 5,119.

1. CRIMINAL LAW (§ 995*)—SENTENCE ON CONVICTION ON DIFFERENT COUNTS—CONSTRUCTION—"SINGLE SENTENCE."

A judgment in a criminal case, designating different and consecutive periods of imprisonment of a defendant on different counts in the same indictment, does not constitute separate and distinct sentences for each period, but a "single sentence" for the aggregate period.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2521, 2523-2526, 2528½, 2530, 2536-2543; Dec. Dig. § 995.*]

2. CRIMINAL LAW (§ 1218*)—SENTENCE—CONSTRUCTION OF STATUTE—WHITE SLAVE TRAFFIC ACT.

On conviction of a defendant of violation of White Slave Traffic Act June 25, 1910, c. 395, 36 Stat. 825 (U. S. Comp. St. Supp. 1911, p. 1343), it is competent for the court to sentence him to imprisonment in a penitentiary for a longer or shorter period than one year.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3320-3328; Dec. Dig. § 1218.*]

Criminal prosecution by the United States against Carter Thompson. On motion by defendant to amend judgment. Denied.

Benjamin L. McKinley, Asst. U. S. Atty.

Sea & Fallon, of San Francisco, Cal., for defendant.

VAN FLEET, District Judge. Defendant was convicted on an indictment charging him with a violation of the White Slave Traffic Act, so called, an offense made a felony, punishable by imprisonment for not to exceed five years, etc. (36 Stat. at Large, 825), and was sentenced to imprisonment in the federal penitentiary at McNeil's Island for an aggregate term of 18 months—a period of one year on the first count and 6 months on the second, the two to run consecu-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

tively. Treating these two periods as constituting separate sentences, the defendant now moves to correct or amend the judgment, by changing the direction therein as to the place of confinement from the penitentiary to a county jail, upon the asserted ground that the court was without power to sentence him to undergo imprisonment in a penitentiary under its judgment.

The contention is based upon the ruling in *Re Mills*, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107. In that case the defendant had been convicted of two several offenses prosecuted under separate indictments, but consolidated for trial, and was sentenced to a term of one year under one indictment and six months under the other; the judgments being necessarily separate and distinct, but both directing execution thereof by confinement in a penitentiary. The offenses charged were not in terms denounced as felonies, one being for selling liquor without a license, and the other for unlawfully importing liquor into the Indian Territory, and there was then no provision of the federal statute defining a felony. Under these circumstances it was held that, in view of the language of section 5541, R. S. (U. S. Comp. St. 1901, p. 3721), it was not competent for the court to direct the judgments to be executed by confinement in a penitentiary, neither of them embracing a term longer than one year; the court saying:

"A sentence simply of 'imprisonment' in the case of a person convicted of an offense against the United States—where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary—cannot be executed by confinement in a penitentiary, except in cases where the sentence is 'for a period longer than one year.' In neither of the cases against the accused was he sentenced to imprisonment for a period longer than one year."

[1] The circumstances of that case are in no substantial respect parallel with the present, and in my judgment the ruling there made has no application to the facts involved here. In the first place, the defendant is, I think, mistaken in the assumption that he has been subjected to two separate sentences. The designation of separate periods under different counts of the same indictment, the second to commence coincident with the expiration of the first, does not, in my judgment, constitute separate sentences, but a single sentence, made up of the aggregate period specified, and constitutes but one punishment, evidenced by one and the same judgment. I am aware that the *Mills Case* seems to have been construed by some of the federal courts as holding that a judgment like the present, designating different periods of confinement upon different counts of the same indictment, constitutes separate and distinct sentences for each period; but neither the facts of that case nor anything said by the court support that view, and it is evidently based upon a misapprehension.

In the next place, the offenses involved in that case are not in the same category as that charged in the present indictment. As suggested, this offense is expressly denominated a felony, and a felony is now defined in the Criminal Code, § 335 (Act March 4, 1909, c. 321, 35 Stat. 1152 [U. S. Comp. St. Supp. 1911, p. 1687]) as an offense "which may be punished by death or imprisonment for a term ex-

ceeding one year." Defendant's offense is therefore an infamous crime. As stated in *Ex parte Wilson*, 114 U. S. 417, 426, 5 Sup. Ct. 935, 939 (28 L. Ed. 89), in determining whether a crime is infamous within the meaning of the Constitution, the inquiry is whether it "is one for which the statute authorizes the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one." And in *Mackin v. United States*, 117 U. S. 348, 352, 6 Sup. Ct. 777, 779 (29 L. Ed. 909), it is said:

"We cannot doubt that at the present day imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment. It is not only so considered in the general opinion of the people, but it has been recognized as such in the legislation of the states and territories, as well as of Congress."

[2] The offense, being thus shown to be an infamous one, is to be punished as such; and to hold that such an offense, where no minimum is fixed, may not competently be punished by imprisonment in a penitentiary, whether for a longer or shorter period than one year, as discretion may dictate, is to deprive the term "felony" of the meaning which it has always carried, not only at common law, but under the statutes of all the states, and a meaning which it would seem to have, as well, under the Criminal Code. In this connection it is pertinent to notice the language of section 338 of that Code, which reads:

"The omission of the words 'hard labor' from the provisions prescribing the punishment in the various sections of this act shall not be construed as depriving the court of the power to impose hard labor as a part of the punishment in any case where said power now exists."

While the language of section 5541 is comprehensive, and, standing alone, might be regarded as broad enough to cover a case like the present, I am of opinion that, in view of these provisions of the Criminal Code, which must be read in conjunction with it, that construction cannot now obtain without doing violence to the very obvious purpose of Congress to work a material change in dealing with those offenses which fall within its classification of felonies. Nor do I think it can be justly regarded as the intention of the court in the *Mills Case* to include such a case as within the limitation of that section. As aptly stated in considering the effect of that case upon a cognate question in *Ex parte Friday* (D. C.) 43 Fed. 916, 919, 920:

"It is thought that the Supreme Court did not intend this decision to apply to a sentence under a section of the statutes making it the imperative duty of the court to impose hard labor. To hold that it does apply makes the enforcement of some of the most important sections of the Revised Statutes simply impossible. Very many of these sections require imprisonment at hard labor, leaving the term entirely in the discretion of the court. 'At hard labor for not more than three years,' or 'not more than five years,' or 'not more than ten years,' is the language of the law. Cases constantly arise under these sections where the court is of the opinion that the ends of justice are fully met by an imprisonment at hard labor for less than a year, and often for less than six months. Other sections fix the term absolutely at less than a year."

These considerations apply with equal force here, and I am of opinion, for the reasons stated, that the judgment as rendered is en-

tirely within the law. Under the opposite view, it would be impossible in many cases to "make the punishment fit the crime."

The motion will be denied.

UNITED STATES v. HEALY.

(District Court, D. Montana. February 3, 1913.)

No. 239.

1. CRIMINAL LAW (§ 37*)—CRIMINAL OFFENSE—DECOYS.

Decoys are permissible to entrap criminals, or to present opportunity to those having intent to or who are willing to commit crime, but not to create criminals, or to ensnare the law-abiding into committing an offense without an intent to do so.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 42; Dec. Dig. § 37.*]

2. CRIMINAL LAW (§ 37*)—DECOYS—INTENT.

Where a statute makes an act a crime regardless of the actor's intent or knowledge, ignorance of fact is no excuse if the act is done voluntarily; but if done on solicitation by the government's instrument to that end ignorance of fact shows the act to have been involuntary, and estops the government from claiming a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 42; Dec. Dig. § 37.*]

3. CRIMINAL LAW (§ 37*)—SELLING LIQUOR TO INDIANS—OFFENSES—DECOYS.

Where an Indian decoy of government officers so concealed the fact that he was an Indian as to mislead defendant and induce him to sell intoxicating liquors to him, in order to procure defendant to commit the crime of selling liquor to an Indian, the sale, under such circumstances, was insufficient to sustain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 42; Dec. Dig. § 37.*]

Dennis Healy was convicted of selling intoxicants to an Indian. Judgment vacated, and defendant discharged.

James W. Freeman, U. S. Atty., and S. C. Ford, Asst. U. S. Atty., both of Helena, Mont.

M. F. Canning and P. E. Geagan, both of Butte, Mont., for defendant.

BOURQUIN, District Judge. In this case the court, of its own motion, vacates the sentence and judgment, sets aside the verdict, and discharges the defendant. The conviction was for a felony, an unlawful sale of intoxicating liquor to an Indian, contrary to Act Jan. 30, 1897, c. 109, 29 Stat. 506. The evidence was that the sale was solicited from defendant, in the ordinary course of his trade of retail liquor dealer in the city of Butte, by said Indian, who therein was in the service of government officers as a decoy. It was claimed that there was suspicion that defendant was making like unlawful sales, and it was sought to entrap him. In this instance defendant was ignorant that the purchaser was an Indian, and nothing in the latter's dress, speech, manner, or appearance served to put him on in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quiry therein; the Indian approximating those not Indians. The court instructed the jury that in view of the evidence its duty was to convict, and the jury returned a verdict accordingly.

After further consideration, I am persuaded a conviction under such circumstances is unjust and contrary to public policy. Hence, the conviction having been at this term, the judgment being "in the breast of the court," and the court having full power over it, the order vacating the same. See *Ex parte Lange*, 18 Wall. 167, 21 L. Ed. 872.

[1, 2] Decoys are permissible to entrap criminals, but not to create them; to present opportunity to those having intent to or willing to commit crime, but not to ensnare the law-abiding in unconscious offending. Where a statute, as here, makes an act a crime regardless of the actor's intent or knowledge, ignorance of fact is no excuse if the act be done voluntarily; but when done upon solicitation by the government's instrument to that end ignorance of fact stamps the act as involuntary, and excuses, or at least estops the government from a conviction. In the former case the actor is bound to know the facts, and acts at his peril. In the latter case he is relieved of the obligation by the government's invitation, which is of the nature of fraudulent concealment and deceit, and, if not consent, yet doth work an estoppel. Though the seller has violated the statute, he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted.

[3] If, however, the decoy is one whose appearance, or otherwise, conveys knowledge of his disability, or is sufficient to put the seller on inquiry, any sale made is voluntary, establishes guilt, and warrants conviction. For in such case the seller is either of guilty intent, or negligent ignorance or recklessness, which relieves the government's participation of any taint of fraudulent concealment or deceit.

It will be observed the case at bar is not of those where the actor knows his act violates the law. Of the latter is he who, on solicitation, sells or passes money known to him to be counterfeit, or he who thus mails prohibited matter, or he who thus sells intoxicants without a license or in "dry" territory. These latter acts are criminal, let the status of the solicitor be what it may; and hence that he is a decoy does not neutralize the criminal quality of the act.

In the case at bar the act is innocent but for the status of the solicitor, and because he is a decoy of concealed disability the act is blameless, and there is estoppel against conviction. Were it otherwise, honest men could easily be made felons. Many of the government's Indian wards are not distinguishable from Caucasians.

Any purveyor of liquors, and any one moved by hospitality to share thereof with guests, ignorant of their status, would unhesitatingly sell or give to them. As decoys in the service of government officers, what instruments of oppression they might be to men devoted to law, but ignorant of their disability! That the seller is suspected of voluntary like sales does not justify entrapping as here; for thereby a law-abiding person may as easily be ensnared. And

the result proves nothing but overzeal, to put it mildly, of government officers. The practice cannot be tolerated, and a conviction for an offense so procured cannot stand.

CARD v. STANDARD COAL & COKE CO.

(District Court, E. D. Tennessee, N. D. January 29, 1912.)

No. 1,618.

1. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—DEMURRER.

In a suit for infringement, a demurrer will lie, if the patent is manifestly void on its face for lack of novelty or invention; but its invalidity must be clear and manifest, and in case of doubt the demurrer must be overruled.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

2. EVIDENCE (§§ 5, 19*)—JUDICIAL NOTICE—MATTERS OF COMMON OR SPECIAL KNOWLEDGE.

In determining the questions of novelty and invention on demurrer to a bill for infringement, the court may take judicial notice of facts of common or general knowledge, but not of matters of special knowledge, even though within the personal observation of the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 4, 23; Dec. Dig. §§ 5, 19;* Patents, Cent. Dig. § 543.]

3. EQUITY (§ 235*)—SUIT FOR INFRINGEMENT—SPEAKING DEMURRER.

In so far as a demurrer to a bill for infringement seeks to import the existence of prior patents, which are not for devices of common use, of whose details the court may take judicial notice, it is bad as a speaking demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 511; Dec. Dig. § 235.*]

In Equity. Suit by Louis F. Card against the Standard Coal & Coke Company. On demurrer to bill. Overruled.

This suit was brought by the complainant by bill in equity against the defendant for the alleged infringement of letters patent No. 794,587, issued to the complainant July 11, 1905, for improvements in car handling apparatus. The defendant demurred to the bill on the ground that said letters patent were void for want of patentable invention, and that the alleged invention had more than two years prior to the filing of the application been made known to the public through various other letters patent of the United States described in the demurrer by numbers, names of patentees and dates of issuance, and was also shown in a report of the Second Geological Survey of Pennsylvania published in 1883 at Harrisburg, Pennsylvania, by the Board of Commissioners.

T. A. Wright, of Knoxville, Tenn., for plaintiff.

Cyrus Kehr, of Knoxville, Tenn., for defendant.

SANFORD, District Judge. [1] 1. In a suit for infringement of a patent a demurrer will lie if such patent be manifestly void on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its face for want of novelty or invention. *Risdon Locomotive Works v. Medart*, 158 U. S. 68, 84, 15 Sup. Ct. 745, 39 L. Ed. 899; *Richards v. Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991; *American Fibre-Chamois Co. v. Buckskin-Fibre Co.* (6th Cir.) 72 Fed. 508, 18 C. C. A. 662; *Heaton-Peninsular Button-Fastener Co. v. Schlochtermeyer* (6th Cir.) 72 Fed. 520, 18 C. C. A. 674; *Thomas v. Railroad Co.* (6th Cir.) 149 Fed. 753, 79 C. C. A. 89; *West v. Rae* (C. C.) 33 Fed. 45; *Eclipse Mfg. Co. v. Adkins* (C. C.) 36 Fed. 554; *Gilbert v. Post* (C. C.) 189 Fed. 81; *Adrian Fence Co. v. Fence Co.* (C. C.) 190 Fed. 195; *Jackson Skirt Co. v. Rosenbaum* (C. C.) 190 Fed. 197.

[2] 2. On such demurrer the court, in determining the questions of novelty and invention, may take judicial notice of facts of common or general knowledge, including old and well known devices in common use, such as pulleys (*Risdon Locomotive Works v. Medart*, supra), the well known elements entering into the use of elevators for transferring grain from railway cars to vessels (*Richards v. Elevator Co.*, supra), common nails and staples (*Heaton Button-Fastener Co. v. Schlochtermeyer*, supra), and, by analogy, ice cream freezers in common use (*Brown v. Piper*, 13 Wall. [91 U. S.] 37, 43, 23 L. Ed. 200). And it may also consider an earlier patent pleaded by the complainant in his bill (*Adrian Fence Co. v. Fence Co.*, supra). But on such demurrer the judicial knowledge must be carefully restricted to matters of common knowledge and well known devices in common use, and cannot extend to matters of special knowledge, even though within the personal observation of the court. *Eclipse Mfg. Co. v. Adkins*, supra; *American Fibre-Chamois Co. v. Buckskin Fibre Co.*, supra. Thus in considering on demurrer the alleged want of novelty of a design patent, the court will not consider the various designs that may previously have come within its observation; the question of novelty in such case being one to be determined on answer and proof. *N. Y. Belting Co. v. Rubber Co.*, 137 U. S. 445, 450, 11 Sup. Ct. 193, 34 L. Ed. 741.

To sustain such demurrer, in view especially of the presumption of validity attaching to the patent, the invalidity of the patent must be clear and manifest; and in case of doubt the demurrer must be overruled. *American Fibre-Chamois Co. v. Buckskin Fibre Co.*, supra; *Eclipse Mfg. Co. v. Adkins*, supra; *Gilbert v. Post*, supra.

[3] 3. In the present case therefore, in so far as the demurrer seeks to import in the demurrer the existence of various prior patents, which are not devices of common use of whose details the court can take judicial knowledge, it is a speaking demurrer and bad for that reason. 1 *Street's Fed. Eq. Pract.* § 922, p. 559. And since, in the last analysis, the matters which are relied on by the demurrant as showing want of invention in the complainant's patent are not matters of common or general knowledge, but depend upon the exact prior state of the art, as shown by the details of various former patents not brought into the record by the demurrer, it results that under the foregoing authorities the demurrer must be overruled and the defendant left to raise this defense under answer and proof. An order will be entered accordingly.

KATALLA CO. v. JOHNSON.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1913.)

No. 2,158.

1. MASTER AND SERVANT (§ 330*)—SERVANT OF INDEPENDENT CONTRACTOR—INJURIES—PREMATURE EXPLOSION OF DYNAMITE—EVIDENCE—NEGLIGENCE.

In an action for injuries to a servant of an independent contractor by the premature explosion of dynamite furnished by defendant for use in the work, evidence *held* to warrant a finding that the dynamite so furnished was old, and by reason of its age extrahazardous, which was the cause of the explosion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.*]

2. MASTER AND SERVANT (§ 321*)—SERVANT OF INDEPENDENT CONTRACTOR—CARE REQUIRED.

Where defendant furnished old dynamite for use in railroad construction, the interposition of an independent contractor did not relieve defendant from liability for negligence in failing to use every reasonable precaution to secure the safety of persons who would be required to handle or use the dynamite so furnished in the prosecution of the work; and hence the interposition of an independent contractor did not relieve defendant from liability for negligence in furnishing such dangerous explosive, resulting in injury to a servant of a subcontractor by reason of premature explosion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1262; Dec. Dig. § 321.*]

Who are independent contractors, see note to Atlantic Transport Co. v. Coneys, 28 C. C. A. 392.]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; George Donworth, Judge.

Action by John P. Johnson against the Katalla Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action for damages for personal injuries received by the plaintiff while employed as a laborer on the construction work of the Copper River & Northwestern Railroad, near Copper river, Alaska, in which the defendant company was engaged. Plaintiff's injuries were caused by the premature explosion of dynamite furnished by the defendant.

It is alleged in the complaint that the defendant negligently and carelessly furnished the men working with the plaintiff and in his immediate neighborhood dangerous and unsafe, defective, and extrahazardous dynamite for use by them in blasting the rock in a tunnel in which they were working; that the dynamite furnished was more than two years old, and by reason thereof unsafe to use and liable to explode prematurely, though handled carefully; that the dynamite furnished by the defendant had further been exposed to the air, wind, rain, snow, heat, and cold before it was given to the men for use, thereby rendering it extrahazardous, unsafe to use, and liable to explode, though handled carefully; that the age of said dynamite and its exposure to the elements and its extrahazardous condition by reason thereof were well known to the defendant and unknown to the plaintiff and the men using the dynamite, and to whom it was furnished by the defendant; that the defendant negligently and carelessly failed to inform plaintiff and the men using said dynamite of the extrahazardous condition of the same; that while the men working with the plaintiff were loading a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.
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hole in the rock with the dynamite so furnished by the defendant, in a proper and careful manner, the dynamite exploded prematurely by reason of its extradangerous, unsafe condition, and without warning and near the place where the plaintiff was working, causing the injuries received by the plaintiff; that the force of the explosion caused a large rock to fall on the plaintiff, by which he was injured, cutting his head, fracturing several ribs, and crushing his right foot; that by reason of these injuries plaintiff had been unable to earn any money or do any work, and, it is alleged, would remain a cripple and unable to do any work the remainder of his life. The defendant's answer put in issue the material allegations of the complaint.

The evidence on behalf of the plaintiff tended to establish the allegations of the complaint, and at the conclusion of the trial defendant moved the court to direct a verdict of the jury in favor of the defendant, upon the ground that the testimony was insufficient to entitle plaintiff to recover. This motion was denied. The jury returned a verdict in favor of the plaintiff for \$7,500; but on motion of the defendant for a new trial the court held that the evidence did not sustain a verdict for \$7,500, giving the plaintiff the option of reducing the verdict to \$5,700 or accepting a new trial. Plaintiff thereupon filed his consent that the verdict be reduced to \$5,700, and a judgment was accordingly entered for that amount.

W. H. Bogle, Carroll B. Graves, F. T. Merritt, and Lawrence Bogle, all of Seattle, Wash., for plaintiff in error.

Martin J. Lund, of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] It appears from the evidence that on May 26, 1910, the plaintiff and others were engaged in tunneling on the line of the railroad, when one Riley, a subcontractor, with another man, went into the tunnel to load dynamite into a hole which had been shot, but had not broken out. Riley's companion cut away the paper wrappers inclosing the dynamite, and Riley placed the dynamite in a hole with a stick. While engaged in this work in the usual way, the dynamite exploded prematurely in the hole, throwing out rock, which fell upon and injured plaintiff. Two witnesses testified that the dynamite being used at the time was in wrappers that were bleached and discolored, and appeared to be covered with an oily substance; that some of the sticks of dynamite had the date of May 15, 1907, printed on them.

I. F. Laucks, an expert mining engineer, testified that when dynamite had been stored for some time in a moist atmosphere the nitroglycerin comes to the surface, either underneath the wrapper, or gets through the wrapper and collects in drops, or sweats, and in that condition it is very dangerous because of the free drops of nitroglycerin. The witness was asked if it would be reasonably safe to give out dynamite two years old, or more, without inspection. His answer was:

"I don't think it would be reasonably safe. I would not do it myself, and I don't believe it would be safe."

This testimony was not contradicted, and the cause of the explosion was not otherwise explained by the evidence. As far as was observed by those in the immediate vicinity, the loading of the hole with dynamite by Riley was in the usual way. The dynamite was being pressed into the hole with a wooden stick. The expert witness Laucks was asked this question:

'Assume as a fact that some men are working in a tunnel on the railroad construction, and a box of dynamite is brought into the tunnel, with the sticks to be used in loading the hole, and two men are loading it. One man is cutting open the wrappers, and the other is shoving the powder down into the hole with the loading stick, consisting of wood, in the ordinary manner of loading dynamite; and while in the act of doing so an explosion is caused by the dynamite in the hole; the dynamite that is used in loading it being more than two years old; that the wrappers are moist, with an oily moisture, discolored—what would you say was the cause of that explosion?'

The witness answered:

"If the loading was properly done, I should say that the probability was all in favor of—in fact, there is nothing else—there is no other answer to that question, except that the dynamite was at fault."

This evidence was clearly sufficient to justify the jury in finding that the cause of the explosion was defective dynamite. It must be remembered that in such a case plaintiff is entitled to the benefit of all the inferences in his favor which the jury could have been justified in drawing from the testimony. *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780; *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 253, 29 Sup. Ct. 619, 53 L. Ed. 984; *Sonnenberg v. S. P. Co.*, 159 Fed. 884, 886, 87 C. C. A. 64.

The accident occurred on May 26, 1910, near a station on the line of the road designated as "123." The dynamite was delivered by the defendant to the subcontractor engaged in the work at a station called Tiekill, and the distance from Tiekill to station 123 was about 22 miles. Samuel Murchison, the superintendent of the construction work for the subcontractor, testified that the dynamite was obtained from the defendant at Tiekill, and was taken by teams to station 123; that the time occupied in this transportation was from five to eight hours; and that during that time the dynamite was not exposed in any way to the weather, or to any condition that would tend to render the dynamite dangerous. The inference to be drawn from this testimony was that the dynamite was nearly three years old; that dynamite more than two years old is not reasonably safe; that the dynamite delivered to the subcontractor by the defendant was in the same condition when delivered that it was when being used at the time of the explosion. Against this inference the defendant contends that the dynamite was not defective, and had not deteriorated, because it had been supplied at different times from February to May, 1910, and had been used, and no explosion had occurred; but the defendant introduced no evidence upon the trial, and there is no evidence whatever as to the age or condition of the dynamite previously delivered to the subcontractor. The evidence as to the date on the wrappers, and the discolored condition of the wrappers indicating the defective and deteriorated condition of the inclosed dynamite, related only to the dynamite used in loading the hole, and which exploded, causing plaintiff's injury. To escape from the inference to be drawn from such a state of the evidence, it was incumbent upon the defendant to show that the dynamite delivered to the subcontractor was, at the time of its delivery, in good order and condition, and failing in this the jury was justified in find-

ing that the dynamite was in an unsafe condition when delivered by the defendant to the subcontractor.

[2] There was evidence to the effect that between the defendant and the plaintiff there was a subcontractor, who had charge of the work in which plaintiff was employed at the time of the accident. Upon this evidence defendant contends that its delivery of the dynamite to the subcontractor, assuming it to have been defective at that time, was not the proximate cause of the injury to the plaintiff, but that its subsequent delivery by the subcontractor to the workmen engaged in using the dynamite was the efficient cause of the accident. The defendant accordingly objected to the following instructions, given by the court to the jury:

"It is the law, however, that if the owner of a railroad engaged in constructing that railroad lets out a general contract for the construction of the road, and, knowing that that contract has been let and that large numbers of men are to be employed, or have been employed, in the actual work of construction, furnishes an explosive to be used by the individuals who are to actually do the definite construction of the work, it is the duty of the owner of the railroad furnishing that explosive, under those circumstances, to exercise ordinary care to see that the explosive furnished is not unnecessarily dangerous."

And it is objected that the court did not give the following instruction, requested by the defendant:

"And if the Katalla Company furnished unsafe explosives to said contractor, and the contractor knew the unsafe character of such explosives, or by reasonable inspection could have determined their character, and with such knowledge or opportunity of knowledge said contractor purchased from the Katalla Company such explosives, and an accident occurred in the use of the same, then the Katalla Company would not be liable, but the direct and proximate cause of such an accident would be the act of the contractor in using or furnishing for use such unsafe explosive."

In *Mather v. Rillston*, 156 U. S. 391, 399, 15 Sup. Ct. 464, 467 (39 L. Ed. 464), the Supreme Court of the United States stated the law applicable to this case in the following language:

"All occupations producing articles or works of necessity, utility, or convenience may undoubtedly be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them; but in such cases, where the occupation is attended with danger to life, body, or limb, it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution; and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted. * * * Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable, known to science, for the prevention of accidents; and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted, by proper precautions, without fatal results, such precautions must be taken by the promoters of the pursuit or employers

of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred, and this fact should not be lost sight of."

The interposition of an independent contractor does not relieve the principal contractor from liability for negligence in failing to use every reasonable precaution to secure the safety of persons who will be required to handle or use dangerous explosives furnished by him for the prosecution of the work. It follows that the instruction given by the court stated the law correctly, and the instruction requested was properly refused.

Finding no error in the record, the judgment of the court below is affirmed.

CITY OF SANTA CRUZ v. WYKES et al.

(Circuit Court of Appeals, Ninth Circuit. January 13, 1913.)

No. 2,088

1. MUNICIPAL CORPORATIONS (§ 863*)—INDEBTEDNESS—LIMITATION—MODE OF CREATION.

Const. Cal. art. 11, § 18, provides that no city shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the revenue provided for such year without the assent of two-thirds of the qualified electors voting at an election held for that purpose, nor unless, before or after that time, provision is made for the collection of an annual tax sufficient to pay interest on the indebtedness as it falls due, and also to constitute a sinking fund to pay the principal within 20 years from the time of contracting the same, and any indebtedness or liability incurred contrary to the provisions shall be void. *Held*, that such provision was an inhibition against which a municipality could not incur any indebtedness exceeding in any year the revenue produced for such year except in the mode or manner prescribed, which mode became the measure of the power of the municipality to incur an indebtedness beyond the measure fixed by the fundamental law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1824-1827; Dec. Dig. § 863.*]

2. MUNICIPAL CORPORATIONS (§ 867*)—EXCESS INDEBTEDNESS—POWER TO CREATE.

Under Const. Cal. art. 11, § 18, prohibiting the creation of increased indebtedness by a municipal corporation except by the assent of two-thirds of the qualified voters voting at an election, the power to increase the excess indebtedness does not abide with the municipality, nor with its common council alone, but with the assent of two-thirds of the electors.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1841; Dec. Dig. § 867.*]

3. MUNICIPAL CORPORATIONS (§ 864*)—PURCHASE OF PROPERTY SUBJECT TO MORTGAGE—ASSUMPTION OF MORTGAGE—MUNICIPAL INDEBTEDNESS.

Where a municipal corporation, desiring to construct waterworks was unable to do so because a required bond issue would exceed the city's debt limit, authorized a private corporation to construct the works, and agreed to purchase the same from such corporation after they were completed, and accepted a deed from the corporation by which it assumed payment of bonds issued by the corporation and secured by mortgage on the works, such assumption made the bonds a municipal debt,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

though it was expected to pay the principal and interest out of the income of the property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1828-1835; Dec. Dig. § 864.*]

4. MUNICIPAL CORPORATIONS (§ 943*)—MUNICIPAL BONDS—RECITALS—BONA FIDE PURCHASER.

Recitals in municipal bonds that they have been issued in pursuance of and in conformity with statutes and ordinances authorizing their issue estopped the city to deny that they were so issued.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1972-1977; Dec. Dig. § 943.*]

5. MUNICIPAL CORPORATIONS (§ 941*)—BONDS—RECITALS—BONA FIDE PURCHASER.

Where bonds executed by a private corporation operating a city waterworks were assumed by the company as a part of the purchase price of the works, and contained no recital or certificate by municipal or other officers that they were issued in conformity with either the Constitution, or laws of the state, or with any ordinance of the city authorizing such issue, the holders of the bonds as against the city were not bona fide purchasers for value, but were charged with notice of any infirmity in the bonds or of want of power in the city to authorize their issue or secure the same by mortgage on its property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1961-1966; Dec. Dig. § 941.*]

6. CORPORATIONS (§ 487*)—ULTRA VIRES ACT—EXECUTED TRANSACTION.

The principle that a corporation will not be permitted to plead ultra vires as a defense to an executed transaction applies where the contract is completely performed on both sides, in which case the court will not interpose to restore either party to his former state or grant other relief, but relief will be granted if it can be done independently of the contract or a new, further, or independent consideration subsists in support of the transaction sought to be enforced.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1893-1898. Dec. Dig. § 487.*]

7. MUNICIPAL CORPORATIONS (§ 878*)—CONTRACTS—ULTRA VIRES—ACTS IN QUASI PRIVATE RELATION.

Where defendant city at the time it contracted for the construction of waterworks under an agreement to purchase the same after they were completed in so doing acted in a proprietary or quasi private relation, and not in its governmental capacity, the fact that it was not then authorized to incur indebtedness to the amount necessary to construct the purchase of works did not render the contract ultra vires in its primary sense, so that, if the city subsequently had power to incur the indebtedness attending the construction and requirements of the works, it had power to assume the obligations of the seller secured by a mortgage on the works as a part of the price.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1857-1861; Dec. Dig. § 878.*]

8. MORTGAGES (§ 283*)—ASSUMPTION BY PURCHASER OF MORTGAGED PROPERTY—PRIMARY DEBTOR—VALIDITY OF MORTGAGE—ESTOPPEL TO DENY.

One purchasing property subject to a mortgage, and agreeing to pay the mortgage debt, becomes primarily liable to the holders of the obligations so assumed, and will not be heard to question the validity thereof.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 756-758; Dec. Dig. § 283.*]

9. MUNICIPAL CORPORATIONS (§ 878*)—INDEBTEDNESS—BONDS—RATIFICATION—REFUNDING.

Const. Cal. art. 11, § 18, prohibits cities from incurring indebtedness exceeding in excess the revenue of any year without the assent of two-thirds of the qualified voters voting at an election, etc. By Act March 19, 1889 (St. Cal. 1889, p. 399), it was provided that a two-thirds vote should be required, and the debt limit fixed at 5 per cent. of the assessed value of the city's real and personal property. By Act March 11, 1891 (St. Cal. 1891, p. 84), the limit was raised from 5 to 15 per cent. *Held*, that where a city having assumed certain water bonds as a part of the purchase price of the works which at the time of the assumption exceeded the city's debt limit, but after the city acquired authority to incur the indebtedness by raising the limit to 15 per cent., it passed an ordinance submitting the question of whether such bonds and other city indebtedness should be refunded to the voters, and authority to refund was granted by an almost unanimous majority, such vote operated as a ratification of the indebtedness and validated the bonds.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1857-1861; Dec. Dig. § 878.*

Constitutional and statutory limitations of municipal indebtedness, see note to *City of Helena v. Mills*, 36 C. C. A. 6.]

Appeal from the Circuit Court of the United States for the Northern District of California; Wm. C. Van Fleet, Judge.

Bill in equity by George Wykes, as successor to the Holland Trust Company of New York, as trustee against the City Water Company of Santa Cruz and the City of Santa Cruz to foreclose a mortgage given by the water company to secure bonds issued by it. Judgment (184 Fed. 752) for complainant, and defendant city appeals. Affirmed.

See, also, 190 Fed. 1017.

Up to July 2, 1888, the city of Santa Cruz was served with water for municipal and household purposes by private enterprise, but on that date the common council of the city passed an ordinance declaring that public necessity required the construction and acquisition of a system of waterworks by the city. On September 6th a bonded indebtedness was authorized by the electorate of the city to the extent of \$300,000, the bonds to bear interest at the rate of 5 per cent. The vote upon the proposition was nearly unanimous. The city entered at once upon the acquisition of water rights and a reservoir site, and of the authorized bond issue expended \$30,000.

On March 19, 1889, the Legislature of the state of California adopted an act limiting the bonding power of municipalities to 5 per cent. of the assessed value of the property within their limits. Prior to the adoption of this act there was no limitation of the power of cities to incur indebtedness. The assessed valuation of the property within the city of Santa Cruz for that year was \$3,245,060, and its borrowing capacity therefore \$162,253. This sum fell largely below the estimated expenditures for providing the water system contemplated. Effort was made to dispose of the balance of the city bond issue, namely, the \$270,000 thereof, but without avail. Having thus failed in the project of itself constructing a waterworks system, the city on September 16, 1889, entered into a contract with Coffin & Stanton, a firm composed of William Edward Coffin, Walter Stanton, Charles Hervey Jackson, and Charles F. Street, to construct and equip a waterworks system, which recites that: "Whereas, the city of Santa Cruz desires to acquire a waterworks system for said city, and whereas, Coffin & Stanton desire to furnish such a waterworks system: Now, therefore, for and in consideration of the sum of one dollar, paid in hand this 16th day of September, 1889, to said city of Santa Cruz by said Coffin & Stanton, the receipt of which is hereby duly acknowledged, and other valuable considerations, the following contract has been entered into."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In purport the city agrees to grant to Coffin & Stanton a franchise for the construction of the waterworks, and Coffin & Stanton agree to construct or cause the same to be constructed in conformity with certain specifications prepared by the city's engineer. The city agrees to purchase the waterworks when completed, and to pay therefor the sum of \$320,000 in manner specified, Coffin & Stanton being accorded the privilege of assigning the contract and all rights granted by the city to whomsoever they might elect. Coffin & Stanton agree to organize, or cause to be organized, a corporation under the name "City Water Company of Santa Cruz," to which the franchise shall be assigned. The Water Company is to cause to be issued a first mortgage on all properties, rights, titles, and franchises owned or to be acquired for an amount not to exceed \$400,000, the bonds to bear interest at a rate not to exceed 6 per cent., and to mature in not more than 30 years, and to issue to Coffin & Stanton at various times during the progress of the work such number of first-mortgage bonds as shall be required for construction purposes, Coffin & Stanton making all necessary cash advances, but not in excess of \$320,000, except in the event of changes or additions to the waterworks system, when the Water Company may issue a sufficient number of first-mortgage bonds at 90 cents on the dollar to pay for such changes or additions, and also issue, at a price not below 90 cents on the dollar, a sufficient number of such bonds to pay the interest on any of its outstanding bonds, except such outstanding bonds as are held in escrow as later provided for. When Coffin & Stanton shall have received all of said \$320,000 of bonds, and when the Water Company shall have completed the waterworks, then Coffin & Stanton are to deposit with the American Loan & Trust Company of New York, or such other trust company as may be agreed upon, \$270,000 of such bonds, which shall be held in trust by such trust company to secure a like amount, namely, \$270,000, of 5 per cent. bonds of the city, which said bonds it is recited the city has "heretofore sold to said Coffin & Stanton," the deed of trust or escrow to provide that, when any of the annual installments of said 5 per cent. bonds shall be paid by the city, the trust company shall cancel a similar amount of first-mortgage bonds, and so continue until all of said Water Company bonds deposited with it are canceled. On default in payment of principal or any installment of interest of the city 5 per cent. bonds, and a continuance of such default for a period of six months on the part of the city, the trust company shall be authorized to deliver said water bonds to the holders of the 5 per cent. city bonds, and provisions to that effect are stipulated to be contained in the deed of trust or escrow. The Water Company, when the waterworks shall have been fully completed, is to convey to the city all its property, rights, titles, and franchises to have and to hold forever, subject only to the mortgage and deed of trust or escrow before mentioned.

The city further agrees to set aside from the gross revenues derived from the waterworks an amount sufficient to pay the interest on said first-mortgage bonds outstanding, except those in escrow, and after five years an amount sufficient to form a sinking fund for the redemption of said outstanding bonds at maturity, except those so held in escrow. The Water Company is to commence construction as soon as practicable, and to have the waterworks completed within one year thereafter, provided that neither the Water Company nor Coffin & Stanton shall be held responsible for unavoidable delays, and provided, further, that the city shall convey to the Water Company clear and unincumbered rights to at least three-quarters of the riparian rights to Laguna creek, the proposed source of supply for said waterworks, or at least three-quarters of such water, also a clear right of way throughout the entire system for laying all necessary pipes or mains, and a clear title to all lands necessary for reservoir sites, or to such other lands as may be found necessary for the effective operation of said waterworks, all of which said transfers of rights or water rights and reservoir sites are to be subject to the legal and equitable rights of the city to the performance of the contract. The Water Company is not to be called upon to begin work until such properties shall have been conveyed to it and the title examined and approved by its counsel. Coffin & Stanton guarantee the performance of all the acts of the

Water Company specified to be performed by it, and agree to pay \$50,000 as liquidated damages in case of failure to perform.

On September 23, 1889, the parties entered into a further agreement, which, after reciting, "Whereas, Coffin & Stanton have purchased two hundred and seventy thousand dollars five per cent. bonds of the city of Santa Cruz, and have entered into an agreement under date of the sixteenth day of September, 1889, with the city of Santa Cruz, for the sale to said city of certain waterworks, named therein, and whereas, it is desired that the proceeds of the sale of said bonds shall be used solely for the purpose of said works or the redemption of said bonds," provides, in effect, that the city shall deposit with Coffin & Stanton the sum of \$245,000 of the proceeds of the sale of said bonds, to be placed to the credit of the city on the books of Coffin & Stanton, for the use of the City Water Company, which fund Coffin & Stanton agree to use in carrying out the contract aforementioned; in the event of the failure of the city to acquire the waterworks in accordance with said contract the fund to be applied by Coffin & Stanton to the retirement and redemption of the \$270,000 5 per cent. city bonds, and for the repayment to the city of any payments it may have made on said bonds, or said Coffin & Stanton to be personally liable for the full amount. Liquidated damages for nonperformance are provided for in the sum of \$300,000. And it is further agreed that when the contracts are awarded for construction, if awarded by the Water Company, Coffin & Stanton shall take security from the contractors in the amount of \$150,000 as additional security for the fulfillment of this agreement and the contracts referred to.

These agreements were signed by G. Bowman, mayor of the city, and attested by O. J. Lincoln, city clerk. No ordinance is shown authorizing their execution. The City Water Company was incorporated September 30, 1889, as contemplated by the agreement. Prior to November 20, 1889, the city acquired certain lands, rights of way, and water rights, including the right to the use of the waters of Laguna creek, together with a reservoir site for the storage of such water, a large part of which was purchased with the proceeds of the bonds issued by the city. All these lands, water rights, privileges, easements, reservoir site, and other property so acquired were on that date conveyed by deed of the city executed through G. Bowman, its mayor, to the City Water Company. This deed was authorized by Ordinance No. 192, adopted on the same day. By the terms of the deed the grant was upon the express condition that the agreement made with the city on the part of Coffin & Stanton, under the contracts of September 16 and 23, 1889, should be strictly performed by the Water Company as well as by Coffin & Stanton. In the meantime the city had granted to Coffin & Stanton, by Ordinance No. 188, a franchise for constructing the water system and supplying the city with water, together with the right to lay mains in the streets, and to do all things necessary for constructing and maintaining such system, although it appears that Coffin & Stanton did not assign the franchise and privileges appertaining thereto to the Water Company until in June, 1890. On April 21, 1890, the Water Company authorized the issuance of bonds in the aggregate of \$400,000 to bear date May 1, 1890, payable to the Holland Trust Company, and subsequently, on May 1, 1890, executed to the Holland Trust Company a mortgage upon its property and franchises, including the waterworks system to be constructed, to secure the payment of such bonds in accordance with their provisions. On June 2, 1890, the Holland Trust Company was by ordinance of the city designated as the depository of the bonds of the Water Company. Two hundred and seventy thousand dollars of the water bonds were deposited with the Holland Trust Company to secure a like amount of city bonds theretofore transferred to Coffin & Stanton in pursuance of the terms of the agreement of September 16, 1889. Coffin & Stanton constructed the system by subcontract with the Risdon Iron & Locomotive Works, in all respects to the satisfaction of the city engineer, and on November 24, 1890, the report of the engineer was received by the common council of the city, and, the property having been tendered to the city by the contractors, the city attorney was authorized to examine the titles, deeds of conveyance, etc., and, if regular, to place the same of record.

On March 29, 1892, the City Water Company executed to the city a deed reconveying the waterworks system and property. The deed recites, among other things, that "the said system of waterworks has been fully completed to the satisfaction of the party of the second part, and said waterworks have been accepted by it." And its habendum clause is as follows: "To have and to hold the same and every part thereof unto the said party of the second part, its successors and assigns, subject, however, to said mortgage or deed of trust and all the obligations thereby imposed, which bonds, mortgage, or deed of trust, and obligations, the party of the second part agrees to pay and perform." On May 2d this deed, as to the matter of its acceptance, was referred to the new common council of the city, and at a meeting held May 23d was referred to the water committee. On March 5, 1894, nearly two years later, on motion it was ordered by the common council that the deed be formally accepted and recorded. The order was not approved by the mayor, however, until April 2, 1894. The entire \$400,000 bond issue of the City Water Company was delivered to the Holland Trust Company June 3, 1890. Thereafter, on June 14, 1890, \$50,000 of these bonds were delivered by the Trust Company to Coffin & Stanton, \$10,000 on July 7th, and \$70,000 on July 15th, aggregating \$130,000. Later Coffin & Stanton returned \$27,000 of these latter bonds to the Trust Company, and still later Coffin & Stanton agreed to surrender others of these bonds, reducing the entire amount outstanding to \$89,000.

On March 11, 1891, the Legislature passed another act, by which the limitation of indebtedness which municipalities were permitted to incur for acquiring public improvements was increased to 15 per cent. of the assessed valuation of the taxable property. On February 26, 1894, the city council adopted an ordinance calling a special election in the city for the purpose of submitting to the qualified electors the question whether the bonded indebtedness of the city should be refunded, among which indebtedness were specified 89 first-mortgage bonds of the City Water Company, of date May 1, 1890, being bonds of the \$400,000 issue of said Water Company and accrued interest thereon. The election contemplated was held March 13, 1894, resulting in a vote of 538 in favor of and 57 against the proposition of refunding the city's bonded indebtedness; the result of the election being declared by the common council March 15th. A contract was shortly thereafter entered into with Coffin & Stanton for refunding said indebtedness. This suit was instituted against the city October 10, 1898, to recover upon 103 of the water bonds, and for a foreclosure of the mortgage given by the Water Company to secure the payment of the same. Decree was rendered favorable to complainant May 24, 1911, George Wykes being substituted in the meanwhile for the Holland Trust Company of New York. From this decree the city of Santa Cruz appeals.

Curtis H. Lindley and Henry Eickhoff, both of San Francisco, Cal., for appellant.

Edward Mills Adams, of San Francisco, Cal., and W. W. Middlecoff, of Los Angeles, Cal., for appellees.

Brainard Tolles, of New York City, for complainant trustee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). In pursuance of its primary purpose of acquiring a waterworks system, the city of Santa Cruz issued \$300,000 of city bonds. It is shown that \$30,000 of these bonds, with other funds of the city, the whole amounting to about \$40,000, were expended in procuring water rights, rights of way, easements, and a reservoir site, looking to the construction of the water system, and a franchise was granted the

city for laying the mains and constructing the necessary equipment for the completed system.

At this juncture in the progress of the work, the state Legislature passed an act limiting the indebtedness which cities within the state were permitted to incur to 5 per cent. of the assessed valuation of the property within the city. Upon this basis the city of Santa Cruz was limited to an indebtedness of about \$162,000. A question arose respecting \$270,000 of the \$300,000 bond issue, whether these remaining bonds, not having been disposed of by the city by sale and transfer to the purchaser, were affected by the act. It was thought by some at least that they were rendered nugatory, and could not be henceforth regularly sold in the market. Finding itself in this condition, and its credit circumscribed, the city was unable to proceed with the construction of the waterworks system upon the plan contemplated. Being unable to dispose of the remainder of the \$300,000 of city bonds, the scheme or plan under which the waterworks system was finally constructed was devised. It is fully delineated by the contracts of September 16 and 23, 1889, entered into by and between the city and Coffin & Stanton, which are set forth in the statement.

The obligations entered into through the stipulations of these two contracts were substantially carried out, on the part of both the city and Coffin & Stanton. The city granted to Coffin & Stanton the franchise for construction, conveyed to the Water Company the water rights and reservoir site specified, purchased the water system when completed, entered into possession thereof, received the revenues derived from its operation, and made provision for payment of the interest on the first-mortgage or water bonds outstanding and for a sinking fund for the redemption of such bonds. Coffin & Stanton constructed the waterworks system in conformity with the agreed specifications, organized the City Water Company, and assigned to it the privileges granted by the city, made the necessary cash advances for the construction of the waterworks, and made the deposit as required of the \$270,000 of water bonds to be held in trust to secure a like amount of the city bonds. And the Water Company executed a first mortgage on the properties and franchises to secure an issue of bonds to the amount of \$400,000, issued to Coffin & Stanton all of such bonds, commenced and completed the construction of the system within the time specified, and conveyed the completed system to the city subject to the mortgage executed by the Water Company to secure the \$400,000 bond issue. The deed from the Water Company to the city contains a provision beyond any stipulated for in the contracts, whereby the city assumed the obligations imposed by the mortgage or deed of trust, and agreed to pay the bonds and perform all such obligations.

By a survey of the contracts of September 16 and 23, 1889, the subsequent treatment thereof and the acts and transactions had with reference thereto by all the parties—the city, Coffin & Stanton, and the Water Company—there is left not a semblance of doubt that the city's aim and purpose was to acquire the waterworks system, and that the scheme devised for the acquirement of the system was in-

tended to circumvent the law limiting the indebtedness of the city to an amount not to exceed 5 per cent. of the assessable valuation of the property within the city. While not assuming the indebtedness incident to the construction of the water system directly, the device was to incur the property of the city therewith, and thus to accomplish indirectly what it was not allowed to do directly. The questions that arise for consideration grow out of this situation. There is no question of fraud to be determined. The pleadings do not present such a case, and, while some irregularities of the kind are suggested by the argument and upon the briefs of counsel, they are foreign to the real controversy.

[1] By the Constitution of the state of California (section 18, art. 11) it is provided:

"No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void."

This is an inhibition against which a municipality cannot incur any indebtedness exceeding in any year the income and revenue provided for it for such year except in a certain mode or manner prescribed. The mode, therefore, becomes the measure of the power of the municipality to incur an indebtedness beyond the measure fixed by the fundamental law. That is to say, before the city can incur itself with such excess indebtedness, it must have the consent of two-thirds of its qualified electors to that purpose, and, when it has obtained such consent, provision shall be made for collection of an annual tax sufficient to pay the interest on such indebtedness annually, and to create a sinking fund sufficient to discharge the principal within 20 years.

[2] The power to create the excess indebtedness does not abide with the municipality or its common council alone, but with the assent of two-thirds of its electors. It is only when that assent is had that it may proceed. This much for the Constitution of the state.

By statute approved March 4, 1887, specific directions are given as to the manner in which the election shall be held for obtaining the requisite consent of the electors and by which the indebtedness shall be created. Stats. Cal. 1886-1887, p. 13. At the time when the \$300,000 indebtedness was incurred by the issuance of the city bonds for acquiring the waterworks system, there was no limitation to the amount of indebtedness that a city might incur provided it was incurred in the mode pointed out by the Constitution. The city, it is conceded, pursued that mode in issuing these city bonds. By an act of March 19, 1889, this statute was amended so as to require that an ordinance declaring the necessity for incurring the indebtedness should be passed by a two-thirds vote of the legislative branch of the municipality, instead of a three-fourths vote, but in other particulars

there was no substantial change. But it was further enacted by section 5, that:

"No city, town or municipal corporation shall incur an indebtedness for public improvements which shall in the aggregate exceed five per cent. of the assessed value of all the real and personal property of such city, town or municipal corporation." Stats. of Cal. 1889, pp. 399, 400.

It was subsequent to this date that the city of Santa Cruz entered into the contracts under and by virtue of which the bonds in question were issued, these contracts bearing date, respectively, September 16 and 23, 1889. By an act of March 11, 1891, the Legislature amended the above section 5 by substituting the words "fifteen per cent." for the words "five per cent.," thus increasing the amount of indebtedness for which the municipality might lawfully become liable accordingly. Stats. of Cal. 1891, p. 84. The refunding act of March 1, 1893, p. 59, c. 47, amendatory of the act approved March 15, 1883, is as follows, in so far as is necessary to recite:

"Section 1. That section one of the above entitled act is hereby amended to read as follows: '§ 1. That whenever any incorporated city or town, other than cities of the first class in this state, has an outstanding indebtedness evidenced by bonds and warrants thereof, the common council, board of trustees, or other governing body thereof, shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness. Said election shall be called and held in the same manner in which other elections are held in such city or town. The notice of such election shall recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued. Such bonds shall be of the character known as "serials," one-fortieth of the principal being payable each year, together with interest due on all sums unpaid. Said bonds may be issued in denominations not to exceed one thousand dollars, nor less than one hundred dollars; principal and interest being payable in gold coin or lawful money of the United States, and either at the office of the treasurer of such city or town, or at a designated bank situated in the cities of San Francisco, New York, Boston or Chicago. Interest upon the same shall not exceed six per cent. per annum, and may be payable semi-annually. Said bonds shall be sold in the manner provided by such city council, or governing body, to the highest bidder for not less than their face value, in the same character of money in which they were payable. The proceeds of such sale shall be placed in the treasury to the credit of the funding fund, and shall be applied only for the purpose of refunding the indebtedness for which they have been issued. Said common council, or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually, each year, sufficient money to pay one fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid.'"

Preliminarily to entering into these contracts, it would seem from the testimony that the city sold to Coffin & Stanton the balance of its \$300,000 bond issue, to wit, \$270,000 thereof, and in exchange therefor Coffin & Stanton paid to the city \$25,000, which went into its treasury, and gave their check or draft to the city for the amount of the par value of the balance or \$245,000. This check was very soon returned to Coffin & Stanton, and the bonds retained by them, it would seem, as an advance towards the payment of the consideration for the acquirement of the waterworks system. When, however, the

contracts were entered into provision was made, as a reading of the contracts discloses, whereby \$270,000 of the water bonds should be deposited with the trust company to be held in trust to secure a like amount of city bonds, which it is stipulated were theretofore "sold to Coffin & Stanton." Thus it was intended, no doubt, to secure the city against a double payment of \$270,000 towards the consideration for the construction of the water system, but the contracts contemplated the issuance and negotiation of both classes of bonds, namely, the city and water bonds. Another provision of the contracts contemplated that there might be changes and additions to the water system which were to be paid for by issuance of a sufficient number of first-mortgage or water bonds at 90 per cent. of their par value to meet the contingency, and also sufficient of such bonds at the same rate to pay the accruing interest of the issue needed for meeting the added expense for these changes and additions to the system. Now, not only the \$320,000 of the authorized bond issue of the Water Company were certified and issued to Coffin & Stanton, but also the remaining amount up to the full authorization. Thus there were issued and certified to Coffin & Stanton \$130,000 bonds in excess of the \$270,000 of the city bonds which the city delivered to them in the preliminary negotiations for the construction of the waterworks system. It is concerning this excess issue that the present suit is being maintained. But of this \$130,000 \$27,000 were returned to the trustee by Coffin & Stanton, and from the evidence and by stipulation of counsel it appears that others of these bonds were also returned to the trust company, reducing the amount of the outstanding bonds to 88, or in par value \$88,000. There is therefore no further controversy as to the amount and class of bonds in litigation. They consist of the first-mortgage bonds of the Water Company, or what we style the water bonds, and not of the city bonds. What has become of all the bonds of both issues save these it is not material to inquire. The Water Company was organized and incorporated some time subsequent to the time when the city entered into the contracts with Coffin & Stanton. The \$400,000 bond issue was thereupon authorized, the bonds themselves to bear date May 1, 1890. During the months of June and July, 1890, the entire balance of \$130,000 of these bonds, including the \$88,000 in suit, was certified and issued and delivered to Coffin & Stanton. It therefore appears that, if these bonds are to be considered as evidentiary of the city's indebtedness, the city had incurred an indebtedness far beyond what it was then permitted by statute to incur.

[3] We may first consider whether this indebtedness should be legitimately accounted an indebtedness of the city. While the city did not agree or undertake primarily to pay the indebtedness, it did agree most positively to take over the waterworks system when completed by deed subject thereto. Further, in order to enable it to secure the construction of the system, the city conveyed property to Coffin & Stanton worth near \$40,000, besides granting the necessary franchise for laying the mains, installing hydrants, etc.; so that the city was in part, leaving aside for the present any mention as to the regularity of

the transaction, only coming into its own through the contemplated deed. The city, by taking over the property by deed under such circumstances, subject to the mortgage made to secure the issue of water bonds, would thereby incur an indebtedness within the inhibition of the statute.

In *Evans v. Holman*, 244 Ill. 596, 91 N. E. 723, the village of Clay City by ordinance granted to one Fisher the right to construct and maintain within the village an electric light plant for a period of 30 years, and agreed to pay Fisher during the time \$70 per annum for each of 23 arc lamps. By another ordinance adopted at the same time the village provided for the issuance of village bonds in the amount of \$4,200, the limit to which it was permitted to incur an indebtedness. Shortly thereafter it entered into a contract with Fisher for the construction of the plant, Fisher agreeing to incorporate a company which should issue bonds in the sum of \$7,296 to be secured by a first mortgage upon the plant, and, when the plant was completed, to convey the same to the village, the village agreeing to pay to Fisher the price of the \$4,200 village bonds in cash and to take the deed subject to the mortgage securing the payment of the \$7,296 of company bonds. The plant was completed, and the deed made as contemplated, but when the village was about to pay one of the mortgage bonds and accrued interest on such bonds, and the village bonds, it was enjoined by taxpayers. The question was squarely presented whether the village had exceeded its limit of indebtedness by an acceptance of the deed to the plant subject to the company mortgage, and it was held that it had; the court saying:

"The plan was merely a scheme concocted for the purpose of evading the Constitution, and devices for that purpose have never succeeded."

The village was allowed, however, to apply the net income of the plant toward the payment of such mortgage indebtedness.

In *Browne v. City of Boston*, 179 Mass. 321, 60 N. E. 934, the city of Boston arranged with the owner of a parcel of land to purchase the same in this way, the city to pay \$24,000 through the issuance of bonds to the owner, the owner to mortgage the property for \$202,000, and when so mortgaged to convey the equity of redemption, or the property subject to the mortgage, to the city. Certain taxpayers sought to restrain the city from completing the purchase on the ground that the city would thereby exceed its debt limit. It was held that the purchase should be enjoined because, in order to keep the lands, the city would be required to pay the mortgages, and hence, in effect, the purchase price was beyond the debt-incurring power. The court reasoned that, while it was true that no action could be maintained against the city for the mortgage deed, yet it was bound to pay it in order to retain the land, otherwise it must lose its equity, so that in practical effect the mortgage would become that of the city. It was further said:

"The object of the statute is to protect the taxpayer by confining the indebtedness of the city within a prescribed limit. The manner in which the indebtedness is created is immaterial, if the result is to subject the city to a present liability, direct or indirect, which the taxpayers eventually will

be called on to meet. It seems to us that such will be the result of the ingenious scheme that has been devised in the present case."

In *Fidelity Trust & Guaranty Co. v. Fowler Water Co.* (C. C.) 113 Fed. 560, a sale of waterworks was made to the town of Fowler subject to the incumbrance of any bonded indebtedness placed upon the plant by Fowler Water Company, which constructed the plant; it being stipulated that the town did not assume the payment of such indebtedness. The question being presented whether by the transaction the city would exceed its limit of indebtedness, the court, speaking to the subject, says:

"If the town had owned the waterworks free of incumbrance, it could not have executed a valid mortgage upon them. No municipal corporation has any power or authority to incumber its property by mortgage, in the absence of legislative authority so to do. If a municipal corporation should accept a conveyance of property subject to a mortgage, it must pay off the mortgage debt, or lose the property. The purchase of the waterworks by the town of Fowler, subject to the incumbrance created by the deed of trust, would create an indebtedness to the full extent of such incumbrance."

And it was held that the town of Fowler was constitutionally disabled from purchasing the waterworks in that manner.

So of other authorities, the general doctrine being that a purchase of what may be termed the equity in property by a municipality subject to a mortgage or bonded indebtedness is the incurring of a municipal debt to the extent of the incumbrance of such property, because the municipality must pay the incumbrance or lose the property. It is not a debt which the municipality can be forced to pay, but it is one which it purposes to pay, and in that sense is a debt inhibited by statutory limitations upon municipal indebtedness. See *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964, 59 Am. St. Rep. 886; *Brown v. City of Corry*, 175 Pa. 528, 34 Atl. 854; *Ironwood Water Works Co. v. City of Ironwood*, 99 Mich. 454, 58 N. W. 371. Nor does it alter the case or impair the effect of the rule that the indebtedness is to be paid out of receipts or income from the property taken over, or from, or is paid in the way of, an annual tax or rentals. *City of Joliet et al. v. Alexander*, 194 Ill. 457, 62 N. E. 861; *Brown v. City of Corry*, supra; *Earles v. Wells*, supra.

It is next urged on the part of the city that, the agreements under which it acquired the plant being of record and constituting the muniments of title of the Water Company, they imparted constructive notice to the purchasers of the water bonds that the city was proceeding beyond its power in incurring indebtedness by the acquirement of such waterworks in the manner contemplated, and therefore that they were not bona fide purchasers for value of the water bonds.

[4] It is settled law that recitals in municipal bonds to the effect that they are issued in pursuance of and in conformity with statutes and ordinances authorizing their issue operate as an estoppel to the municipality to deny that they were so issued. As was said in *Moulton v. City of Evansville* (C. C.) 25 Fed. 382, 387:

"A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify."

A leading case upon the subject is *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760. This involved the issuance of bonds by a city in payment of subscription to stock in a railroad company. The bonds contained recitals that they were issued in payment of such subscription "made in pursuance of an act of the Legislature of the state of Indiana and ordinances of the city council of said city, passed in pursuance thereof," and the faith, credit, real estate, revenues, and all resources of the city were irrevocably pledged for the payment of principal and interest. It was there contended that, if the ordinances of the city were examined, they would show that the election held by the city upon the question of the issuance of the bonds was not legally held, thus rendering the bonds nugatory. But the court said, after reviewing its former decision:

"As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the nonperformance of the conditions precedent were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the Legislature."

The bonds were therefore sustained in the hands of a purchaser for value.

The doctrine was reaffirmed and applied in the case of *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552, which involved refunding bonds issued with a view to payment of the identical bonds in dispute here. The court there announced its conclusion in the following language:

"When, therefore, the refunding bonds in suit were issued with the recitals therein contained, the city thereby represented that it issued them under and in pursuance of and in conformity with the act of 1893 and the Constitution of the state. As nothing on the face of the bonds suggested that such representations were false, purchasers had the right to assume that they were true, especially in view of the broad recital that everything required by law to be done and performed before executing the bonds had been done and performed by the city. As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds."

It is unnecessary to pursue the authorities further on this subject, except to cite *Presidio County v. Noel-Young Bond Co.*, 212 U. S. 58, 29 Sup. Ct. 237, 53 L. Ed. 402, where the doctrine is again reaffirmed, citing previous authorities.

[5] On the other hand, if the bonds contain no sufficient recital as to their issuance in conformity with the Constitution, laws, or ordinances, or if the issuance is beyond the power of the municipality to authorize, then it is not estopped to controvert their validity. The doctrine is applicable in cases where bonds have been issued in excess

of constitutional or legislative authority. *Township of East Oakland v. Skinner*, 94 U. S. 255, 24 L. Ed. 125; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *School District v. Stone*, 106 U. S. 183, 187, 1 Sup. Ct. 84, 27 L. Ed. 90; *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; *Doon Township v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 222, 35 L. Ed. 1044; *Nesbitt v. Riverside Independent District*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044.

The bonds in suit contain no recitation or certification by the municipal or other officers that they were issued in conformity with either the Constitution or laws of the state, or with any ordinance of the city authorizing their issue. Indeed, they are not city bonds at all, but bonds of a private corporation containing no certificate whatever as to the regularity or legality of their issuance. Of course, all holders must have notice that the bonds are not primarily obligations of the city. If, therefore, bonds containing no recital or certification to the effect that they were authorized and issued in pursuance of law and the ordinances of the municipality do not estop the municipality to controvert their validity for want of power to authorize their issuance, the obligations being the bonds of the city itself, by how much stronger reason would the municipality not be estopped to controvert the validity of bonds not of its issuance but secured by mortgage upon the city's property, which mortgage as security the city was without power to authorize or to execute? We think that the city's contention that the plaintiffs are not the owners and holders of these bonds for value and without notice of their infirmity is sound, and that they must be deemed to have taken them with full notice of the want of power in the city to authorize their issuance or to secure the same by mortgage upon its property. But, whether this be so or not, in the view we take of the case, this question relating to the bona fides as it respects the purchase and ownership of these bonds by the present holders becomes practically immaterial.

The appellant's counsel claim, in effect, that the city had no power to accept the deed, and thereby to assume and to obligate itself to discharge the indebtedness evidenced by the bonds and secured by the mortgage of the Water Company. In other words, the question is presented whether the city was eventually authorized and empowered to incur the indebtedness which it attempted to assume, and thus obligate itself to pay to the holders of the bonds. We have seen that the mode prescribed for incurring indebtedness is also the measure of the municipality's power for so doing. But counsel for appellees strenuously urge that, although the acts of the city in assuming the indebtedness may have been *ultra vires*, they were not *ultra vires* in a sense that rendered the transactions absolutely and unalterably void, but that where the contract has been fully executed, the city having received the benefit, it will not be permitted to disavow or abrogate its liability. Let us examine the authorities on the subject. It is said in *St. Louis Railroad v. Terre Haute Railroad*, 145 U. S. 393, 407, 12 Sup. Ct. 953, 957 (36 L. Ed. 748):

"If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant."

And further:

"When the parties are in *pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract."

The case was one where the plaintiff railroad company entered into a contract with the defendant railroad company, the defendant company not possessing the power so to contract, and as to it the act of so contracting was *ultra vires* its authority. The plaintiff, after the contract had been fully executed and it had received rents from the defendant for seventeen years, sought to abrogate the lease, but the court refused upon such a state of facts to grant the relief, assigning as a further reason therefor that plaintiff had been guilty of laches. The rule is very well stated in *Long v. Georgia Pac. Ry. Co.*, 91 Ala. 519, 8 South. 706, 24 Am. St. Rep. 931:

"It is thoroughly well-settled law that a party to an *ultra vires* executory contract, made with a corporation, is not estopped to set up the want of corporate capacity in the premises either by the fact of contracting, whereby the power to contract is in a sense admitted or recognized, or by the fact that the fruits or issues of the contract have been received and enjoyed; and this, though the assault upon the transaction come from the corporation itself. But where the contract is fully executed, where whatever was contracted to be done on either hand has been done, a different rule prevails. In such case the law will not interfere, at the instance of either party, to undo that which it was originally unlawful to do, and to the doing of which, so long as the contract to that end remained executory, neither party could have coerced the other."

This is a case where a party sought to recover land that he had sold to a corporation having no power to purchase, and it was held that he could not recover. See, also, *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Parish v. Wheeler*, 22 N. Y. 494, 508; *Lestapies v. Ingraham*, 5 Pa. 71, 81.

[6] The principle applies not as an estoppel to the corporation, where the *ultra vires* contract is still executory, to set up its incapacity to entertain it; but where the contract has been executed—that is, fully and completely performed on both sides—the court will not interpose to restore either party his former estate, or grant other relief, but will leave the parties where it found them. But, however well-established this rule may be, relief will nevertheless be granted if it can be done independently of the contract, or a new, further and independent consideration subsists in support of the transaction sought to be enforced. Mr. Justice Miller recognizes the principle in part in an opinion rendered in *Penn. Co. v. St. Louis, Alton, etc., Railroad*,

118 U. S. 290, 317, 6 Sup. Ct. 1094, 1106 (30 L. Ed. 83). In a discussion of the general rule attending ultra vires contracts, he says:

"But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands."

But in a much earlier case the doctrine is affirmed that though an illegal contract will not be enforced by the courts, yet where such a contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied and the transaction will not be unraveled for the ascertainment of its origin. *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. Ed. 473. See, also, *Lestapies v. Ingraham*, supra.

And it is again affirmed by the Supreme Court that:

"An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case." *Armstrong v. American Exchange Bank*, 133 U. S. 433, 469, 10 Sup. Ct. 450, 461 (33 L. Ed. 747).

These principles find application in *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 342, 49 Pac. 197, 200, a California case of some analogy to the one at bar. In this case the question was made that the Pacific Railway Company had exceeded its power in mortgaging certain property that it had acquired from another company, namely, the Cable Railway Company, and hence was not liable under a foreclosure of the bonds thus secured. The court disposes of the contention as follows:

"But it is said that the bonds themselves were issued in contravention of law, and are void in the hands of the holders. This is asserted, as we understand appellant's contention, because of the connection between the issue of bonds and the attempted acquisition by the Pacific Railway Company of the property and franchises of the Cable Railway Company on which it was supposed, when the bonds were authorized, that they would be secured. The argument necessarily assumes, though it is not precisely so stated, that whoever bought a bond thereby promoted an illegal enterprise, and must lose his money. We dissent from this view. Granting that it was ultra vires of the Pacific Railway Company to mortgage the property of the Cable Railway Company, it was still intra vires for it to borrow money and issue evidences of indebtedness. This is not denied. Consequently its bonds were not invalidated by the want of power to make the mortgage by which they were in terms secured. *Railroad Co. v. Lewis*, 33 Pa. 33 [75 Am. Dec. 574]. If, then, there was any taint of illegality in the sale or pledge of the bonds, it must have lain in the purpose to which the proceeds were designed by the Pacific Railway Company, paying the debts of the Cable Railway Company, completing and extending its scheme of street transit. There was nothing criminal or against good morals in the effort of the Pacific Railway Company to acquire the entire plant and franchises of the Cable Railway Company. At the most, it was an attempt at something beyond the charter powers of the companies, and forbidden by considerations of public policy; but that was a vice which infected only the contract of the two corporations. The issue and disposition of bonds to third persons consti-

tuted a series of transactions each resting on a new consideration, and connected only indirectly with the contract between the corporations. Admitting, as urged by appellant, that the holders had notice of the purposes of the Pacific Railway Company, yet they did nothing to promote those purposes beyond parting with their property on the faith of its obligations. They do not found their right of recovery on the illegal contract between the companies; and, in our opinion, they are not affected by it."

[7] We are convinced that the acts of the city of Santa Cruz in entering into its contractual relations with Coffin & Stanton were not ultra vires in its primary sense. It was acting in its proprietary or quasi private relation, and not in its governmental capacity, by which it exercised the sovereign powers with which it was endowed. If, therefore, it subsequently had power to incur the indebtedness attending the construction and acquirement of the waterworks system, it had power to assume the obligations of the Water Company.

[8] It seems to be the rule in California that a person purchasing subject to a mortgage and agreeing to pay the mortgage liability will not be heard to question the validity of such liability, and by thus assuming payment he becomes primarily liable to the holders of the obligations thus assumed. *Johns v. Wilson*, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. Ed. 613, citing *Williams v. Naftzger*, 103 Cal. 438, 37 Pac. 411. See, also, *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27; *Weaver v. McKay*, 108 Cal. 546, 41 Pac. 450.

[9] This brings us to a consideration of the effect of the submission to the electors of the city of the propriety of refunding certain bonded indebtedness, including indebtedness of the Water Company, comprising the bonds in suit. The submission was made by Ordinance No. 314 passed by the city council and approved by the mayor February 26, 1894, directing the election to be held on March 13, 1894. That the election was accordingly held, resulting favorably to the refunding of such bonded indebtedness, is attested by Ordinance No. 317 passed and approved March 15, 1894. The question thus submitted to the qualified electors was that of "refundng the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same." The ordinance (No. 314) further declares that the indebtedness of the city which it is proposed to refund is as follows:

"* * * (2) Eighty-nine (89) first-mortgage bonds (with interest thereon from November 1st, 1893) of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, * * * secured by a mortgage or deed of trust upon the property known as the City Waterworks of Santa Cruz * * * and which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz of the property known as the City Waterworks, and now are, a valid lien and charge upon said property known as the City Waterworks, and became thereby a part of the bonded indebtedness of the city of Santa Cruz."

We are advised by the resolution of the common council of the city of Santa Cruz adopted November 24, 1890, that the waterworks system had been "completed according to contract, and, the property having been tendered by the contractors," the city attorney was directed to examine all deeds of conveyance, etc., and, if found regular,

to place the same of record. Much later, to wit, May 2, 1892, we find that the matter of the acceptance of the deed of the city waterworks to the city of Santa Cruz was ordered referred to the new council. Later, on May 23, 1892, the deed from the City Water Company was referred to the water committee. Thus the matter seems to have rested until March 5, 1894, when the city council by motion ordered that the deed be accepted and recorded. This action of the common council was not approved by the mayor, however, until April 2, 1894.

It is manifest that the election for submitting the refunding project to the electors was not held for the purpose of authorizing the city to incur the indebtedness arising in course of the construction and acquirement of the waterworks system, but, by the very terms of the ordinance submitting the question, of refunding the bonded indebtedness of the city and issuing bonds for the purpose, and by the plainest language possible the electors sanctioned such indebtedness in so far as the bonds in question are concerned, and thereby, in effect, ratified the action of the city in incurring the same. The vote was in reality upon the question whether the city should pay this indebtedness through a refunding of the same, and it was in effect declared that it should. There could scarcely be a more positive ratification of the acts of the city in incurring the indebtedness, assuming that such indebtedness was in reality that of the city, though incurred beyond its legal authority. It will be noted that the city delayed for a long while, more than three years, the acceptance of the deed from the Waterworks Company, after the completion of the water system. Why the delay does not fully appear from the record. But it does appear that the deed which was accepted contains an agreement on the part of the city to assume and pay the indebtedness of the Water Company, which was wholly, as we have seen, beyond any stipulation contained in the original contract between the city and Coffin & Stanton. It may be fairly inferred from this circumstance, and the fact and manner of submitting the refunding project to the electors for their authorization and ratification, that the city had been led to doubt its authority to acquire the waterworks in the manner formerly adopted and to incur the indebtedness necessary to its construction, and was seeking a ratification of its acts and an authorization by the electors for assuming the indebtedness previously incurred by acceptance of such deed with the covenant or agreement noted. Resort was had to the plan of refunding the bonded indebtedness, treating the water bonds in question as a part of such indebtedness. Concurrent in time with procuring authority for refunding, the city accepted the deed, with the undertaking on its part to pay such bonded indebtedness of the Water Company. It would thus seem that the two acts were a part of the same plan, although it was designed that the bonded indebtedness, the water bonds, should be paid through the issuance of bonds of the city and with the proceeds thereof.

It will be noted that the resolution for the acceptance of the deed was adopted March 5, 1894, but it was not approved by the mayor until April 2d, and, of course, did not become operative until the latter

date, and cannot be said to have been in reality passed before that date. So that we have an acceptance of the deed with the agreement on the part of the city to assume and pay the water bonds at the time or subsequent to the time when the city was authorized by the electors through an election regularly held to refund the bonded indebtedness, including the water bonds in question. As we have indicated, this election was tantamount to a recognition and ratification of the water bonds as bonded indebtedness of the city, and, in effect, authorized the city to incur such indebtedness, granting that it never had previous authority to do so. This the city attempted to do by assuming and agreeing to pay such indebtedness in process of its acceptance of the Water Company's deed.

It may be suggested that the authorization to incur the indebtedness was not in the mode pointed out by the Constitution of the state of California and the statute. To this it may be answered that the mode was at least substantially followed. There was an election by the electors of the city pertaining to the refunding of certain indebtedness, which it was assumed that the city was obligated to pay, or at least ought to pay, and it was declared that such indebtedness should be paid through a refunding of the same. The case of *Bell v. Waynesboro*, 195 Pa. 299, 45 Atl. 930, lends support to this view. It was said in the decision of the court: "In the present case we hold that the vote of the 7th November, 1899, authorizing the town council to create the indebtedness for the express purpose of liquidating this floating debt, which had been irregularly contracted, was such a recognition and ratification of the debt as made it enforceable against the borough. It made valid that which was before illegal." In that case, as in this, the city authorities had incurred an indebtedness beyond the authority of the borough to incur without the assent of the electors. But the electors could and did ratify the indebtedness thus illegally incurred by authorizing the town council to create an indebtedness for the purpose of liquidating this excess indebtedness.

Now we come to the question whether the city could lawfully undertake and agree to pay this bonded indebtedness of the Water Company in view of its ultra vires agreement with Coffin & Stanton, whereby it sought to acquire the waterworks system in the first place. The agreement to assume the remaining indebtedness of the Water Company was a new and independent contract. The agreement under the Coffin & Stanton contract was simply that the city should take the deed subject to the mortgage securing such water bonds, so that the agreement to assume the mortgage indebtedness is beyond anything contained in that contract, whatever may have been the effect of accepting the deed under the original stipulation. True, the consideration for the enlarged agreement was the acquirement of the water system. But the original contract has been fully executed, and, as was said in *Planters' Bank v. Union Bank*, supra:

"The money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin."

Further, as was said in *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, supra:

"The issue and disposition of bonds [in this case the water bonds] to third persons constituted a series of transactions each resting on a new consideration, and connected only indirectly with the contract between the corporations [here the city and Coffin & Stanton]."

Also within the principle of that case, as previously observed, the attempt of the city to acquire the water system as contemplated was a transaction within the exercise of its proprietary functions, a thing inhibited by considerations of public policy, and not because it was criminal or contrary to good morals. It was a thing, therefore, that it might with just propriety ratify or confirm; the statutory inhibition being removed. The inhibition was so removed in the present case in so far as it concerned an incurring of indebtedness equal to and beyond the amount of these outstanding water bonds, and, it having been authorized thereto by the action of the electors, we are of the opinion that the city lawfully assumed the payment of such indebtedness. The Supreme Court of the United States has recognized the force of this view in *Waite v. Santa Cruz*, 184 U. S. 302, 313, 22 Sup. Ct. 327, 331 (46 L. Ed. 552). It says:

"One of the contentions of the city is that the words 'outstanding indebtedness, evidenced by bonds and warrants thereof,' in this act do not embrace the 89 bonds executed by the Water Company. Those bonds, although not executed by the city, certainly constituted a part of its outstanding indebtedness, for the reason that the city had assumed to pay them. Both the city authorities and the qualified electors so regarded the matter. The city's assumption of the bonds imposed as much obligation upon it to pay them as if it had itself directly executed and issued them. It could not acquire complete ownership of the waterworks without paying for them, and it took a deed for the waterworks expressly subject to a valid lien in favor of the Water Company's first-mortgage bonds, including the above 89 bonds. In every substantial sense, therefore, these bonds were part of the city's outstanding bonded indebtedness. Such is the argument made in behalf of the plaintiff, and its force is recognized."

It is not a question now whether the water bonds were such, evidenced by the city's bonds and warrants, as are authorized for refunding under the act of March 1, 1893, but whether the city has through its electors recognized the outstanding water bonds as evidentiary of indebtedness of the city, and thereby in effect authorized the city to assume and pay such indebtedness. We think it has. From an equitable point of view the city has acquired this water system and has had the use of it for many years, and it ought not to be heard, after the inhibition for incurring the indebtedness has been removed and the electors have taken action recognizing the indebtedness here in suit, and in effect ratifying the acts of the city in incurring such indebtedness, to deny its obligation to pay the same under its assumption thereof through acceptance of the deed of the Water Company to the water system.

It is finally urged that the decree of foreclosure as rendered is faulty, in that it does not preserve to the city the statutory right of redemption from sale as directed to be made. From an examination of the

decree it will appear that no order or adjudication has been made touching redemption from sale, but, on the other hand, the court has reserved for further determination all matters of equity "not herein expressly adjudged, and any party to this cause may apply for further order and direction touching the matters in issue undisposed of by this decree." If the city is entitled to the right of redemption, the trial court under this reservation has ample authority to grant it, should it be deemed necessary, in view of the present form of the decree, to do so.

The decree of the trial court will be affirmed, with costs to appellees.

ROSS, Circuit Judge. I concur in the judgment in this case, because the Supreme Court in the case of *Waite v. Santa Cruz*, 184 U. S. 302, 314, 22 Sup. Ct. 327, 46 L. Ed. 552, held that the city's assumption of the bonds that had been issued by the Water Company (88 of which are in suit here) imposed as much obligation upon the city to pay them as if it had itself directly executed and issued them, and because it appears in the present case that at the time the city thus assumed the payment of the bonds issued by the Water Company the indebtedness the city was authorized to incur had been so extended by a statute of the state as not to bring its action in assuming the indebtedness evidenced by the water bonds within the inhibition of any provision of the Constitution or statutes of the state.

KETTENBACH et al. v. UNITED STATES †

(Circuit Court of Appeals, Ninth Circuit. January 13, 1913.)

No. 2,080.

1. BANKS AND BANKING (§ 256*)—NATIONAL BANKS—OFFENSES—AIDING AND ABETTING—"EVERY PERSON."

Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), denounces a penalty against every president, cashier, teller, clerk, or agent of a national bank who shall falsify reports to the Comptroller of the Currency and every person who, with like intent, aids or abets any officer, clerk, or agent in any violation of such section. *Held*, that the words "any person" as so used were not limited to persons not connected with the banking association, but included officers and agents of the bank itself, so that the president of a national bank could be properly convicted of aiding the cashier in committing the offense described.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 958-964, 967; Dec. Dig. § 256.*

For other definitions, see Words and Phrases, vol. 3, pp. 2515-2517; vol. 8, p. 7655.]

2. CRIMINAL LAW (§ 1137*)—TRIAL—CONSOLIDATION OF INDICTMENTS—RIGHT TO OBJECT.

Where defendants, charged with falsifying reports to the Comptroller of the Currency, applied for a severance as to them from charges against other defendants, and that all of the indictments involving the applicants be consolidated and tried at the same time, as authorized by Rev. St.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied February 24, 1913.

§ 1024 (U. S. Comp. St. 1901, p. 720), they could not object after conviction that the court erred in consolidating their indictments for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

Consolidation of and trial of indictments together, see note to *McGregor v. United States*, 69 C. C. A. 488.]

3. JURY (§ 136*)—INDICTMENTS—CONSOLIDATION—PEREMPTORY CHALLENGES.

Where indictments against two defendants for violating the National Bank Act were consolidated on their application, the consolidated indictments became in legal effect separate counts of a single indictment, and the defendants were therefore only entitled to ten peremptory challenges, as in the case of a trial under a single indictment.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 607-618; Dec. Dig. § 136.*]

4. INDICTMENT AND INFORMATION (§ 121*)—REQUISITES—CERTAINTY—BILL OF PARTICULARS.

Where an indictment against national bank officers for falsifying reports to the Comptroller of the Currency specifically referred to the entries which were alleged to be false, it was not an abuse of the trial court's discretion to deny an application for a bill of particulars calling for the production of practically all the government's evidence to sustain the charge and for items from the bank's books; no affidavit or other showing being made to support the application or show that defendants could not have access to the books, etc.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316-320; Dec. Dig. § 121.*]

5. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES—SIMILAR TRANSACTIONS—INTENT.

In a prosecution of national bank officers for falsifying reports to the Comptroller, etc., evidence of the making of a series of false reports as to the bank's condition to the Comptroller of the Currency, beginning seven years prior to the dates of the reports which were counted on in the indictments, showing a uniform system of falsification similar to the falsification of the reports charged in the indictment, was admissible to show motive or intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

6. CRIMINAL LAW (§ 384*)—EVIDENCE—OTHER OFFENSES—TIME.

No limit is placed on the court's power to admit evidence of a series of prior similar transactions committed by the accused in the ordinary course of his business to show motive or intent, but the period of time within which such matter may be competent is a matter largely within the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 848; Dec. Dig. § 384.*]

7. CRIMINAL LAW (§ 1035*)—APPEAL—OBJECTIONS AND EXCEPTIONS—NECESSITY.

Improper remarks, alleged to have been made by the trial judge during the progress of the trial in the presence of the jury, cannot be reviewed, where no objection or exception was taken thereto at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2633-2638, 2643, 2644; Dec. Dig. § 1035.*]

8. CRIMINAL LAW (§ 656*)—TRIAL—STATEMENTS BY COURT.

Where, on the trial of bank officers for falsifying reports to the Comptroller of the Currency, the report was blank as to an item of indebtedness to trust companies and savings banks, it was not error for the court to remark, "The report shows blank, and that is reporting

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

nothing as a matter of fact"; it being the court's duty to state the legal effect of leaving a blank unfilled in such a report.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.*]

9. CRIMINAL LAW (§ 762*)—WITNESSES (§ 246*)—FEDERAL COURT—PRACTICE.

A trial judge in a federal court is not a mere presiding officer, it being his function to conduct the trial in an orderly way, with a view to elicit the truth and attain justice between the parties, and he being authorized to interrogate witnesses, and to express his opinion on the weight of the evidence and on the credibility of the witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759; Dec. Dig. § 762;* Witnesses, Cent. Dig. §§ 852-857; Dec. Dig. § 246.*]

10. WITNESSES (§ 269*)—CROSS-EXAMINATION—SCOPE.

It was not error to exclude questions asked of a witness on cross-examination which were not within the scope of his direct examination, and which were not relevant to the issues in the case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

11. CRIMINAL LAW (§ 829*)—TRIAL—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

It is not error to refuse requests to charge substantially covered by instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

12. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—OFFENSES.

In a prosecution of national bank officers for making false reports to the Comptroller of the Currency, the court properly charged that defendants might be convicted on proof that the false reports were made in pursuance of a previous arrangement between the clerk who made them and the defendants who instigated them, the statute being applicable to counseling and procuring in advance of the act, and refused to charge that, in order to convict, it must be proved beyond a reasonable doubt that defendants directed the specific reports complained of in the indictment or made such reports themselves, as such request assumed that defendants could be convicted only on proof that they made the reports, or stood by and directed that the specific reports be made by another.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 966, 970-976; Dec. Dig. § 257.*]

13. BANKS AND BANKING (§ 257*)—NATIONAL BANKS—OFFICERS—OFFENSES—EVIDENCE.

In a prosecution of national bank officers for falsifying reports to the Comptroller of the Currency, evidence *held* sufficient to sustain a finding that defendant K., the president of the bank, participated in the offense, and was therefore guilty.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 965, 966, 970-976; Dec. Dig. § 257.*]

14. CRIMINAL LAW (§ 1023*)—NEW TRIAL—DENIAL—REVIEW.

Denial of a motion for a new trial in a criminal case is not reviewable on writ of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.*]

In Error to the District Court of the United States for the Southern Division of the District of Idaho; R. S. Bean, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William F. Kettenbach and George H. Kester were convicted of violating the National Bank Act, and they bring error. Affirmed.

George W. Tannahill, of Lewiston, Idaho, Cavanah & Blake, of Boise, Idaho, and James E. Babb, of Lewiston, Idaho, for plaintiffs in error.

Peyton Gordon, of Washington, D. C., and Fletcher Dobyns, of Chicago, Ill., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiffs in error were indicted under four indictments—Nos. 777, 779, 780, and 782—all charging them with violations of section 5209 of the Revised Statutes (U. S. Comp. St. 1901, p. 3497). They entered a plea of "not guilty" to each indictment, and thereafter, upon their motion for the consolidation of the indictments, an order was made consolidating the same for trial. The jury returned a verdict of guilty on counts 1, 2, 4, 5, and 6 of indictment 780, and returned a verdict of not guilty on the other indictments and on count 3 of 780.

[1] It is contended that the court below erred in overruling the demurrer of the plaintiffs in error to the indictment, which was interposed on the ground that Kettenbach, who was the president of the Lewiston National Bank, was charged with aiding and abetting Kester, the cashier thereof, in committing the offenses alleged. The statute denounces a penalty against every president, cashier, teller, clerk, or agent of a national bank who makes any false entry in any book, report, or statement of the association, and "every person who, with like intent, aids and abets any officer, clerk, or agent, in any violation of this section." The contention is that, under this statute, one officer of a banking association cannot be charged with aiding and abetting another officer in committing the offense which is described therein, and that the provision in regard to persons who aid and abet any officer clerk, or agent of the association applies not to officers and employes of the bank, but to outsiders, persons not connected with the banking association. The language of the statute is broad enough to include the officers of the bank among those who may be charged with aiding and abetting, for it refers to "every person," and such, with possibly one exception, appears to have been the uniform ruling of the courts. *United States v. Northway*, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664; *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481; *Cochran & Sayre v. United States*, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704; *United States v. Berry* (D. C.) 96 Fed. 842; *Gardes v. United States*, 87 Fed. 172, 30 C. C. A. 596. The case which seems to be out of harmony with the foregoing is *Richardson v. United States*, 181 Fed. 1, 104 C. C. A. 69. In that case it was contended that the cashier who was indicted under section 5209 should not have been charged as principal but as aider and abettor, because the false entries, although made at his instigation, were made by others. The court ruled against the contention and held that the cashier

was a principal, notwithstanding that the entries and items falsified were made by clerks acting under his direction. The court said:

"Where an act is done by the procurement of a person, it is his act in effect, even where it is made a crime."

What the court said in that case is in line with an expression in the opinion of this court in the case of *Peters v. United States*, 94 Fed. 127, 36 C. C. A. 105, in which Judge Hawley, speaking for the court, answering the objection of counsel to the indictment that the cashier was charged in one count with directing and procuring false entries to be made by the bookkeeper, said:

"He is as guilty if he directed false entries to be made by the clerk or bookkeeper as if he made the entry in person."

But in the *Richardson Case* the court went on to say that the aiding and abetting referred to in the statute "applies to those not connected with the bank who instigate, counsel, or incite those who are." This was an expression of opinion unnecessary to the decision of the case. The question was whether the defendant in that case could properly be charged as a principal. The court held correctly, we think, that he could be. *Kettenbach* in this case might properly have been charged as a principal. He cannot complain that he is charged as aiding and abetting. By the express language of section 5209 of the offense described, whether committed by the direct act of the accused, or by his aiding and abetting another to commit it, is a misdemeanor, and both offenses are of the same grade, and are subject to the same penalty, and those who commit both are in fact principals. Said the court in *United States v. Gooding*, 12 Wheat. 475, 6 L. Ed. 693:

"In cases of misdemeanor, all those who are concerned in aiding or abetting, as well as in perpetrating the act, are principals."

And this doctrine has been expressly applied to cases of prosecution under section 5209. *Gallot v. United States*, 87 Fed. 446, 31 C. C. A. 44; *United States v. Hillegass* (D. C.) 176 Fed. 445. See, also, *Bliss v. United States*, 105 Fed. 508, 44 C. C. A. 324. There was no error, therefore, in overruling the demurrer to the indictment.

[2] We find no merit in the contention that the court erred in consolidating the indictments for trial. Not only was the order made under the authority of section 1024 of the Revised Statutes (U. S. Comp. St. 1901, p. 720), but it was made upon a motion and application of the plaintiffs in error, in which they alleged:

"That each and all of the charges against these defendants or either thereof grew out of one and the same transaction, to wit, the violation of the national banking laws of the United States, and under the law can be tried at one and the same time, and save great expense and many hardships in requiring these defendants to prepare for trial. * * * Wherefore these defendants, and each thereof, respectfully pray that a severance be had as to these two defendants, and that they be tried separately from the other defendants, that each and all the indictments involving these defendants or either thereof be consolidated and be tried at the same time."

The application was supported by the affidavit of counsel for the plaintiffs in error, in which it was stated that the motion was made in

good faith, and not for the purpose of delay; and that it was well founded in law. No exception was saved to the order of consolidation, and the plaintiffs in error are now in no position to assign error to it.

[3] Equally without merit is the contention that the court erred in denying the right of the plaintiffs in error to exercise more than 10 peremptory challenges to jurors. In a second application for a consolidation of the cases and for a severance from Robnett and F. W. Kettenbach, who were indicted with them, the plaintiffs in error said:

"These defendants also waive their right to more than 10 peremptory challenges in case an order is made trying these said indictments at one and the same time, and a severance is granted as to the defendant Clarence W. Robnett, and a severance is granted as to the defendant Frank W. Kettenbach."

That application was verified by the affidavit of the plaintiff in error William F. Kettenbach. Irrespective of the written waiver of the plaintiffs in error of more than 10 peremptory challenges, the consolidation of the indictment under section 1024 grouped together all the counts in all the indictments so consolidated as if they were separate counts in a single indictment. *McElroy v. United States*, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355; *Porter v. United States*, 91 Fed. 494, 33 C. C. A. 652; *Turner v. United States*, 66 Fed. 280, 13 C. C. A. 436. And, the consolidated indictments having thus become in legal effect separate counts in one indictment, the plaintiff in error could exercise only the number of peremptory challenges provided by law for a trial under a single indictment. *Krause v. United States*, 147 Fed. 442, 78 C. C. A. 642; *Kharas v. United States*, 192 Fed. 503, 113 C. C. A. 109.

[4] Error is assigned to the denial of the application of plaintiffs in error for a bill of particulars as to indictment 780. Their applications for bills of particulars of the charges in the other indictments were allowed, but as to indictment 780 the court said:

"It appears that the indictment in the case at bar, involving charges of false entries, specifically refers to the entries which are alleged to be false, and it is thought that the defendants by the indictment itself are sufficiently advised of the nature and the details of the charges to enable them intelligently to prepare their defense."

Where the charges of an indictment are so general that they do not fully advise the accused of the specific acts with which he is charged, the court may order that a bill of particulars be furnished him so that he may properly prepare his defense. But the allowance or refusal of the order rests in the sound discretion of the court. In *Rosen v. United States*, 161 U. S. 29-35, 16 Sup. Ct. 434, 436 (40 L. Ed. 606), the court said that the accused could "have applied for a bill of particulars, which the court, in the exercise of a sound legal discretion, might have granted or refused, as the needs of justice required." Said the court in *Breese v. United States*, 106 Fed. 680-682, 45 C. C. A. 535, 537:

"The motion was addressed to the discretion of the court, and its refusal was a proper exercise of this discretion."

See, also, *Dunlop v. United States*, 165 U. S. 486-491, 17 Sup. Ct. 375, 41 L. Ed. 799; *State v. Rathbone*, 8 Idaho, 161, 67 Pac. 186. In *Commonwealth v. Giles*, 1 Gray (Mass.) 466, a case which was cited with approval in *Dunlop v. United States*, the Supreme Judicial Court of Massachusetts said of the office of a bill of particulars:

"When it is once made, it concludes the rights of all parties who are to be affected by it, and he who has furnished a bill of particulars under it must be confined to the particulars he has specified as closely and effectually as if they constituted essential allegations in a special declaration."

In *United States v. Adams Exp. Co.* (D. C.) 119 Fed. 240, it was said:

"The office of a bill of particulars is to advise the court, or more particularly the defendant, of what facts, more or less in detail he will be required to meet, and the court will limit the government in its evidence to those facts set forth in the bill of particulars."

The application for a bill of particulars which was presented in the case at bar covers seven pages of the printed record. It went into great detail as to all the matters charged, and called for the production of practically all of the evidence of the government to sustain them. It called largely for items from the books of the bank. No affidavit was offered in support of it, and no showing was made that the plaintiffs in error could not have access to the books or obtain therefrom all evidence contained therein as to the matters which formed the substance of the charge against them. The allegations of the indictment were not indefinite or vague, nor does it appear that the plaintiffs in error were entitled as a matter of right to the disclosures of the nature of the oral testimony which the government intended to produce. There was no abuse of discretion, therefore, in the ruling of the trial court.

[5] It is urged that error was committed in the admission of testimony of similar transactions to those which were charged in the indictment to show motive and intent. Upon the proffer of such testimony, counsel for the plaintiffs in error objected on the ground that the testimony was too remote, was beyond the period of the statute of limitations, and did not refer to matters involved in the indictment. The court overruled the objection, held the testimony competent as bearing upon the questions of intent and motive, but confined its admission to the time during which the plaintiffs in error had been officers of the bank. By this ruling there was admitted in evidence a series of other reports to the Comptroller of the Currency, beginning with the year 1900, seven years prior to the dates of the reports which were counted upon in the indictments, in all of which reports there was evidence of a uniform system of falsification as shown by the books of the bank; similar to the falsification of the reports which was charged in the indictment. This evidence was by the instructions of the court to the jury carefully limited in its application to the question of the motive and intent with which the acts charged were committed. The authorities for the admission of such testimony are abundant,

and are not in conflict. In *Wood v. United States*, 16 Pet. 342, 10 L. Ed. 987, Mr. Justice Story said:

"The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable in many cases to establish such intent or motive."

That doctrine has been applied in numerous cases, among which may be cited *Coffin v. United States*, 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109; *Allis v. United States*, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91; *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; *Dow v. United States*, 82 Fed. 904, 27 C. C. A. 140; *Bacon v. United States*, 97 Fed. 35, 38 C. C. A. 37; *Wolfson v. United States*, 101 Fed. 430, 41 C. C. A. 422; *Spurr v. United States*, 87 Fed. 701, 31 C. C. A. 202; *United States v. Breese* (D. C.) 131 Fed. 915; *Brown v. United States*, 142 Fed. 1, 73 C. C. A. 187. The objection that the testimony so admitted was too remote in point of time is not tenable.

[5] No limit is placed upon the power of the court to admit evidence of a series of prior similar transactions committed by the accused in the ordinary course of his business. Said the court in *Spurr v. United States*:

"The period of time within which the matter offered to establish the guilty purpose must have occurred to permit of their admission is largely discretionary with the court."

In *Walsh v. United States*, 174 Fed. 615, 98 C. C. A. 461, the court permitted the introduction of evidence of similar offenses committed during the 12 years prior to the transaction which formed the basis of the indictment. In *Williamson v. United States*, the Supreme Court said:

"The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

There are several assignments of error, upon which are presented the contention that the court below during the progress of the trial, and in the presence of the jury, manifested bias and prejudice against the plaintiffs in error, and made remarks which were prejudicial to them. We have given careful consideration to this contention, and we find it wholly without justification. The remarks of the court, in the half a dozen instances which are referred to, were not inappropriate to the matter in hand, and were not such as to indicate or express bias or prejudice.

[7] It is to be observed, also, that in not a single instance was an exception taken to the language used. This fact alone is sufficient to dispose of the contention which is made in this court. But, to illus-

trate the nature of the remarks of the court to which objection now for the first time is made, we will refer to the incident which the plaintiffs in error seem to consider the most important.

[8] A witness was asked what the books of the bank showed on a certain day as due to trust companies and savings banks. He answered \$25,305.30. Then the assistant district attorney remarked:

"The report shows none."

Counsel for the plaintiffs in error objected to that statement, and remarked:

"The statement might show blank in a certain place."

The court then said:

"The report shows blank, and that is reporting nothing as a matter of fact."

That was not an improper remark. It was the duty of the court to state what was the legal effect in a report to a Comptroller of the Currency of leaving a blank unfilled under a heading which called for an answer, and to instruct the jury that to do so was to report that the bank had nothing under that heading.

[9] The trial judge in a federal court is not a mere presiding officer. It is his function to conduct the trial in an orderly way with a view to eliciting the truth, and to attaining justice between the parties. It is his duty to see that the issues are not obscured, that the trial is conducted in a proper manner, and that the testimony is not misunderstood by the jury, to check counsel in any effort to obtain an undue advantage or to distort the evidence, and to curtail an unnecessarily long and tedious or iterative examination or cross-examination of witnesses. He has the authority to interrogate witnesses, and to express his opinion upon the weight of the evidence and the credibility of the witnesses. In the case at bar there was no such expression of opinion by the court, and there is nothing in the record which is before us to indicate or to give the jury the impression that the judge was in any degree partial or biased or prejudiced against the plaintiffs in error.

It is contended that the court erred in permitting counsel for the government on the cross-examination of the plaintiffs in error, who appeared as witnesses in their own behalf, to interrogate them as to matters which were not brought out on their direct examination. This contention is not sustained by the bill of exceptions. The plaintiff in error Kettenbach on his direct examination denied his guilt as to each offense charged against him in the indictments, and testified as to his relation to the bank and the other defendants, and to many matters that had been put in evidence by the government, and he was interrogated as to the alleged similar offenses or similar transactions which had been testified to by various witnesses, and he testified that he made none of the entries in the reports to the Comptroller of the Currency, that he made no request that Robnett, Chapman, or Kester make any entries in those reports,

and that he had nothing to do with making out the reports. He testified:

"Once or twice the reports were made up on a blank form in pencil and handed to me, and I copied them and looked over the general totals, but I never went to the physical assets of the bank and worked out or made a report to the Comptroller of the Currency during the time I was in the bank."

His cross-examination was confined to matters connected with the evidence he had adduced on his direct examination. Nothing is pointed out that goes beyond that. The same is true of the cross-examination of the plaintiff in error Kester. He had given a detailed history of his connection with the bank. He denied that he was guilty of the offenses charged. He was interrogated as to his version of the transactions testified to by Robnett, and as to all the principal items in the evidence adduced against him by the government. His attention was called to the evidence of similar prior transactions, and his counsel said:

"I will ask you to explain them briefly to the jury."

His cross-examination was confined within the lines of the matters he had testified to upon the direct examination. The testimony admitted on cross-examination to which exception has been taken was testimony brought out in answer to the inquiry whether he made out the reports to the Comptroller of the Currency, whether there was anybody else who had authority to make them out, and how he made out those of the reports which were exclusively in his own handwriting. Whether as an officer of the bank he had knowledge of certain overdrafts, and whether those overdrafts were reported in the schedule.

Error is assigned to certain rulings, whereby the court sustained objections to questions propounded by counsel for plaintiffs in error to the witness Robnett on cross-examination. Robnett had been clerk and bookkeeper of the bank. In two of the indictments he was jointly indicted with the plaintiffs in error. He was made a witness for the government, and on two of the indictments his testimony was the principal evidence for the government. On indictment 780, on which the plaintiffs in error were convicted, his testimony was corroborated by other witnesses. He testified to a conversation with Kester, in which Kester said that he and others were figuring on increasing the capitalization of the bank and that other men were coming in, and that it would be necessary to appoint a committee to check up the overdrafts and bills receivable, and that Kester remarked:

"And your indebtedness is quite large, and it is best not to increase it any more, and, if there is any amounts, you have got to take care of in taking care of your deals, for the present we had better run it through the silent indebtedness and inactives."

On cross-examination the witness was asked to state to whom he mentioned this conversation, and whether he had written out a memorandum of it, and he was asked:

"Was anything in that memorandum about Kester wanting you to go to Asotin to open up a bank there?"

This was objected to as not cross-examination, and the objection was sustained, but no exception was taken to the ruling of the court. The witness was further interrogated on cross-examination as to his testimony given on a trial of an indictment of the United States against Kettenbach, Kester, and Dwyer, charging them with fraudulently acquiring title to timber lands, and was asked whether Kester at any time had any connection with him in acquiring title to timber lands or any part thereof, to which he answered that he had not. He was then asked

"State whether or not you so testified?"

To which he answered:

"I did not. Q. Was that evidence true or false?"

On objection the court ruled that it was wholly immaterial whether Robnett so testified or not, to which an exception was reserved. Robnett was also asked whether he had not testified that he had no connection with Kester in acquiring title to lands. The court ruled that the testimony was too remote, and said:

"I don't see how it is inconsistent with any testimony he has given here on this trial."

An exception was taken to the ruling. Robnett was asked other questions as to what he had testified to in that case with relation to his interest in the acquisition of title to timber lands, and his connection with transactions to acquire title thereto, and as to whether he had denied that he had entered into a conspiracy or combination with Kester, Kettenbach, and Dwyer to acquire title to government lands.

[10] We are unable to see, and it is not pointed out, how the testimony so sought to be elicited on the cross-examination of Robnett had anything to do with his direct examination, or with the issues in the case. It did not tend to contradict anything that he had testified to on direct examination, for he had stated that he had heard conversations about Kester and Kettenbach's purchase of timber lands, and that he had asked them to let him go in with them, that they had said that they could not let him work with them, but that he could go into it in his own way, on his own behalf, and "that they would see that I would get the money that was needed." And he testified that he did get the money from the bank through overdrafts and notes. The foregoing are samples of the alleged errors of the court in ruling upon the cross-examination of Robnett. The remainder of the assignments of error there-to are equally devoid of merit.

[11] Error is assigned to certain instructions given by the court, and to the refusal to give instructions which were requested by the plaintiffs in error. As to the requested instructions, those portions thereof which correctly stated the law were in substance covered by the instructions which were given. There were certain portions thereof which the court properly refused.

[12] Thus the court was requested to instruct that it must be

proven beyond a reasonable doubt that the defendants directed the specific entries complained of in the indictments to be made, or made them themselves. This is not a correct statement of the law. It assumes that the defendants could be found guilty only upon proof that they made the entries or that they stood by and directed that the specific entries be made by another. The court properly instructed the jury that the defendants might be found guilty upon proof that the false entries were made in pursuance of a previous arrangement between the clerk who made them and the defendants who instigated them. The statute is "applicable to counseling and procuring in advance of the act." *United States v. French* (C. C.) 57 Fed. 382, 387; *Peters v. United States*, 94 Fed. 132, 36 C. C. A. 105; *United States v. Northway*, 120 U. S. 327, 330, 7 Sup. Ct. 580, 30 L. Ed. 664. The instruction which was given upon that subject was excepted to, but no other exception was taken to the charge except to the portion thereof by which the jury were instructed that if it appeared from the testimony, and they believed beyond a reasonable doubt, that the defendants aided, incited, encouraged, stimulated, or instigated Robnett to commit either of the offenses, they would be guilty of the offense which they so aided and abetted. The question raised by this exception has already been discussed under the head of the demurrer to the indictment, and nothing need be added to what was there said.

[13] It is earnestly contended that there was no evidence of Kettenbach's participation in the offenses of which he was found guilty, and that the court below erred in denying the motion to instruct the jury to acquit him. We have gone carefully through the record, and among other things we find the following: Kettenbach was the president and Kester was the cashier of the bank. There is convincing evidence that reports which contained grossly false entries were made as charged in the indictment, and that similar reports were made during the period of seven years preceding the time of the offenses so charged, and during all of which time these two officers of the bank controlled its affairs. Robnett testified that for the purpose of approximating the time when the bank might receive a call from the Comptroller for a report, Kettenbach kept in his desk a card running over a period of ten years, which set forth the different dates on which calls from the Comptroller had been made. "From that we could approximate within a few days the time a report would be called." One of the prior reports which contained the same class of false entries was made out entirely in Kettenbach's handwriting, and was sworn to by him. Another was made out by Kettenbach and Robnett. It is true that Kettenbach testified that in making out these reports he only copied what was handed to him on a blank form, and written with a pencil. But the jury were not bound to accept that explanation, and they may well have found reason to discredit it altogether. It is not explained why it was necessary for Kettenbach to copy what had been made out by a clerk. It was not necessary that the entries in the reports should have been made in his handwriting, or

in the handwriting of any officer of the bank. The evidence shows also a system of inflating the assets of the bank and bolstering up its reserve, in which Kettenbach took an active part. For instance, on March 2, 1905, he, as president of the bank, issued a certificate of deposit to the Idaho Trust Company for \$20,000. On the same day the Trust Company issued two certificates of deposit of \$10,000, each to Kettenbach's bank, and on the same day the bills receivable of that bank was increased \$10,000, and its gold in vault was increased a like sum. A report to the Comptroller of the Currency was called for as of March 14, 1905. Eight days after the date of that report, each bank took back its certificates of deposit. The bills receivable of the Lewiston National Bank were reduced \$10,000, and its gold in vault was reduced in like sum. Of this transaction Chapman, the teller, testified that the bank was low on reserve, and, in order to bolster up the reserve, "Mr. Kettenbach went to the Idaho Trust Company and got a certificate of deposit. I think there were two for \$10,000 each, and one of the \$10,000 certificates I was asked to put in the safe and count as gold coin, as cash." He testified that Kettenbach told him to do that. Again, there is evidence that in March, 1907, the bank owed \$30,000 to the Spokane & Eastern Trust Company, secured by \$60,000 of its bills receivable; that, on making out a report to the Comptroller about that time, Kester went to Kettenbach, and said that they ought to make some mention of the notes that were in the Spokane & Eastern Trust Company as collateral for the \$30,000 bills payable, and that Kettenbach said, "No; don't do it;" and that Kester said, "You remember the letter we got from the Comptroller in regards to the National Park note, and he is likely to make a comment on this, and I think we had better make mention of it;" and that Kettenbach said, "No; it would just reduce our bills receivable, and lower our balances," and told him not to make any mention of it, that it was a state bank, and that the national bank examiner would never get in touch with those there, and before another examination the note would be paid and the funds would be back in the Lewiston National Bank, and that he would take the responsibility. Chapman testified that he overheard a conversation in which Kettenbach wanted Kester to make the report a certain way "that would please him, and Mr. Kester hesitated, saying he would not do it—that it was unlawful—but Mr. Kettenbach, I think, finally persuaded him to do so." There can be no question of the evidence that both Kester and Kettenbach, by means of overdrafts, used large sums of the funds of the bank in their private enterprises, and that in all the reports to the Comptroller none of these overdrafts was reported under the head of overdrafts of officers of the bank. We think this evidence was sufficient to go to the jury on the question of Kettenbach's participation in the offenses charged against him. In fact, the whole testimony suggests the conclusion that the false entries which were repeated year after year in a series of more than 30 reports to the Comptroller were made under the direction of the two men who were in control of

the bank's affairs. They were the only persons who had any motive for making false reports. The clerks and bookkeepers had none, and it is not conceivable that the cashier alone was aware of the manner in which the books were kept and the reports were made. Kester testified that he and Kettenbach together managed all the important affairs of the bank, and that one of the important matters of the bank was making out the reports to the Comptroller.

[14] Error is assigned to the denial of the motion of the plaintiffs in error for a new trial. The motion was supported by affidavits. The affidavits presented matter tending to show that there was an opportunity to influence the jury improperly, and matter showing that certain witnesses for the government made statements out of court which were contradictory to the statements which they made on the trial. The court below entertained the motion, and considered the affidavits, and his ruling thereon is not subject to review in this court. See the decision of this court in *Holmgren v. United States*, 156 Fed. 439, 84 C. C. A. 301, affirmed in *Holmgren v. United States*, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778.

There are other assignments of error which we have considered and which we find it unnecessary to discuss. We find no error under any of them.

The judgment of the court below is affirmed.

J. N. H. CORNELL & CO., INC., v. VIRGINIA AIR LINE RY. CO.

(Circuit Court of Appeals, Fourth Circuit. December 7, 1912.)

No. 1,103.

1. CONTRACTS (§ 305*)—MODIFICATION—CONTRACT TO BUILD RAILROAD—EXTENSION OF TIME.

Complainant contracted to build a railroad for defendant to be completed by a certain date, unless delayed by causes beyond its control. During the progress of the work disagreements arose between the parties, especially as to the provisions of the contract with respect to ballasting, and the work was delayed, so that completion by the time fixed was impossible. It was of great importance to defendant that the road should be completed to a certain town by that date, and its president made a proposition to complainant that it should lay the track to such town without ballast, and that defendant would do the ballasting for a stated reduction from the contract price, also stating that, if accepted, it should "close all minor questions, if any, unsettled, time of completion," etc. A counter proposition somewhat differing in terms was accepted and carried out, and the work was thereupon completed and accepted. *Held*, that such modification of the original contract was a waiver by defendant of all claims for damages for failure to complete the work by the time agreed, and that all that was required of complainant thereafter was to prosecute the work with due diligence.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1398, 1399, 1467-1475; Dec. Dig. § 305.*]

2. CONTRACTS (§ 246*)—MODIFICATION—CONSTRUCTION AND EFFECT.

A supplemental contract modifying a contract for the building of a railroad, made after the work had been partially completed, for the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

purpose of settling differences and controversies which had arisen respecting the provisions of the original contract, construed, and its effect on the rights of the parties determined.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1131–1138; Dec. Dig. § 246.*]

Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry C. McDowell, Judge. Suit in equity by J. N. H. Cornell & Co., Incorporated, against the Virginia Air Line Railway Company. Decree for defendant, and complainant appeals. Reversed.

George Perkins, of Charlottesville, Va., and Charles V. Meredith, of Richmond, Va. (Moon & Fife and Perkins & Perkins, all of Charlottesville, Va., and Meredith & Cocke and Samuel A. Anderson, all of Richmond, Va., on the briefs), for appellant.

Aubrey E. Strode, of Amherst, Va., and Randolph Harrison, of Lynchburg, Va. (C. W. Allen and Harmon & Walsh, all of Charlottesville, Va., on the briefs), for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. The Virginia Air Line Railway Company is the appellee. It will be called "the company." It is a Virginia corporation. It was formed to build and operate a railroad to connect the tracks of the main line and of the James River division of the Chesapeake & Ohio Railroad system. The new road was to cross Fluvanna county, Va., from north to south. It was required to have its line in operation from either one end or the other to a point within $1\frac{1}{2}$ miles of the county courthouse at Palmyra not later than May 1, 1908. Trains were to be running over the entire road by December 1st of that year. J. N. H. Cornell & Co., Incorporated, is the appellant. It will be referred to as "the contractor." It is a New Jersey corporation.

On December 3, 1906, the contractor and the company entered into a written agreement. Such agreement will be spoken of as the December contract. By its terms the contractor was to locate and design the railroad, which was to extend from the Chesapeake & Ohio Railroad at or near Lindsey to a connection with the tracks of the James River Division of that company at or near Bremono Bluff, a distance of about 29 miles. The company was to pay the contractor the actual cost of engineering, locating, designing, and constructing, and, in addition, a fixed fee of \$91,250. The contractor guaranteed that such cost, including the fee, should not exceed \$656,000. The guaranty was conditional, not absolute. It was not to be binding should the total length of the line exceed 30 miles, or if the aggregate amount of material moved exceeded 700,000 cubic yards classified as specified in the contract. In the latter event the guaranteed cost was to be raised. Certain unit prices were stated in the agreement in accordance with which was to be determined the excess, if any, over the guaranteed cost to which the contractor might be entitled. In no event was that cost to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

exceed \$706,000. None of the figures named were to include extra work. For that the contractor was to be paid $12\frac{1}{2}$ per cent. more than it cost him. The company could not call on the contractor to expend more than \$41,600 on station buildings, sidings, water stations, road-crossings, and accommodation works, nor "in excess of \$888.88 per mile for placing ballast in the track." The company had the right within those limits to direct as it saw fit the distribution of such sums. By the specifications it was agreed that "tracks shall be brought to true surface and line on the ballast as provided for in the contract." The contractor bound itself in any event to have the railroad constructed from either terminal as it might elect to within $1\frac{1}{2}$ miles of the courthouse at Palmyra by May 1, 1903. It was to finish the entire work by that day unless delayed "by strikes, fire, flood, riot, lightning, violence of the elements or other causes beyond" its "control." The company had the right at any time before February 1, 1907, to adopt another route. If it exercised this privilege, the contractor was no longer bound by the guaranties as to costs or quantities of work, material, and time. Various things happened, both before construction actually begun and afterwards, which the contractor said amounted to a change of route by the company. The court below was of opinion that this contention could not be maintained. It is not made here. It is mentioned because that it was once made and strenuously insisted upon throws light upon the attitude in which the parties stood to each other at the time of subsequent negotiations, agreements, and transactions between them.

As time went on and the work progressed, the relations between the president of the company and the contractor became strained. They had a number of disputes. Some of these were settled to the satisfaction of the one; some in accordance with the views of the other. A number of the most serious remained open at least as late as April, 1908. As the year 1907 drew to a close, and in the early months of 1903, the president of the company became much exercised. He and the contractor could not agree as to the exact location for the southern terminal. The precise kind of ballast to be used, where it was to be bought, and how much was to be paid for it had not been determined. At first both parties had hoped that suitable ballasting material could be found along the line of the road in quantities and under conditions which would make its use wise and economical. At a later period the contractor thought that such material would have to be purchased elsewhere and for an appreciable distance hauled over other railroads. If this belief was correct, the \$888.88 a mile, which was the maximum the company could call upon the contractor to expend for placing the ballast in the track, would not suffice to pay the price of enough ballast and of delivering it in the track, to say nothing of the expense of properly aligning and surfacing the track upon it. The company said the contractor was bound to do the surfacing and aligning without having any right to charge the cost of doing it against the \$888.88 per mile. The contractor asserted that the true meaning of the contract was that the \$888.88 a mile was to cover all the expense of ballasting the road, using the word "ballasting" in its

most comprehensive sense. The company called attention to the fact that the specifications provided that the track should be brought to true surface and line on the ballast, and claimed that the limitation of \$888.-88 per mile applied only to the expenses of placing the ballast in the track. It said that the work of getting the ballast under the ties and rails, and of surfacing and aligning the track on the ballast, was not accurately described by the words "placing ballast in the track." It claimed that practical railroad men would understand the contract as it did. It argued that \$888.88 per mile was but a little more than half the sum required to provide the right kind of material in sufficient quantities and to ballast the road for the kind of traffic which both parties knew would use it. The contractor said that the entire work of ballasting a railroad was not inaccurately or inaptly described by the words "placing ballast in the track"; that while it was true that the specifications required that tracks should be brought to true surface and line on ballast, those words were limited by the phrase "as provided for in the contract"; that the contract said nothing about ballasting other than to limit the expense to which the contractor should be put for placing ballast in the track to \$888.88 per mile; and that, therefore, the words in the specifications could have had no other meaning than to make clear that the contractor's obligation to line and surface was restricted to the expenditure of a sum not exceeding \$888.88 per mile for ballasting. It had its practical men to indorse its understanding of the contract phraseology. It claimed that the contract itself was necessarily entered into in haste; that neither party at that time did or could know where the ballast could be obtained or how much it would cost. It now says that the meaning of the limitation in the agreement cannot be read in the light of subsequent events.

The quarrel was a serious one as it stood. It was likely to delay the completion of the road, if it had not already done so. The contractor wanted to buy expensive ballast elsewhere, and to place it at once in such parts of the line as were ready for it. The company thought the price asked for it was much too high, and in any event, in the company's view, it should not be placed upon the road in the months of January, February or March; that is to say, not until the frost was well out of the ground. Under the terms of the contract, the ballast could not be purchased except with the consent of both parties, no matter how the dispute as to construction might be settled. If trains were not running from one terminal or another to or within one and a half miles of Palmyra by May 1, 1908, the consequences to the company would be of the most serious character. Under the conditions as they existed in March and early April, 1908, it was certain that the road could not be completed and ballasted as required by May 1, 1908. Moreover, the contractor claimed that it was not bound by the guaranties of cost and time of completion contained in the December contract. It said that the changes of route which had been made released it from them. The company's financial resources were limited. It could not meet any considerable increase of cost above the sum of \$656,000 plus the price of the extras which it had already or-

dered. From its standpoint it was of first importance to get the ballasting out of the contractor's hands and into its own. It wanted the southern terminal definitely fixed. It was imperative that the one-half of the road from Palmyra to the northern terminal should be turned over to it by May 1st in such condition that trains could be operated. Whether that part of the road was then ballasted or not was for the moment of subsidiary importance. It wished very much to obtain a new guaranty of total cost which would limit the maximum cost, excluding extras, to \$656,000, if possible, but which, in any event, would restrict any excess thereover to such sum as the December contract itself provided should be payable in the event that the material to be moved, in quantity or difficulty, exceeded the estimates therein made.

For some months the president of the company had been trying to effect an arrangement by which the company would be protected against some or all the dangers to which it was in his apprehension exposed. To this end on March 6, 1908, he appears to have put in writing certain suggestions. This was done in the form of a letter to the bankers who were the financial agents of the company. This communication does not appear to be in the record. In a letter from the president of the company to the contractor under date of April 3, 1908, quotations are made from it. Under date of April 3d he states that he had proposed to the contractor that both parties should "agree upon Upper Bremo as the southern terminus, and the minimum contract price, viz., \$656,000, to be the full amount to be paid out of which is to be used the appropriation for ballast and for buildings, sidings, etc., \$41,600 and \$888.88 per mile, respectively. "(2) That the contractor put the road to a good running surface and line, on dirt, at profile grade. That we take the road in this condition and do the ballasting ourselves; that is, use the \$888.88 per mile allowed in the contract for the purchase of ballast and we do the surfacing and lining on the ballast. (3) With this agreement, which is also giving the contractor some advantage, to be finally closed all minor questions, if any, unsettled, time of completion," etc.

These propositions the president of the company reviews. He added:

"As I understood from you on yesterday, you desire to make this arrangement, provided you might not be embarrassed at some future time by claims such as the Steele Bros. matter, and thus have your quantities increased to your disadvantage. In connection with this feature, we would be willing to supplement the arrangement as made on March 6th with the following proviso: Should it occur after this agreement that any of your subcontractors, including the case of Steele Bros., should set up and establish a claim for reclassification, thus necessitating your paying them a greater amount than previously estimated, and establishing the quantities at a greater figure than named in the original contract, we would be willing to disregard the agreement as herein made and let our relations rest entirely upon the original contract."

On the 6th of April the contractor replied. It said:

"At your request we are willing to permit the Virginia Air Line Railway Company to do the ballasting, and will allow a deduction from our contract, for this purpose, of \$26,044.18, which is at the rate of \$888.88 per mile for the 29.3 miles.

"We will align the skeleton track and put same in fair running surface on the subgrade in order to permit the operation of trains.

"We are further willing to agree that the line, as terminated at Upper Bremo, will be completed within the minimum guaranteed cost of \$856,000 less the \$26,044.18 allowed you for ballast, but exclusive of extra work that has been performed, or may be performed between now and the completion.

"It is understood that in agreeing to the minimum price of \$656,000 that should it occur after this agreement that any of our subcontractors (including W. I. Steele, whose claim is now pending) should set up and establish claims for reclassification, thus necessitating our paying them for a greater amount of material than our estimates and measurements show, that the above agreement as to total cost of road to Upper Bremo is null and void and that the provisions of the contract of December 3rd, 1906, are to apply.

"All other matters, as contained in your memorandum sent us on April 3rd, will be adjusted as the original contract of December 3rd, 1906, provides, and are not to be taken into consideration in this agreement, which is only to apply to the question of ballast and costs to the present terminus, as above stated."

This proposition was accepted in writing by the company on the 14th of April, 1908. The memorandum related to various matters in which the company complained that the work already done was not up to specifications. It is this letter of April 6th which in this litigation is referred to as the April contract. On May 1, 1908, 15 miles of the railroad from Lindsey to 1½ miles of Palmyra courthouse was delivered by the contractor to the company and accepted by it as being a skeleton track in fair running surface on the subgrade. On the 22d of August the remainder of the road was similarly delivered. The company purchased the ballast, and did all the work of ballasting at an aggregate cost, as found by the master and the judge below, of \$46,520.18, of which \$26,044.18 was expended for the purchase of material, and for delivering it on the track and \$20,476 for the cost of aligning and surfacing the track on such ballast. In June, 1908, the W. I. Steele referred to in the April contract recovered a judgment in the circuit court of Fluvanna county against the contractor for \$1,864.03, more than by the contractor's estimates was due him. In July the company made a claim against the contractor of many thousands of dollars as damages for failure to complete the road by May 1st. On October 16th the contractor recorded in the proper clerk's offices a mechanic's lien against the railroad for \$83,256.96. In effect this sum was arrived at by charging the company with, first, the fixed fee of \$91,250; second, with the actual cost of all work which the contractor thought was covered by the contract; third, with the actual cost of all extra work plus 12½ per cent., and by crediting the company with the sums which the contractor had received from it. In form the \$91,250 does not appear in the account, but the credits given to the company in it were \$91,250 less than the contractor had actually received. The net result was therefore as above stated.

It will be perceived that this account altogether ignored the guaranties of minimum cost given by the December contract. It was made up upon the theory that the company had directed a change of route, and by so doing had released the contractor from his guaranty. The actual cost as stated in this claim exceeded by about \$65,500 the sum

which the court below held the contractor under the guaranty was entitled to charge against the company. In its account the contractor claimed some \$4,000 more for extra work than the court allowed. It did not charge itself with any damages for delay in completing the work. The court below held it liable for nearly \$35,500 therefor. In other words, upon the court's view of the law and of the facts, this account erred in favor of the contractor to the extent of about \$105,000. The contractor by it claimed that the company owed it \$83,236.96. The court decreed that the contractor owed the company \$21,778.03. In so stating the final outcome of the litigation below we have anticipated the march of events. That litigation was begun by the filing of a bill by the contractor to enforce his asserted lien. The court held that it had acquired none. It was, however, of opinion that his bill could and should be sustained as one for an accounting. Under the circumstances shown by the record, we concur in both these conclusions.

The controversies as to extra work were of the usual character. The parties differed as to whether a number of things which the contractor did were required by the contract or were outside of it, and for which it was entitled to extra compensation, and as to the amount of such compensation when any was due. There was a dispute between them as to whether, when the contractor turned the road over to the company, it was in the condition in which the contractor by the contract of December, as modified by that of April, was bound to put it. On these questions much testimony was taken. The contentions of the parties were carefully considered, first, by the special master, and afterwards by the learned and painstaking judge of the court below. Some of them were decided in favor of the company, some in favor of the contractor. The latter appeals. The former does not. The questions involved in the controversies mentioned in this paragraph are almost purely of fact. It does not appear to us that a mistake has been made as to any of them. So far as the decree below deals with them, it will be affirmed.

[1] The contractor by its assignments of error challenges two other determinations of the court below. It says that it should not have been charged with the sum of \$20,476, being the amount expended by the company for ballasting in excess of the sum of \$888.88 per mile, which by the April contract the contractor agreed to pay or allow for ballasting; or with the sum of \$35,443.75 as damages for not completing all of the road by May 1, 1908. We shall not consider its objections to the amount of such claims. Whether they or either of them is too large depends upon matters of fact as to which the testimony was conflicting. The special master and the judge were of one mind as to them. We cannot say that any mistake was made. Whether the contractor was liable at all on these accounts, or on either of them, involves questions of law which must receive our independent consideration. It may tend to clearness if we first inquire whether such liability can be sustained as to the ballasting and the time limit, if it be assumed that the April contract remained in force. It is not disputed that by that contract the contractor was relieved of all re-

sponsibility for ballasting, using that word in its broadest sense. The company expressly undertook to furnish the ballast and to do the subsequent work required. For this the contractor was to allow it \$888.88 per mile, or \$26,044.18 in the aggregate, and no more. So much the company admits. It did below claim that the contractor had not delivered the road with the skeleton track aligned and put in fair running surface on the subgrade in order to permit the operation of trains. It claimed \$7,500 damages for such failure. The master and the court below held that such claim had not been made out. The company did not appeal. In this court it does not dispute that, if the April contract still governs the relations of the parties, it is not entitled to the allowance of \$20,476 made to it below or to any part of it. It does say that the April contract did not relieve the contractor from the obligation to complete the road by May 1st, and that the decree in its favor and against the contractor for \$35,443.70 for delayed delivery is right, whether the contract of April is or is not now binding upon the parties. The learned judge below apparently agreed with this contention, although, in view of his conclusion that the April contract had been abrogated, he did not find it necessary to make an express ruling upon it. When that contract was made, it was obvious to every one that one-half of the road would not and could not be turned over to the company on the day fixed by the December agreement for the completion of the entire work.

One of the purposes of the April contract was to reduce the number of open questions. The president of the company in his letter of April 3d said that, if the agreement was made, it would finally close all minor questions if any unsettled, time of completion, etc. It is true that the proposition made by the letter of April 3d was not accepted by the contractor. The latter made a counter offer of its own which in some respects differed from it. Nevertheless, any one with the letter of April 3d before him would be justified in believing that all claims for damages for delay would be waived if as the result of the negotiations then pending a mutually acceptable agreement should be reached, unless in that agreement an express reservation of such claims should be made.

Our attention has been called to the fact that the president of the contractor testified that he would not consent to be bound to any specific time for completion, and had therefore rejected that part of the letter of April 3d. Obviously in so testifying he could not have had before him the letter of April 3d, for there is nothing in it which fixed or attempted to fix any time limit. On the other hand, it expressly waived one. The letter and the testimony of both the company's president and the president of the contractor show that negotiations which culminated in the letters of April 3d and 6th, and the formal acceptance of the latter by the company, had been going on for some months. In the course of these negotiations the contractor had refused to make a time limit a term of any new agreement. When the April contract was made, the company did not say that it reserved the right to claim damages for delay. As we have seen, it is possible to construe what it did say as an express waiver of any right to

make such claim. The most that from its standpoint can be contended is that it was silent. Under all the circumstances that was not enough. If the April contract is still binding on the parties, the contractor was relieved from the obligation to finish the work by May 1st. All that it undertook under that contract to do was the implied obligation to press the work thereafter with all due and reasonable diligence. It was no longer bound to finish it by a day certain. The record does not show that it failed to use such diligence. The learned judge below was, however, of opinion that the contract of April had become null and void except as to those things which had been actually done under it and which were beyond human power to undo.

[2] Both the contracts, as well that of December as that of April, were peculiar. They are hard to construe. Sometimes under such circumstances what seems obscure is made plain by the practical construction which the parties by their conduct gave them. If in the case before us we attempt to interpret what the parties agreed to do by what they did, and by what they said, the difficulties are augmented. Indeed whatever interpretation be put upon them, some problems, both logical and practical, will remain unsolved. Any possible solution will be inconsistent with much which was done and said by the party in whose favor it is given. In its bill below the contractor relied on the December contract. In its answer the company on that of April. Before the case came on for final hearing below, they had reversed their positions. The company then said, as it still says, that the April contract had been abrogated. The contractor thought it was in most respects in full force and effect. During the course of the litigation each appears from time to time to have taken whatever position with reference to these contracts seemed at the moment to hold out the greatest promise of a maximum recovery against the other. The task of doing justice between them has not thereby been made easier.

The contention that the April contract was abrogated turns upon the construction to be put upon the fifth of its paragraphs. The company now contends that the recovery in June, 1908, by W. I. Steele was of a judgment against the contractor for some \$1,864.03 in excess of the amount admitted to be due him, and the affirmance of that judgment by the Supreme Court of Virginia put an end to the April contract and relegated the parties to that of December. The court below so held. The company, however, does not admit that it is liable to the contractor for the amount of such judgment. The court below was of opinion, as we think rightly, that it was not. What did follow from the recovery of such judgment, it is said, was that the contractor could require the company to pay whatever sum in excess of \$656,000 it was able to show under the December contract the quantity and kind of material excavated entitled it to. Below this excess was determined to be \$3,435.82.

The fact that such judgment for \$1,864.03 was given and affirmed made the contractor liable in the view of the company and of the court below for \$20,476 for excess cost of ballasting for which it is admitted it would not have been liable had such recovery not been had, and for \$35,443.75 damages for delay for which, in our opinion, it

would not have been otherwise bound. In other words, the effect of the recovery of the subcontractor's judgment was to benefit the company by the difference between \$20,476 plus \$35,443.75, or \$55,919.75, and \$3,435.82; that is to say, the contractor lost by the judgment, in addition to its amount, the net sum of \$52,483.93. This must have been an unlooked for result of a provision inserted in the April contract for the protection of the contractor. Moreover, if the construction contended for by the company is correct, it made no difference how small the subcontractor's recovery might have been. The same result would have followed if he had made good a claim to \$5 as if he had shown that he was entitled to \$10,000.

At the time the April contract was made, the Steele suit was pending. The possibility, if not the probability, that it might result in some recovery for the plaintiff, was in the minds of both parties. Could they really have intended that if, for example, he had recovered a judgment for \$5, all the adjustments they had been at so much pains to make should go for naught? In view of the strained relations then existing between the parties and the controversy they had had over ballasting, was it likely that the contractor would have agreed that it should still be responsible for all the cost of ballasting, although it would have no right to control, or even supervise, the purchase of the material or the doing of the work? Is it probable that either of the parties to an agreement for the settlement of differences and controversies would have deliberately inserted in it a provision which would have made it impossible, perhaps for years, to know whether the contractor was liable to the company for items which might run up into many thousands of dollars and have amounted to \$55,000? The company could not have anticipated that such a proviso would be of much protection to it. If the contractor had understood that the recovery of a small judgment by a subcontractor against it would have cost it so dear, would it not have been very easy for it to have settled the claim of such a subcontractor out of court by a revision of its own estimates or otherwise? In this manner it would have avoided the costly result for which the company now contends. Nevertheless, the parties were dealing at arm's length. They knew, or should have known, their own business. There was nothing unlawful or contrary to public policy in the bargain the company now says that they made. If they did make it, they are bound by it, but before a court will hold that they did it must be persuaded that the words they used could not mean anything else. Did they so express themselves? The language they used was that in the event of the establishment of the claim of a subcontractor for an amount exceeding the contractor's estimates the above agreement "*as to the total cost of the road to Upper Bremono*" shall be null and void. The italics are ours. The more natural interpretation of this phraseology is that the agreement was in the contingency provided for to remain in full force and effect except as to the stipulation limiting the total cost. It is true that this construction left the company unprotected against the possibility that such cost would exceed the minimum amount named in the agreement. The company's engineer, however, had been in more or less

close contact with the work as it had proceeded. By April, 1908, the construction had reached a point at which a relatively close approximation could probably be made as to quantity and character of material that had been or would be moved. In point of fact the court below has ascertained that the excess compensation to which the contractor became entitled under the December contract was \$3,435.82. The agreement was a waiver of the contractor's claim that there had been such a change of route as abrogated the cost guaranty of the December contract. The items of the account filed by the contractor with its mechanic's lien claim showed that it asserted that it was entitled to some \$45,000 over and above the \$656,000 named. It is true that the contractor, in spite of the April agreement, did insist that it could recover this \$45,000. We do not think that a reasonable construction of the April contract would have entitled it to have done so even had there been in fact a change of route, as there was not. The contractor's estimates and measurements were important only in the event that the guaranties of cost in the December contract were still effective. If by change of route they had been nullified, the contractor was entitled to recover not on estimates and measurements, but on the basis of the actual amount expended by it. In this view of the case there was sufficient reason why the company should have entered into the April contract even construing that contract, as we do, as constituting an absolute irrevocable waiver by it of all claims that the contractor should contribute to any part of the cost of ballasting, or should be answerable in damages for delay.

By the April agreement the company gained a number of things which it greatly desired. It is not at all improbable that it might have been willing to take the chance of the contractor being able to show that more material in the aggregate, or a larger proportion of the more costly kinds, had been removed. Any other construction will in our opinion do more violence to the language of the contract, and will involve greater hardship and injustice. It follows that so much of the decree below as holds the contractor liable for \$20,476 excess cost of ballasting, and for \$35,443.75 damages for delay in completion, must be reversed. As the decree was in favor of the company for the principal sum of \$21,778.23, the disallowance by us of these two items aggregating \$55,919.75 requires a decree in favor of the contractor for the difference between these two amounts, or \$34,141.72. The decree below allowed interest on the sum found to be due the company from October 1, 1908. The contractor set up large claims which could not be sustained. If such claims had not been made, the litigation might have been more speedily disposed of, and it certainly would have cost very much less.

Under the circumstances, we think substantial justice will be done if the principal sum found to be due to the contractor shall not begin to bear interest until March 22, 1910, at which date the learned judge below decided that the more extravagant claims of the contractor must be eliminated.

Reversed.

THOMPSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,136.

1. INDICTMENT AND INFORMATION (§ 15*)—SECOND INDICTMENT—FEDERAL GRAND JURY—JURISDICTION—STATE LAW.

Under Rev. St. U. S. § 800 (U. S. Comp. St. 1901, p. 623), providing that federal jurors shall have the same qualifications as jurors of the highest courts of law in the state where they are to serve, and Cal. Penal Code, § 1008, as amended in 1905 (St. 1905, p. 773), providing that, if a demurrer is sustained to an indictment, it is a bar to another prosecution for the same offense, unless the court directs the case to be submitted to the same or another grand jury, a federal grand jury sitting in California, after having once found an indictment which is discovered to be defective, may return a second indictment for the same offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 83-88; Dec. Dig. § 15.*]

2. INDICTMENT AND INFORMATION (§ 137*)—MOTION TO QUASH—PENDENCY OF TWO INDICTMENTS.

Pendency of two indictments against the defendant for the same offense is not ground for motion to quash the second.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

3. POST OFFICE (§ 48*)—RECEIVING STOLEN MAIL MATTER—INDICTMENT.

Rev. St. § 5470 (U. S. Comp. St. 1901, p. 3693), provides that any person who shall receive or conceal, or aid in receiving or concealing, any bank note, bank post bill, bill of exchange, etc., knowing any such article or thing to have been stolen or embezzled from the mail or out of any post office, shall be punishable. *Held*, that an indictment charging that defendant did willfully, etc., receive from A. certain described bank notes of a specified value which had been knowingly, etc., stolen from the mails, and that defendant at the time and place of receiving and concealing, etc., knew the same to have been unlawfully and feloniously stolen and carried away from the mails of the United States, imported that the concealment by defendant was done with an unlawful intent, and was therefore not objectionable for failure to charge the intent or the name of the owner.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 66-80; Dec. Dig. § 48.*]

4. POST OFFICE (§ 44*)—OFFENSES AGAINST THE MAILS.

In prosecuting offenders for violating Rev. St. U. S. §§ 5467, 5469, 5470 (U. S. Comp. St. 1901, pp. 3691-3693), prohibiting the receiving of articles stolen from the mails, opening of letters and fraudulently obtaining mail, etc., it is not necessary that the indictment allege, or that the government prove, all the essential ingredients of the crime of larceny.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 60, 61; Dec. Dig. § 44.*]

5. CRIMINAL LAW (§ 1120*)—WRIT OF ERROR—RULINGS ON EVIDENCE—BILL OF EXCEPTIONS.

Alleged wrongful admission of certain testimony cannot be reviewed, where the bill of exceptions does not contain the testimony given by the witness after the overruling of the objections urged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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6. CRIMINAL LAW (§ 413*)—EVIDENCE—SELF-SERVING DECLARATIONS.

Evidence that, after plaintiff was indicted for receiving or aiding in receiving or concealing money stolen from the mails, he went to witness, who was an attorney, and sought his advice as to whether he could institute a suit to ascertain who the money belonged to, and was informed that he could not as that would be betraying the secrets of his client, was inadmissible as self-serving declarations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.*]

7. WITNESSES (§ 78*)—COMPETENCY—CONVICTION OF FELONY—PARDON—IDENTITY.

Where one who had been convicted of a felony was offered as a witness for the government against accused, and on objection produced a pardon bearing the same name as the witness, who testified that he had received the pardon and had accepted it, the proof sufficiently identified the witness as the person pardoned.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 195-200; Dec. Dig. § 78.*]

8. WITNESSES (§ 49*)—COMPETENCY—PARDON.

Where one convicted of certain felonies was offered by the government as a witness against accused and on objection produced pardons which were full and complete, they were effective to remove the penalties and disabilities and restore the witness to his rights, and were not objectionable as pardoning the offender, and not the offense, nor for failure to set forth the indictment and judgment of conviction for the offenses pardoned.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 116-118; Dec. Dig. § 49.*]

9. CRIMINAL LAW (§ 1144*)—WRIT OF ERROR—PRESUMPTIONS—FOUNDATION FOR EVIDENCE.

Where certain pardons were produced to qualify a witness who had been convicted of felonies against the United States, it would be presumed on writ of error, in the absence of anything appearing in the record to the contrary, that the court took judicial notice that the pardons related to the particular judgments under which the witness had been convicted, each pardon having stated the date of the conviction and sentence, and named the court in which the judgment was rendered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

10. CRIMINAL LAW (§ 1122*)—WRIT OF ERROR—INSTRUCTIONS—REVIEW.

The Circuit Court of Appeals may refuse to review instructions objected to where the bill of exceptions does not contain all the instructions or the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940-2945; Dec. Dig. § 1122.*]

11. CRIMINAL LAW (§ 1137*)—APPEAL—INSTRUCTIONS—RIGHT TO ALLEGE ERROR.

Where accused requested an instruction in which certain witnesses were designated as accomplices, he could not object that an instruction given referred to the same witnesses as accomplices, in that the determination of the question whether they were accomplices or not was for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

12. CRIMINAL LAW (§ 1038*)—TRIAL—REQUEST TO CHARGE.

An objection that an instruction given should have been qualified would not be reviewed, where plaintiff in error failed to call the trial court's attention to the omission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2999; Dec. Dig. § 1038.*]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Fred H. Thompson was convicted of having unlawfully received and concealed and assisted another in concealing money stolen from the United States mails, and he brings error. Affirmed.

Fred H. Thompson, of Los Angeles, Cal., in pro. per., and Paul W. Schenck, of Los Angeles, Cal., for plaintiff in error.

A. I. McCormick, U. S. Atty., and Edward A. Regan and Harry R. Archbald, Asst. U. S. Attys., all of Los Angeles, Cal.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The plaintiff in error, an attorney at law practicing at Los Angeles, Cal., defended Orlando F. Altorre in a case in which Altorre was indicted for stealing \$15,000 in currency from the mails of the United States. Altorre was employed in the registry division of the post office at Los Angeles. In June, 1909, he stole from the mail two packages of currency which had come into his possession as registry clerk, one containing \$10,000 and the other \$5,000. Altorre was convicted on the indictment for stealing from the mails, also on an indictment for perjury, and was sentenced to serve a term of two years in Leavenworth and pay a fine of \$1. In July, 1910, the plaintiff in error was indicted by the federal grand jury at Los Angeles, indictment No. 268, charging him with having unlawfully received and concealed, and assisted Altorre in concealing, the money above referred to. Shortly afterwards, in order to avoid certain objections which had been made to the indictment, a second indictment, No. 295, was returned against the plaintiff in error and his wife, and on that indictment he was convicted.

Error is assigned to the refusal of the trial court to quash indictment No. 295. The motion is based on two grounds, the first of which is that prior to finding and returning the same the grand jury had found and presented indictment No. 268 against the plaintiff in error and Etta M. Thompson, his wife, accusing them and each of them with the identical offense embraced in indictment No. 295, and that the defendants in indictment No. 268 had been arraigned and had entered their pleas, and the trial had been set for a day certain.

[1] The contention is that under the law of California, which it is said became the rule of practice for the federal courts in that state, a grand jury which has once indicted a defendant is disquali-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fied to bring in a second indictment against him charging him with the same offense. Assuming for the purpose of this discussion that section 800 of the Revised Statutes (U. S. Comp. St. 1901, p. 623), which provides that "jurors to serve in federal courts shall have the same qualifications as jurors of the highest courts of law in the state where they are to serve," is applicable to the case, we turn to the statutes and decisions of California for light upon the question whether the grand jury was disqualified to bring in the second indictment. Counsel for plaintiff in error cite three decisions—*People v. Hanstead*, 135 Cal. 149, 67 Pac. 763; *People v. Bright*, 157 Cal. 663, 109 Pac. 33; *People v. Landis*, 139 Cal. 426, 73 Pac. 153. The two cases last named are not in point, but *People v. Hanstead* holds distinctly in accordance with the contention of the plaintiff in error. That was a decision by a department of the Supreme Court, and it runs directly counter to a former decision of that court in banc, reported in *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129. The opinion in the *Hanstead* Case takes no note of the *Northey* Case, and the court would seem to have overlooked the decision in that case. The practice in the state of California, therefore, cannot be said to be settled in favor of the proposition for which the plaintiff in error contends. It is to be observed that all of the decisions of the Supreme Court of California above cited were rendered prior to the change in section 1008 of the Penal Code, which was made in 1905 (St. 1905, p. 773). That section prior to the amendment provided that, if a demurrer were sustained to an indictment, it was a bar to another prosecution for the same offense, unless the court being of the opinion that the objection to which the demurrer was allowed might be avoided in a new indictment "directs the case to be submitted to another grand jury." The section as amended substitutes for the last clause the following: "Directs the case to be submitted to the same or another grand jury"—thereby declaring the law of the state to be that a grand jury which had once found an indictment against a defendant was not disqualified to find a second indictment against him upon the same facts, a wise provision of law, and we may well wonder why it should ever have been held otherwise, as no substantial reason is apparent why a grand jury after having once found an indictment which is discovered to be defective in form may not, upon the information which it has acquired, and with the same conviction, based upon that information, that the defendant should be brought to trial, present a second indictment for the same offense.

[2] The second ground of the motion to quash, which was that there were pending two indictments against the defendant for the same offense, is not sustainable. It is not supported by any citation of authority, probably for the reason that none could be found. In *O'Meara v. State*, 17 Ohio St. 516, the court, referring to a similar contention, said:

"We know of no such law. The last indictment is as valid as the first. Two indictments for the same offense are often pending at the same time. The state can only proceed upon one of them, but may elect upon which it will proceed."

The same was held in *Smith v. Commonwealth*, 104 Pa. 339, *Commonwealth v. Drew*, 3 Cush. (Mass.) 279, *Dutton v. State*, 5 Ind. 533, and *State v. Lambert*, 9 Nev. 321.

[3] It is contended that the court erred in overruling the demurrer to the indictment, that the indictment is faulty, in that it fails to charge the intent with which the money was received, or from whom it was concealed, or the name of the owner thereof. The defendant was indicted under section 5470 of the Revised Statutes (U. S. Comp. St. 1901, p. 3693), which provides that:

"Any person who shall buy, receive or conceal, or aid in buying, receiving or concealing * * * any bank note, bank post bill, bill of exchange, etc. * * * knowing any such article or thing to have been stolen or embezzled from the mail or out of any post office * * * shall be punishable," etc.

The indictment charges that the defendant did willfully, knowingly, unlawfully, and feloniously receive from Altorre the bank notes which were therein described, and states the value thereof, and charges that they had been knowingly, unlawfully, and feloniously stolen and taken and carried away from the mails of the United States in a post office of the United States at Los Angeles by the said Altorre, and that the defendants at the time and place of receiving and concealing, and aiding in concealing said articles, knew the same to have been unlawfully and feloniously stolen, taken, and carried away from the mails of the United States. These allegations clearly import that the concealment by the defendants was criminal, and done with an unlawful intent, and they cover all the elements of the crime which is described in section 5470. The purpose of the statutes (sections 5467-5470 [U. S. Comp. St. 1901, pp. 3691-3693]) is to protect the mails against plundering, pilfering, or other interference or meddling with their contents.

[4] In prosecuting offenders for violation of sections 5467, 5469, and 5470, it is not necessary to allege in the indictment or to prove on the trial all the essential ingredients of the crime of larceny. *United States v. Falkenhainer* (C. C.) 21 Fed. 624; *United States v. Jolly* (D. C.) 37 Fed. 108; *United States v. Atkinson* (D. C.) 34 Fed. 316; *United States v. Trosper* (D. C.) 127 Fed. 476; *Bowers v. United States*, 148 Fed. 379, 78 C. C. A. 193.

[5] It is assigned as error that upon the examination of Maude J. Matthews, a witness for the government as to certain alleged automobile transactions occurring after the commission of the acts charged in the indictment, the court overruled the objections of plaintiff in error to the following question: "Will you state what happened at the time they came in to negotiate with you?" The bill of exceptions informs us that, after the objections were overruled, the witness was allowed to testify "in support of the charges set forth in said indictment, and particularly with reference to said alleged automobile transactions occurring after the commission of the alleged offense." None of the evidence is contained in the bill of exceptions, and we have no means of knowing that any testimony so given was injurious to the plaintiff in error or beneficial to the cause of the government. In the absence of such a showing, no error will be presumed. These re-

marks are applicable also to the error assigned to the admission of testimony of Frank S. Hutton. Also to the assignment that the court erred in permitting Jackson F. Durlin, deputy marshal, to identify "Plaintiff's Exhibit 14 consisting of the top of a jar," and to the denial of the motion to strike out the testimony of the witness with reference to finding the same, on the ground that it occurred more than a year after the matter charged in the indictment. We have no means of knowing how the evidence could possibly have tended to incriminate or prejudice the plaintiff in error.

[6] It is assigned as error that the court excluded testimony proposed to be adduced by Gesner Williams, to show that the plaintiff in error, after his arrest, consulted the witness who was an attorney, and sought his advice as to what to do under the circumstances, and informed him that he, the plaintiff in error, did not know that the money was stolen, and inquired whether or not he could bring a suit and bring in the bank which claimed to own the money, the Insurance Company, Altorre, and all other parties interested in it, to determine to whom the money belonged, and that the witness advised him that he could not do so, that he would be betraying the secrets of his client. This testimony was clearly incompetent. To prove the statements made to Williams would be to show only the self-serving declarations of the plaintiff in error made after he had been arrested and charged with the crime of which he was subsequently convicted.

Altorre was called as a witness for the government. His testimony was objected to on the ground that he had been convicted of perjury and sentenced therefor. The witness produced a pardon which he testified he had received and accepted. It was dated March 21, 1911, was signed by the President, and it pardoned Altorre of the crime of perjury and also of the crime of embezzling the money which the plaintiff in error was charged with concealing. He produced also a pardon of date September 28, 1911, pardoning him of the offense of feloniously stealing, taking, and carrying away certain articles of value from a mail bag of the United States, in violation of section 5467. The objection was made to the first pardon that it was not full and complete, and to the second pardon that it was incompetent, irrelevant, and immaterial, and that no proper foundation had been made for its introduction. The bill of exceptions then recites that the objections to the introduction of the pardons were overruled, to which exception was taken, and thereupon the witness was allowed to testify "in support of the charges set forth in said indictment." The contention is that it does not appear that the witness was the same person as the person named in the pardons, that the pardons did not pardon any offense but pardoned the offender, and that the pardons failed to set forth the indictment and conviction for the offense committed against the United States.

[7] There is no merit in any of these objections. The witness bearing the name of the person named in the pardons, testified that he had received the pardons and accepted them. That was sufficient to identify him.

[8] The pardons were full and complete, and their effect in law was to remove penalties and disabilities and restore the witness to his full rights. Said the court in *Ex parte Garland*, 4 Wall. 333, 380 (18 L. Ed. 366): "It makes him, as it were, a new man, and gives him a new credit and capacity."

[9] As to the objection that no proper foundation was laid for the introduction of the pardons, it is sufficient to say that the record is silent in that respect, and it will be presumed that it was shown, or that the court took judicial notice that the pardons related to the particular judgments under which Altorre had been convicted in that court of violation of section 5467 and of perjury, for each pardon contained the date of the conviction and sentence, and named the court in which the judgment was rendered.

[10] Error is assigned to certain instructions of the court to the jury. The bill of exceptions contains none of the evidence, nor does it purport to contain the whole of the instructions. For these reasons we might properly decline to enter into a consideration of these assignments. But, assuming that the whole of the instructions are before us, we find no substantial merit in any of the objections that are raised thereto.

[11] For example, error is assigned to the following:

"The court has been requested to instruct you on the law with reference to accomplices, especially as affecting the testimony of Mrs. Anna White and Orlando F. Altorre, and you are accordingly instructed that accomplices are competent witnesses," etc.

The objection made to this is that the court characterized the witnesses as accomplices, whereas the question whether they were such was to be determined by the jury. It is clear, however, from the opening sentences of the instruction that it was given in compliance with the request of the plaintiff in error and that the witnesses were designated accomplices in the request, for it appears in a requested instruction which the court refused to give that the plaintiff in error requested the following:

"If the testimony of Mrs. Anna White is to be believed at all, she was what is known in the law as an accomplice," etc.

[12] Again, after quoting a lengthy sentence from the instructions, the plaintiff in error asserts that there should have been a few words added by way of qualification. If he thought that those words were a necessary qualification of the instructions, he should have directed the attention of the court to their omission. As it was, all that the bill of exceptions shows is that the defendant took an exception and the exception was allowed to the whole of an instruction which involved a number of propositions, in none of which in our judgment was there any error.

It is unnecessary to go into further detail, or to enter into a further discussion of the numerous assignments of error to the refusal of the court to grant requested instructions. We find no error in any of them.

The judgment is affirmed.

SHAW v. GOEBEL BREWING CO., Limited.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1913.)

No. 2,272.

1. CORPORATIONS (§ 114*)—ASSIGNMENT OF STOCK—SIGNATURE OF TRANSFEREE.

Where articles of association provide that transfers of shares shall be "signed both by the transferror and transferee," and in "any usual common form of instrument of transfer," *held*, that an omission by the transferee to sign at the time of the transfer may be cured by subsequently signing it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 466, 470-478; Dec. Dig. § 114.*]

2. CORPORATIONS (§ 130*)—ORGANIZATION—TRANSFER OF STOCK.

Where complainant accepted an assignment of certain stock in a British corporation organized under the Great Britain Companies' Act 1862-1909, doing business in the United States, he was charged with notice of section 35 of such act, which authorized designated courts, by summary proceedings, to order a change in the company's register of members, in certain cases, without a production of the certificates of stock duly transferred, notwithstanding a representation contained in each certificate that "no transfer of any of the above shares can be registered without the production of this certificate."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 488, 489; Dec. Dig. § 130.*]

CORPORATIONS (§ 133*)—TRANSFER OF STOCK—LACHES.

The owner of certain shares in a British corporation transferred them to B. October 1, 1894, agreeing upon his return to the United States to mail the certificates to B. Failing to receive the promised certificates, B., in 1904, applied to have the transfer registered, which was denied, whereupon he instituted proceedings authorized by the Great Britain Companies' Act 1862-1909, § 35, in which he was declared owner of the shares and the corporation directed to transfer them, which it did pursuant to the order of the court. July 7, 1890, the original owner had assigned certain of the same shares to complainant and delivered the certificates to him, but complainant took no steps either to notify the company of his possession of and rights to the certificates or to secure a transfer until 16 years thereafter, and about four years after the corporation had transferred the shares to B. in accordance with the order of the court, and three years after B. had disposed of the shares and ceased to be a member of the company. *Held*, that complainant must be deemed to have consented to the proceeding resulting in the court order compelling the company to rectify its register, and also to have been guilty of laches, and so to be barred upon either hypothesis from maintaining a suit to require the corporation to transfer the shares.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 513-520; Dec. Dig. § 133.*]

Appeal from the Circuit Court of the United States for the Eastern District of Michigan; Arthur C. Denison, Judge.

Suit by David R. Shaw against the Goebel Brewing Company, Limited. Judgment for defendant, and complainant appeals. Affirmed.

This was a suit in equity to establish ownership in appellant of 60 shares of the capital stock of the appellee company; to compel the company "to reissue said stock" to appellant and to pay him all dividends that have accrued or may accrue thereon; and meanwhile to enjoin payment of accruing dividends. The appellee is a corporation created under the Companies' Act of Great Britain.

The company has two sets of officers and directors, who are designated as "general" and "local." The general officers and directors reside in London, England, and the local in Detroit, Mich. The Register for Members (stockholders) of the company is kept in London, and the issue and transfers of stock of the company are made and entered there. The company's brewery and equipment are located in Detroit and its brewing business is conducted there. It has complied with the statute of Michigan permitting foreign corporations to conduct business in the state, and is admittedly there amenable to process and suit. Its capital stock is divided into preference and ordinary shares, and the par value of both classes is 10 pounds each. The stock in dispute consists only of ordinary shares, represented by three certificates bearing date June 12, 1891 and numbered respectively 402, 403, and 404, each in due form and under seal, in the name of John Peter Grant of Detroit, and certifying that he is the proprietor of ordinary shares numbered (in 402) 4,961 to 4,980 inclusive, (in 403) 4,981 to 5,000 inclusive, (in 404) 5,001 to 5,020 inclusive, "subject to the articles of association and the rules and regulations of the company, and that there has been paid in respect of each of such shares the sum of three pounds (and it appears by indorsements on the certificates that further payments were made in June, 1891, until such shares were fully paid). * * * No transfer of any of the above shares can be registered without the production of this certificate."

July 7, 1890 (Shaw testifying, however, that he received the paper in '91 or '92), John Peter Grant signed and sealed the following:

"I, John Peter Grant, * * * in consideration of the sum of fifteen hundred dollars paid by David R. Shaw, of Detroit, Michigan, hereinafter called the transferee, do hereby bargain, sell, assign and transfer to the said transferee one hundred fully paid 10-pound shares numbered 5,021 to 5,040, 5,001 to 5,020, 4,981 to 5,000, 4,961 to 4,980, 4,941 to 4,960 of and in the undertaking called the Goebel Brewing Co., Ltd. To hold unto the said transferee, his executors, administrators, and assigns, subject to the several conditions on which I held the same immediately before the execution hereof; and I, the said transferee, do hereby agree to accept and take the said shares subject to the conditions aforesaid."

The paper was not signed by Shaw; nor was it stamped. While this paper refers to a greater number of shares than the 60 shares described in the three certificates of stock before mentioned, the appellee never received any other certificates; but he has held the three ever since their delivery to him with the instrument of transfer. No dividends were paid on the stock between that time (1891 or 1892) and 1908; but there is testimony tending to show that the stock possessed a market value of £3 and upwards per share "for a good many years" prior to 1908. In that year demand was made both upon the local secretary and the London secretary for transfer of the stock to the name of appellant and payment of dividends, but answer was made by the London secretary that, while in Europe some 14 or 15 years before, Grant had executed a transfer of all his shares in the company to a Mr. Byrne and had promised to remit the certificates immediately upon his arrival in New York; that he had failed to do so and Byrne had never been able to trace him; that in 1904 Byrne made application to the board in London to register his transfer, which was declined without an order of court; that such an order was obtained December 9, 1904, compelling the company to rectify the register by entering Byrne's name as the owner of the shares formerly standing in the name of Grant. The form of assignment of Grant to Byrne differs from that of Grant to appellant Shaw, above set out, only in date, description of shares, and in the fact that the instrument was stamped and was signed and sealed by Byrne, the transferee. The instrument bears date October 1, 1894, and embraces among others the shares included in the assignment to appellant and represented by the three certificates before mentioned. The order of court before referred to was made by the High Court of Justice, Chancery Division, sitting in London, and, omitting the findings, is as follows:

"This court doth order that the Register of Members of the above-named company be rectified by removing therefrom the name of John Peter Grant as the holder of 117 ordinary shares numbered 4,941 to 5,057 and 95 prefer-

ence shares numbered 4,181 to 4,257 inclusive, and by inserting in lieu thereof the name of said Edmund Byrne as the holder of the shares aforesaid pursuant to a transfer thereof by the said John Peter Grant to the said Edmund Byrne, dated the 1st day of October, 1894. * * * And it is ordered that due notice of the said rectification be given to the registrar of joint-stock companies."

This order was no doubt carried into execution, for the secretary testifies that Byrne ceased to be a member of the company November 13, 1905, having on that date transferred the last of the shares standing in his name.

This suit was commenced in the state court and removed to the court below. Issue was joined by answer, and decree was entered below dismissing the bill.

Corliss, Leete & Joslyn, of Detroit, Mich. (John B. Corliss, of Detroit, Mich., of counsel), for appellant.

Orla B. Taylor and Chas. F. Delbridge, both of Detroit, Mich., for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SESSIONS, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). The important question is whether Shaw can compel the Brewing Company to accept a surrender of his certificates and execute and deliver new ones in his name. He obtained his certificates some 16 years before notifying the company of his purchase or demanding a transfer; and this was about 4 years after the company had, in obedience to an order of court, entered upon its register a transfer of these shares to Byrne, and 3 years after Byrne had disposed of the shares and ceased to be a member of the company. It is true that each of Shaw's certificates contains the statement: "No transfer of any of the above shares can be registered without the production of this certificate." It is also true that each of these instruments certifies that Grant is the "proprietor" of the shares named, "subject to the articles of association and the rules and regulations of the company." The twenty-ninth paragraph of the articles of association provides that transfers of shares shall be "signed both by the transferror and the transferee"; but transfers were permissible in "any usual common form of instrument of transfer," and we think, if Shaw's omission in the present instance to sign as transferee were the only difficulty, he could solve it simply by signing the transfer. In *re Tahiti Cotton Company*, 17 Eq. Cas. 273.

[1] Section 35 of the Companies' Act 1862-1909, Great Britain, which among other sections was admitted in evidence as part of the proofs, provides:

"If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved * * * or the company itself, may, as respects companies registered in England * * * by motion in any of Her Majesty's Superior Courts of law or equity, or by application to a judge sitting in chambers, * * * apply for an order of the court that the register may be rectified, and the court may either refuse such application * * * or it may, if satisfied of the justice of the case, make an order for the rectification

of the register. * * * The court may, in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register."

The Companies' Act provides for the organization of companies such as this, and it is not disputed that this company was so organized; nor is the settled principle disputed (indeed, it is in effect relied on in support of one portion of the argument for appellant) that the applicable provisions of the act must be regarded as entering into and forming part of the company's charter. If it be assumed for the moment that the principle can be safely applied in a case like this, Shaw's rights as stated in his certificates of stock must be considered in connection with section 35 of the Companies' Act. Stated differently, Shaw's right to rely upon the representation contained in the certificates of stock that transfers of the shares could not be registered without production of the certificates was at least in terms qualified by the power vested in the courts of England by summary proceeding, upon motion of any "person or member aggrieved * * * or the company itself," to order the register of members to be rectified wherever a name was without sufficient cause omitted therefrom or when unnecessary delay took place in entering on the register "the fact of any person having ceased to be a member." Since Grant and Shaw were consciously dealing with shares of stock in an English corporation, which involved certificates that admittedly could not be replaced by new ones, with a transfer on the register of members, except in London, it is plain enough that Shaw's right to the relief prayed is to be tested in large measure by such laws of England as were designed to form part of appellee's charter. *Johnson v. Charles D. Norton Co.*, 159 Fed. 361, 363, 86 C. C. A. 361 (C. C. A. 6th Cir.); *Bond v. John V. Farwell Co.*, 172 Fed. 58, 64, 96 C. C. A. 546 (C. C. A. 6th Cir.). The rule in this behalf is the same as it would be if the appellee company had been created by the law of one of our own states, say other than the state of Michigan where Shaw at the time of the transfer resided and still resides. *Bank of Augusta v. Earle*, 13 Pet. at page 591, 10 L. Ed. 274. The question in that case was "whether, by the comity of nations, and between these states (Georgia and Alabama), the corporations of one state are permitted to make contracts in another" (13 Pet. 588, 10 L. Ed. 274); and immediately following the statement of the question the Chief Justice said:

"It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned."

Justice Peckham said of that case in *Iglehart v. Iglehart*, 204 U. S. 487, 27 Sup. Ct. 332, 51 L. Ed. 575:

"Ever since the case of *Bank of Augusta v. Earle*, * * * this doctrine of comity between states in relation to corporations has been steadily maintained, and it has been recognized by this court in many instances."

And Justice Story said in *Black v. Zacharie & Co.*, 3 How. 483, 511 (11 L. Ed. 690):

"From the nature of the stock of a corporation, which is created by and under the authority of a state, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that state, and not by the local law of any foreign state."

It has been held, as in *Guilford v. Western Union Telegraph Co.*, 59 Minn. 332, 343, 61 N. W. 324, 326 (50 Am. St. Rep. 407), relied on by appellant, that a general law of one state prescribing simply a remedy will not be regarded as binding in another state. The question in that case was whether a resident of Minnesota was entitled to a decree to compel a New York corporation, conducting only its telegraph business in the former state, to issue new certificates of stock in lieu of certificates proved to have been lost 12 years before. The company offered to deliver the new certificates upon receiving a bond of indemnity, claiming that one of its rules required such indemnity. Failing to prove the existence of such a rule, reliance was placed upon a general law of the state of New York which provided a method of obtaining a new stock certificate in case of loss of the original. It was claimed that this furnished the exclusive remedy; but it was held that this was "merely one of the general laws and regulations of the state of New York affecting the remedy, which govern only within the limits of the state enacting them." True, that statute authorized a summary proceeding to be taken in the Supreme Court and an order to be made requiring the corporation to deliver new certificates upon depositing such security or filing a bond in such form and with such sureties as the court might require. 5 Rev. Stat. of N. Y. (8th Ed.) p. 4103. But no such proceeding had been taken or order made. Manifestly that situation was quite different from this one. Here we have a court order actually made and executed, and new certificates issued in obedience to it, which (so far as appears) passed into the hands of third persons without notice of any right in Shaw.

We are constrained to believe that section 35 must be regarded as an integral part of the appellee company's charter, and that Shaw was chargeable with knowledge of the limitation which that section in effect imposed upon his rights under the certificates of stock. *Copin v. Adamson*, L. R. 9 Ex. 345; *Bank of Australasia v. Harding*, 9 C. B. 686; *Bank of Australasia v. Nias*, 16 A. & E. 733, 734. The Companies' Act prescribes the mode in which such corporations as this shall be created. The act states the powers and limitations in detail. It will not do to include some portions, as learned counsel for appellant do, and attempt to exclude others. The portions that are distinctly applicable, like section 35, should be interpreted rather than ignored. In determining the true construction of the section, we should be governed by the decisions of the courts of Great Britain. *Elmendorf v. Taylor*, 10 Wheat. 158, 6 L. Ed. 289, opinion by Chief Justice Marshall. It should perhaps be stated by way of precaution that it is not meant to say that laws of a foreign nation will be so recognized and enforced, which are repugnant to the local laws or policy.

In the well-considered case of *Ex parte Shaw*, 2 Q. B. D. 463, 479. it was held to be a matter of discretion whether the court should exercise the summary jurisdiction given by section 35. Although it is apparent in that case that there was a conflict in the earlier decisions, the ultimate conclusion reached in the Court of Appeal and concurred in by his associates is found in what Lord Coleridge said:

"Looking at all the words of section 35, and giving them a reasonable construction, I think that the Legislature intended to give the court jurisdiction to make an order so as to decide questions of title, trusting to the discretion of the court not to decide in this summary manner any intricate or difficult question of title; but that, if the court think fit, they have jurisdiction to make the order in all cases."

See report, also, of same case as affirmed in the Court of Appeal. 46 Law Jour. 394; also, *Re Kimberley North Block Diamond Co.*, 59 Law Times, 579; *Lindley on Companies* (5th Ed.) 122; 3 *Enc'l of Laws of England*, 306.

[2] The order of rectification set out in the statement, under which Byrne's name in lieu of Grant's was placed on the register of members, was made upon the motion of Byrne, the hearing of counsel for the Brewing Company, and certain evidence offered in the form of affidavits and exhibits, including the transfer of shares by Grant to Byrne. Grant was not a party to the proceeding. It was made to appear, however, that, upon delivery in London of the instrument transferring his shares to Byrne, Grant promised the latter that upon returning to New York he would forward the certificates to Byrne. Ten years had elapsed since the date of that instrument of transfer, and the evidence tended to show that in spite of diligent search Grant could not be found. Why then did not the court obtain jurisdiction to rectify the register? True, Shaw was not a party to the proceeding and was not given notice of it; nothing appears to have been known of either him or his holdings by anyone connected with the proceeding. The articles of association (section 29) provide that "the transferror shall be deemed to remain a holder of the shares until the name of the transferee is entered in the register in respect thereof." Section 22 of the Companies' Act provides that shares "shall be personal estate." The certificates representing the shares in dispute were simply evidence of title, and, despite Shaw's possession of the certificates, the shares themselves were within Great Britain for the purposes of a suit or proceeding to determine title. *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 12, 13, 20 Sup. Ct. 559, 44 L. Ed. 647. Schedule 1, table A, section 8, referred to in section 50 of the Companies' Act, prescribes the form of transfer, and section 16 of such schedule and table provides that:

"The instrument of transfer shall be presented to the company, accompanied with such evidence as the directors may require to prove the title of the transferror, and thereupon the company shall register the transferee as a member."

The court order in practical effect operated as an evidential substitute for these absent certificates. If the Companies' Act had so required and steps had been taken to make Shaw a party to the proceeding by publication, as was required by the statutes under con-

sideration in the Jellenik Case, the decision there rendered would be conclusive of this case. But, imputing knowledge to Shaw of the provisions of the Companies' Act, it is not perceivable why, as respects the complaint that he was not made a party to the proceeding and that there was want of due process, he should not be regarded as having *consented* to the very procedure which resulted in the order to rectify the register

The most that Shaw can urge or does urge is that the company is bound by its representation that no transfer of the shares could be registered without the production of the certificates. The basis of liability upon such a representation is estoppel. *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183, 185, 46 N. W. 337. Indeed, we are bound to hold that this is the true theory of liability upon the entire certificate. *Moores v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 165, 4 Sup. Ct. 345, 28 L. Ed. 385. But estoppel or any other theory of liability cannot be invoked in the presence of knowledge, either actual or constructive, that the company's representation was so qualified as that a designated court could summarily relieve against it. Indeed, such fact must be read into the representation. The validity of such a qualification is at last founded on consent. We do not know of any policy of this country that would prevent the giving of such consent; nor of any reason why the maxim "*Consensus facit legem*" should not be applied in such a case as this. *Calloway v. People's Bank of Bellefontaine*, 54 Ga. 444, 449; *Copin v. Adamson*, *supra*, p. 354 (L. R. 9 Ex. 345); *Feyerick v. Hubbard*, 71 L. J. 1902, K. B. 509, 511; *Rousillon v. Rousillon*, 14 Chanc. Div. 371. This is not a case of negligence or of deception or fraud on the part of the company. The company did not of its own volition change its register; it refused to do so; it simply yielded obedience to the order of the court. After executing the court's order, the company was obviously bound to deliver certificates for the stock in favor of Byrne. In saying this, it is not meant to pass upon any right of Shaw as against Byrne.

Further, to urge the doctrine of estoppel or any other theory of liability against the company is to overlook the doctrine of laches as respects Shaw. He trusted Grant, while the company refused to trust either Grant (through his last transfer) or Byrne. Shaw's conduct enabled Grant to perpetrate the only fraud that appears to have been committed. Grant's transfer to Shaw described 100 shares, but he delivered certificates for only 60. This was calculated to excite seasonable inquiry both as to a further certificate and Grant's failure to observe the obligation of his transfer; and yet Shaw seems to have been as indifferent in these respects as he was in regard to notifying the company of his holdings. Grant made his transfer to Byrne 10 years before the court was called upon to make its order; another year elapsed between that time and the time Byrne disposed of his stock; and still three years more were allowed to pass before Shaw made his demand for a transfer. If Shaw had simply apprised the company, at any time during the 12 years that passed between the time he obtained the certificates and the date of the court's order, that he was the owner of the shares described in the certificates in dispute, his case would have been entirely different. *Westminster Bank*

v. Electrical Works, 73 N. H. 465, 480, 62 Atl. 971, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637; *Brisbane v. Delaware W. & R. R. Co.*, 94 N. Y. 204, 208. He did not in all that time even notify any of the local officers at Detroit of his holdings. It is no answer to say that he desisted from giving notice or making earlier demand because the company was not paying dividends, for, as stated, the evidence tends to show that the stock was for years of substantial value. As between him and the company, he was not a member—a stockholder. He was entitled to become one at any time prior to the action of the court rectifying the register of members; but such a right should have induced diligence, not neglect. We are not unmindful of the title acquired by Shaw to the certificates through their transfer and delivery; but, in view of the limitation imposed by the company's charter upon the representation contained in his certificates, we hold that it was culpable neglect in Shaw to sleep upon his rights so many years, and that, even if the court order and its execution did not alone operate to divest him of the right to compel the company to recognize the certificates as evidence of title to the shares, he is in no position to urge such recognition.

The decree below is affirmed, with costs.

PARK v. CONLEY.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1912.)

No. 3,629.

MORTGAGES (§ 517*)—FORECLOSURE SALE—INCREASED BID—JURISDICTION—COLLATERAL ATTACK.

A foreclosure decree directed a sale to pay \$2,833.33, costs, and fees. On the sale the property was struck off to complainant for \$250. On the master's report the sale was ordered confirmed, unless cause was shown to the contrary by respondents within eight days after the service of the order on them. No such copy having been served, complainant applied for leave to increase his bid to \$3,000, which application was granted, and the master ordered to deliver a deed to him on the expiration of the period of redemption, whereupon intervener, as an alleged judgment creditor of the respondents, applied to redeem on payment of complainant's original bid with interest, etc. *Held* that, since the condition on which the confirmation of the sale for \$250 was made to depend had not been performed prior to complainant's application to increase his bid, the court still had jurisdiction of the sale, and hence its order permitting the increase was not subject to collateral attack.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1519; Dec. Dig. § 517.*]

Foreclosure in federal courts, see note to *Seattle, L. S. & E. Ry. Co. v. Union Trust Co.*, 24 C. C. A. 523.]

Appeal from the Circuit Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Mortgage foreclosure proceeding by William T. Conley against Fred W. Keitel. From an order denying the right of Edwin H. Park,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

an alleged creditor, to redeem, except on paying \$3,000, with interest, he appeals. Affirmed.

Edwin H. Park, of Denver, Colo., pro se.

Archibald A. Lee, of Denver, Colo., for appellee.

Before CARLAND, Circuit Judge, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. The facts in this case disclose that William T. Conley, being the owner and holder of a mortgage upon certain real estate owned by one Fred W. Keitel, brought an action to foreclose the same in the United States Circuit Court for the District of Colorado, against said Keitel and Selma Keitel, his wife, and on June 10, 1910, a decree was duly entered, finding that there was due on the notes secured by said mortgage the sum of \$2,833.33, and directing that, unless said amount, together with costs and an attorney's fee taxed in the sum of \$200, be paid within 10 days thereafter, the real estate covered by said mortgage should be sold by a master named in decree, and the proceeds applied in payment of such amount. The decree not having been satisfied by payment, the master, in the manner provided by law, advertised said premises to be sold on the 18th day of August, 1910, and on said day struck off the same to William T. Conley, the plaintiff in the action, for the sum of \$250, he being the highest bidder therefor, and the master, pursuant to the order and decree, reported the same to the court. Whereupon, on August 25, 1910, the court entered the following order:

"This cause comes on now to be heard, Archibald A. Lee appearing as solicitor for the complainant, and thereupon, on his motion, it is ordered by the court that the master's report of the sale of the lands and premises in the decree of foreclosure herein stand in all things approved and confirmed, unless the respondents, or some of them, show cause to the contrary, within eight days after service of a certified copy of this order upon them."

The record does not disclose that any copy of the order, or even notice of said order, was served upon or given to the respondents, and on September 30, 1910, no objection having been made to the sale, William T. Conley, the complainant and purchaser, applied to the court for leave to increase his bid to the sum of \$3,000. The court permitted him, upon such application, to increase his bid to \$3,000, and confirmed the sale to him in the sum of \$3,000, and directed that the master execute and deliver to him, William T. Conley, upon the expiration of the period of redemption provided for by the statutes of Colorado, unless redeemed within said time, a proper deed of conveyance to said premises. Neither the defendants nor any other person having applied to the court to redeem the premises from said sale, Edwin H. Park, on March 20, 1911, filed a petition in said court, in which, among other things, was the following statement:

"Your petitioner further shows that he is a judgment creditor of the respondent, F. W. Keitel, and desires to redeem from said sale and to subject the said property to sale under the judgment of your petitioner; that your petitioner's said judgment was obtained in the district court of the city and

county of Denver and state of Colorado. * * * Your petitioner further now tenders into court the sum of money for which said property was sold by the said special master, to wit, the sum of \$250, together with interest thereon at 10 per cent. per annum from the 18th day of August, 1910, to the present time, for the purpose of redeeming said lands aforesaid from the said sale so made by the special master aforesaid."

This petition came on to be heard on March 28, 1911, and the petition of said Park was denied, excepting upon the payment of \$3,000, with interest at 8 per cent. per annum from September 30, 1910. Park, declining to pay said amount, his petition was denied, from which order and judgment of the court he brings this appeal.

A single question is presented, to wit: Under the facts as stated, was Park, being a judgment creditor, entitled to redeem said premises from said sale upon payment of the amount of \$250, and interest, being the amount of Conley's bid at the master's sale, and was the judgment of the court, requiring him to pay the sum of \$3,000, with interest, erroneous? This, in our judgment, depends upon whether or not the action of the court had on the 30th day of September, 1910, permitting the purchaser to increase his bid to \$3,000, and confirming the sale as one for \$3,000, was void. Had the sale, as reported by the master, for the sum of \$250, been unconditionally confirmed by the court, or the condition upon which the confirmation was to take place been performed, then, we think, the sale would have been fully executed, and the court thereby have lost jurisdiction of the case. But it appears that the nisi order of confirmation, of date August 25, 1910, was not to take effect until eight days after the service of a certified copy of that order upon the respondents in the case. As before stated, the record nowhere shows, or contains any allegation, that such service was made. Hence the nisi order was ineffectual as a confirmation of the sale on September 30, 1910, and the court still had jurisdiction of the case. While it may have been irregular for the court to permit the purchaser to increase his bid, no appeal was taken from such order, and, the court having jurisdiction, it was not a void judgment, and hence is not subject to collateral attack in this proceeding. As said by this court, in *Morrison v. Burnette*, 154 Fed. 617-623, 83 C. C. A. 391, 397:

"The rule is without exception in the national courts, and it has been very generally adopted in the state courts, that the bidder at a sale by a master or receiver, under an order or decree which contemplates a subsequent report and confirmation of the sale, becomes a purchaser when the officer announces the sale to him. Thereafter he is liable for, and may be compelled to pay, the purchase price he bids. Thereafter he may be made to suffer the loss of the destruction or depreciation, and may be permitted to reap the profit of the appreciation, of the property. Nevertheless he buys subject to the confirmation or avoidance of the sale by the court, and as he is aware of this fact, and the court is selling the property of others, and is acting in the dual capacity of trustee for the owners and of a judicial tribunal, it is undoubtedly its duty, until confirmation, to exercise a wise judicial discretion to secure for the owners the largest price consistent with a just regard for the rights of the bidder. Hence, if a material advance in price is offered and secured by a deposit, or by a bond, before the sale is confirmed, the sale has sometimes been opened, further bids have been received, and a sale to the highest bidder has been confirmed. * * * But there is a marked and radical distinction between the situations, the rights of the parties, and the established

practice before and after the confirmation of the sale. The purchaser bids with full notice that the sale to him is subject to confirmation by the court, and that there is a power granted and a duty imposed upon the judicial tribunal, when it comes to decide whether or not the sale shall be confirmed, to so exercise its judicial power as to secure for the owners of the property the largest practical returns. He is aware that his rights as a purchaser are subject to the rational exercise of this discretion. But, after the sale is confirmed, that discretion has been exercised. The power to sell and the power to determine the price at which the sale may be made has been exhausted. From thenceforth the court and the successful bidder occupy the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties."

This rule we think clearly applicable, as showing that the sale was not a completed one, so that the court lost further jurisdiction until the sale was confirmed. Had a certified copy of the nisi order entered August 25, 1910, been served upon the respondents, and no objection made to the sale, it would have stood confirmed eight days after the service of such order. But that was a conditional order, not to become effective in any event until eight days after the service upon respondents of a certified copy of the order. Under the statute law of Colorado, the respondents were given six months from the time of the sale in which to redeem therefrom, upon paying the amount of the purchase price with interest thereon. If such redemption right was not exercised by respondents within six months, then any judgment creditor of the debtor could redeem, upon paying the like amount any time within three months thereafter, or within nine months from the date of the sale. It does not appear in the record that appellant, Park, was a judgment creditor, or even a creditor, of Keitel at the time the sale was made. Had he been a judgment creditor at that time, it is possible that he would have had such a right in the premises that he could have intervened and appealed from the order entered September 30, 1910, permitting the purchaser to increase his bid and confirming the sale. That question, however, is not before us, and hence one that we are not required to answer.

Our conclusion is that the court retained jurisdiction of the case until the sale was confirmed; that it was not confirmed until the 30th of September, 1910; that the order, permitting the purchaser to increase his bid, and confirming the sale for such increased amount, was within the jurisdiction of the court, and not void, and its correctness cannot be assailed by appellant, Park, upon an application to redeem.

The decree of the court below is therefore affirmed.

Ex parte STEINER et al.

Ex parte WAGNER.

(Circuit Court of Appeals, Second Circuit. January 13, 1913. On Petition for Rehearing, February 3, 1913. On Rehearing, February 24, 1913.)

Nos. 97, 98.

1. CONTEMPT (§ 44*)—FEDERAL COURTS—JURISDICTION.

Under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1169 [U. S. Comp. St. Supp. 1911, p. 246]) §§ 299, 300, relating to the substitution of the District for the Circuit Court, the District Court is to be treated exactly as if it were the Circuit Court, and therefore had jurisdiction to punish as for a contempt of the Circuit Court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 128-130; Dec. Dig. § 44.*]

2. HABEAS CORPUS (§§ 27, 30*)—SCOPE OF WRIT—JURISDICTION.

The writ of habeas corpus cannot be used to correct error in a judicial determination, but may be used to attack any judicial determination involving personal liberty, which was made without or beyond the jurisdiction of the court, but only after final hearing except in extraordinary cases.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 22, 25; Dec. Dig. §§ 27, 30.*]

Jurisdiction of federal courts, see note to In re Huse, 25 C. C. A. 4.]

3. HABEAS CORPUS (§ 94*)—CONTEMPT—FEDERAL JURISDICTION—STATUTES.

The power of a federal court to punish for contempt by imprisonment, under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [U. S. Comp. St. Supp. 1911, p. 237]) § 268, providing that such courts shall have power to punish for contempts not extending to any cases except misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, etc., involves a question of jurisdiction, as distinguished from mere error, which may be determined on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 82, 92; Dec. Dig. § 94.*]

4. CONTEMPT (§ 13*)—POWER TO PUNISH—CONSPIRACY TO MISLEAD COURT—PRESUMPTIONS.

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [U. S. Comp. St. Supp. 1911, p. 237]) § 268, provides that the federal courts shall have power to punish contempts consisting of misbehavior of any person in their presence, or so near as to obstruct the administration of justice, the misbehavior of any of the officers of the courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, decree, or command of such courts. *Held*, that a federal court had power under such section to punish as for contempt a conspiracy to mislead the court by swearing to false affidavits in opposition to a motion for a preliminary injunction, and in the absence of anything to the contrary it would be presumed, in support of the court's jurisdiction, that the affidavits were verified in the presence of the court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 30-35; Dec. Dig. § 13.*]

Appeals from the District Court of the United States for the Southern District of New York; Julius M. Mayer, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Petitions by William Steiner and others and by Leon Wagner for writs of habeas corpus. From decrees dismissing the writs, petitioners appeal. Affirmed.

Kellogg & Rose, of New York City (A. J. Rose, Seward Davis, and Alfred C. Pette, all of New York City, of counsel), for appellants.

John Neville Boyle, Asst. U. S. Atty., and Henry A. Wise, U. S. Atty., both of New York City, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an order of the District Court denying a writ of habeas corpus on the ground that the petition showed the petitioners were not entitled to the same. The five petitioners were in custody of the United States marshal by virtue of a warrant of attachment issued by Judge Lacombe sitting in the late Circuit Court, requiring him to bring them before the court that they may be dealt with according to law for the offenses charged against them, which were that all five had been guilty of a criminal contempt in conspiring to mislead the court, and to that end swearing to false affidavits used in opposition to a motion for a preliminary injunction, and that four of them were guilty of an additional contempt in not surrendering all the infringing cameras in their control in accordance with the order of the court.

[1] The petition challenged the jurisdiction of the court on the ground that the District Court was without power to punish for a contempt of the Circuit Court. We think this objection not well founded because, under sections 299 and 300 of the Judicial Code, the District Court is to be treated exactly as if it were the Circuit Court. The petition also challenged the jurisdiction of the court on the ground that the offenses charged were not contempts within section 268 of the Judicial Code (formerly section 725, U. S. Rev. St. [U. S. Comp. St. 1901, p. 583]) which reads as follows:

"Sec. 268. (Power to administer oaths and punish contempts.) The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

[2, 3] A writ of habeas corpus cannot be used to correct error in a judicial determination, but may be used to attack any judicial determination involving personal liberty which was made without jurisdiction or beyond the jurisdiction of the court. It is frequently difficult to determine whether a decision involves mere error or is without the jurisdiction of the court. We are satisfied that the power to punish for contempt by imprisonment under the foregoing section does involve the question of the jurisdiction of the court as distinguished from mere error. The right of the court to punish at all depends

upon whether the alleged contempt falls within the definition contained in the statute. If this were not so the lengthy discussions in many habeas corpus proceedings in the Supreme Court, among others in *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205, and *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405, would have been entirely unnecessary. The cases could have been at once disposed of by saying that the orders involved could not be attacked collaterally, but, if erroneous, could only be corrected by writ of error or appeal. The question under this statute is discussed at length as jurisdictional in *Cuddy*, Petitioner, 131 U. S. 280, 286, 9 Sup. Ct. 703, 33 L. Ed. 154. The Supreme Court, however, has indicated that as matter of procedure it is improper, except in extraordinary cases, to grant the writ until the final determination of the ruling of the court below upon writ of error or appeal, where such remedies are available. *Riggins v. U. S.*, 199 U. S. 547, 26 Sup. Ct. 147, 50 L. Ed. 303. This proceeds on the theory that the erroneous decision of a court which has a right to dispose of a controversy on the merits, as well as a decision where the court has no jurisdiction to dispose of the question at all may be corrected directly by appeal or writ of error. There is ordinarily no necessity for a writ of habeas corpus. The final determination of a question which the court has no authority to dispose of at all may be attacked collaterally in a habeas corpus proceeding. In other words, the writ remains still as of old, a safeguard against illegal interference with the liberty of the individual.

[4] Furthermore, if we assume the present to be an extraordinary case, the result will be the same. The Supreme Court has included within the statute contempts committed in the presence of the court which do not involve violence or disorder, such as an attempt to deter a witness from testifying (*Savin*, Petitioner, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150), or an attempt to bribe a juror (*Cuddy*, Petitioner, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154). Counsel for petitioners in this case do not attempt to distinguish a conspiracy to mislead the court by making and using false affidavits as differing in nature from the before-mentioned acts, but contend that neither the conspiracy alleged nor the verification of the affidavits was made in the presence of the court. The trouble with this is that, there being nothing in the papers to show where the conspiracy was made or the affidavits were verified, we are bound to assume in aid of the jurisdiction of the court below that these things were done in its presence. Mr. Justice Harlan so held in *Cuddy*, Petitioner, *supra*, saying:

"The record in the present case shows that the appellant was before the court, that testimony was heard in respect to the matter of contempt, and that the appellant testified in his own behalf. The judgment being attacked collaterally, and the record disclosing a case of contempt, and not showing one beyond the jurisdiction of the court, it must be presumed, in this proceeding, that the evidence made a case within its jurisdiction to punish in the mode pursued here. We do not mean to say that this presumption as to jurisdictional facts, about which the record is silent, may not be overcome by evidence. On the contrary, if the appellant had alleged such facts as indicated that the misbehavior with which he was charged was not such as, under section 725 of the Revised Statutes, made him liable to fine or imprisonment, at the discretion of the court, he would have been entitled to the

writ, and, upon proving such facts, to have been discharged. Such evidence would not have contradicted the record. But he made no such allegation in his application, and, so far as the record shows, no such proof. The general averment, in the petition, that he was detained in violation of the Constitution and laws of the United States, and that the District Court had no jurisdiction or authority to try and sentence him, in the manner and form above stated, is an averment of a conclusion of law, and not of facts, that would, if found to exist, displace the presumption the law makes in support of the judgment. As it was neither alleged nor proved that the contempt which the appellant was adjudged, upon notice and hearing, to have committed, was not committed in the presence of the court, and as his misbehavior, if it occurred in its presence, made him liable to fine or imprisonment, at the discretion of the court, it must be held that the want of jurisdiction is not affirmatively shown; consequently, that it does not appear that error was committed in refusing the writ."

The question whether or not it is a contempt within the statute to verify false affidavits at a place distant from the court where such affidavits are subsequently presented does not arise upon the present appeal, and we cannot therefore properly express an opinion thereon.

The order is affirmed, without costs.

On Petition for Rehearing.

PER CURIAM. The petition for a reargument is granted.

Counsel may have 10 days from date in which to submit short supplementary briefs upon the point presented by the petition that the alleged contempt was not committed in the presence of the court or so near thereto as to obstruct the administration of justice.

We see no occasion for an additional oral argument.

On Rehearing.

PER CURIAM. Since our decision in these habeas corpus proceedings, it has been pointed out to us that the petitions for the writs did contain an allegation to the effect that the affidavits charged to be false were verified by the petitioners more than half a mile away from the court. In view of this, we granted a motion for a rehearing upon the single point whether such acts could be considered contempts within section 268 of the Judicial Code, "in the presence of the court or so near thereto as to obstruct the administration of justice." In the meantime the Supreme Court has handed down an opinion in the case of *Johnson v. Hoy*, U. S. Marshal, 227 U. S. 245, 33 Sup. Ct. 240, 57 L. Ed. —, disapproving in the most peremptory manner of the granting of writs of habeas corpus before trial. Moreover, it holds that a case is not within the exception to the general rule as extraordinary where the petitioner is at liberty. This because he has the relief which the writ is intended to give. It was for this reason principally that we affirmed the order of the District Court. What else we said was on the assumption that the case was an extraordinary one. The petitioners not being in custody, it does not seem to us proper, in the face of this late decision of the Supreme Court, to depart from the practice which it treats as definitely established.

Therefore the order as heretofore entered will not be disturbed.

ARMOUR v. WANAMAKER (two cases).

(Circuit Court of Appeals, Third Circuit. February 1, 1913.)

Nos. 1,664 and 1,665.

1. EXPLOSIVES (§ 9*)—VIOLATION OF STATUTORY DUTY—EVIDENCE.

Where plaintiff's wife died as the result of burns caused by the explosion of a bottle of hair tonic, which, though containing from 60 per cent. to 80 per cent. alcohol, was misbranded in violation of Food and Drug Act June 30, 1906, c. 3915, § 8, 34 Stat. 771 (U. S. Comp. St. Supp. 1911, p. 1357), and, being misbranded, had also been introduced by defendant into interstate commerce in violation of section 2 thereof, defendant's omission to properly brand, and the introduction of the package into interstate commerce in violation of the act, afforded competent evidence for submission to the jury of the question of negligence, under the rule that the omission to fulfil a statutory imposed obligation creates statutory negligence.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. § 9.*]

2. EXPLOSIVES (§ 9*)—PROXIMATE CAUSE—STATUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for death resulting from the explosion of a glass bottle containing hair tonic, which, though containing 60 per cent. to 80 per cent. alcohol, was misbranded, in violation of Food and Drug Act June 30, 1906, c. 3915, § 8, 34 Stat. 771 (U. S. Comp. St. Supp. 1911, p. 1357), as containing "extract from herbs, roots and flowers," whether such misbranding, and defendant's further negligent act in introducing the tonic as misbranded into interstate commerce in violation of section 2, was the proximate cause of the explosion and decedent's resulting death, *held* for the jury.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. § 9.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Actions by John Armour, as administrator of the estate of Mira J. Armour, deceased, and by John Armour in his own behalf, against John Wanamaker. Judgment for defendant, and plaintiff brings error in each case. Reversed, and venire de novo awarded.

Charles L. Smyth and Duane, Morris & Heckscher, all of Philadelphia, Pa., for plaintiff in error.

Wm. L. Nevin and W. W. Smithers, both of Philadelphia, Pa., for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and REL-STAB, District Judge.

BUFFINGTON, Circuit Judge. In the court below, John Armour in his own right in one case, and John Armour, as administrator of Mira J. Armour, his wife, in a second, all of whom were citizens of New Jersey, brought actions of trespass against John Wanamaker, a citizen of Pennsylvania, to recover damages for alleged negligence causing the death of said Mira J. Armour. The court having directed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a verdict for defendant, the plaintiffs, on entry of judgment thereon, sued out these writs. The sole question involved is whether, under the plaintiffs' proofs, the cases should have been submitted to the jury.

[1] The proofs on behalf of the plaintiffs, which was the only testimony in the cases, tended to show that Mrs. Armour, the decedent, a few days before her death, bought in defendant's store in Philadelphia, hair tonic contained in a bottle closed with a tight, ground glass stopper. The bottle was labeled as being an "Extract from Herbs, Roots and Flowers," but in reality about 60 per cent. to 80 per cent. of it was alcohol. Under the legislative definition of section 8 of the federal Food and Drug Act of 1906, this bottle was misbranded, in that said section provides that there is a misbranding, "in case of drugs, * * * if the package fail to bear a statement of the quantity or proportion of any alcohol * * * contained therein." The proofs also tended to show that, in further contravention of the provisions of section 2 of said act, which provides "that the introduction into any state * * * from any other state * * * of any * * * drugs, * * * which is misbranded, is hereby prohibited," the defendant delivered said misbranded bottle to the purchaser's home in New Jersey. The omission of the defendant to properly brand, as required by statute, this bottle as containing alcohol, and the introduction of the package into an interstate commerce prohibited by the act, clearly afforded competent evidence for submission to a jury on the question of defendant's negligence. The principle is clear that the omission to fulfill a statutory imposed obligation creates statutory negligence. 1 Shearman & Redfield's Negligence, § 13.

[2] There then being evidence on which the question of the defendant's negligence could be submitted to the jury, the next question arises: Was there evidence from which a jury could find that this statutory negligence injured the deceased? In that respect there was proof tending to show that, on the Sunday following the receipt of the bottle, Mrs. Armour, while in her bedroom, attempted without success to remove the stopper from the bottle. She then went to the kitchen and told the cook she could not draw the stopper. The cook's version was that Mrs. Armour—

"sat down and tried to open it, and she couldn't open it, and then I tried to open it for her. I asked her to let me open it, and she handed it to me, and I couldn't open it. * * * I tried to get it out, and I couldn't, and then I gave it to her again, and told her that probably Mr. Armour could get it out for her, and she says, 'No; I can get it out.' She says, 'You get the basin and pour some warm water in,' and she says, 'I will place the end of the bottle in, and then I can get it out easily,' and I did so, and then she went over to the range and placed the neck of the bottle in and lifted it out, and as she did it burst, and as it burst it caught, and the noise when it caught was the sound of a gun, and it was all over in flames; the whole kitchen was in flames. * * * It [the water] was not so very hot, because I placed my finger in it and asked her if it was hot enough, and she said, 'Yes; it is warm enough.'"

The basin was put on the back of the range. The lids were on, and no flame was exposed. The testimony of the chemist who analyzed another bottle of the tonic was that alcohol vapor was not explosive, that when mixed with air it was inflammable, that being heavier than

air it would drop and ignite instantly on touching a heated stove. He further said:

"I think it is obvious from the testimony of the witnesses that the bottle broke, letting out the contents with explosive violence, and so much so that the alcohol was scattered over the room. That requires an adequate cause. Such a cause would only be found from the internal pressure exercised from the alcohol vapor in that bottle. That in turn requires that that alcohol must have been heated in order to generate that pressure. * * * I found in that bottle as it is there would be some pressure at ordinary summer temperature."

He further testified that a temperature of from 105° to 125° was sufficient to produce an explosion of the tonic, due to unequal strains upon the shoulder of the bottle and the ground glass stopper. His conclusion, in substance, was that the escape of the fluid was caused by internal pressure, accompanied by the expansion of the neck of the bottle and the weakening of the shoulder, "by this expansion of the neck of the bottle by the application of heat causing the weakening of the bottle along certain lines, this internal pressure making it veritably an alcoholic bomb, blowing it in every direction," adding that it was perfectly patent to any mind that dwells upon it that some of the alcohol in liquid form or the fumes got down to the surface of the range, into the space where the ring was and the lid, and came in contact with the fire and became ignited.

Under such proofs, would a trial judge err in allowing a jury to infer that defendant's statutory negligence caused Mrs. Armour's death? Possibly no simpler and clearer statement of the law bearing on this case can be found than that given by the Supreme Court of Pennsylvania in *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695:

"The general rule is that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may, on this account, be foreseen by ordinary forecast, and not for those which arise from a combination of his fault with other circumstances that are of an extraordinary nature."

It will be observed that one negligent is charged with responsibility, not only for such consequences as he foresees by ordinary forecast, but, if the negligent act is one which naturally might result in injury, it is not necessary that the doer of such act should have in mind all the particular results which might happen therefrom. *City of Dixon v. Scott*, 181 Ill. 116, 54 N. E. 897; *Memphis v. Creighton*, 183 Fed. 552, 106 C. C. A. 98; *Pulaski v. McClintock*, 97 Ark. 576, 134 S. W. 1189, 32 L. R. A. (N. S.) 825. So in *Foster v. Railway Co.*, 127 Iowa, 84, 102 N. W. 422, 4 Ann. Cas. 150, it is said:

"Doubtless the particular situation might not have been foreseen, but this was not essential to making out a charge of negligence. Accidents as they occur are seldom foreshadowed; otherwise, many would be avoided."

In *Baltimore v. Slaughter*, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. Rep. 503:

"To entitle one to a trial of the question of another's negligence, which resulted in injury, it is not necessary that the effect of the act or omission complained of in all cases, or even ordinarily, be to produce the consequences which followed; but it is sufficient if it is reasonably to be apprehended that

such an injury might thereby occur to another while exercising his legal right in an ordinarily careful manner."

And in *Burk v. Creamery Co.*, 126 Iowa, 730, 102 N. W. 793, 106 Am. St. Rep. 377:

"The test, after all, is: Would ordinary prudence have suggested to the person sought to be charged with negligence that his act or omission would probably result in injury to some one? The particular result need not be such as that it should have been foreseen."

For if a man actually foresaw an injury to another, and adopted such a course as subjected him to that injury, he would be guilty of a malicious wrong; but a malicious wrong is not necessary to constitute negligence. Indifference, disregard, the omission of considerate regard for the consequences of an act, may amount to negligence; for negligence may be an act of thoughtless omission, as well as one of willful commission. *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65.

Applying these principles to the undisputed facts in hand, it is clear that men of reasonable mind might from these facts draw different inferences on the question whether the statutory negligence of the defendant was or was not the direct and efficient cause of the injury to plaintiff's decedent. In view of a retrial being necessary, we refrain from a present discussion of the facts, and limit ourselves to stating our conclusion, which is that the case was one to be submitted to a jury.

The judgments below are reversed, with a venire.

DASHLEY et al. v. DANIEL.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,074.

1. APPEAL AND ERROR (§ 1244*)—SUPERSEDEAS BOND—ACTION—PARTIES.

Where a supersedeas bond is made to two or more obligees jointly, and there is nothing to show that the interest of the obligees is several, all must join in an action thereon, unless one is dead, when the action must be brought in the name of the survivor or survivors; but if the bond, while joint in form, expresses distinct obligations as to the different obligees, separate actions may be maintained by each.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4797; Dec. Dig. § 1244.*]

2. APPEAL AND ERROR (§ 1244*)—SUPERSEDEAS BOND—SEPARATE OBLIGATIONS—PARTIES PLAINTIFF.

Where a supersedeas bond running to two obligees, while joint in form, created separate obligations as to each of the obligees, and one of them was a nonresident, and could not be found or served with process within the jurisdiction, the other was entitled to sue, without joining such nonresident obligee as a party plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4797; Dec. Dig. § 1244.*]

3. APPEAL AND ERROR (§ 1229*)—SUPERSEDEAS BOND—UNLIQUIDATED DAMAGES—LIABILITY—ACCRUAL.

Where a supersedeas bond provided for a stay of a decree which awarded certain placer claims to one of the obligees and a hotel building

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the other, so that damages accruing thereunder would necessarily be unliquidated, liability on the bond did not accrue until the amount of the damages had been assessed in a proper proceeding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4749; Dec. Dig. § 1229.*]

4. PLEADING (§ 407*)—COMPLAINT—FORMAL DEFECTS—WAIVER—SUPERSEDEAS BOND.

In an action on a supersedeas bond, failure of the complaint to allege that the damages sued for had not been paid was a mere formal defect, which was waived by the defendants' failure to demur, and by their going to trial and submitting the case to the jury without raising the objection.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1360; Dec. Dig. § 407.*]

In Error to the District Court, of the United States for the Second Division of the District of Alaska; Cornelius D. Murane, Judge.

Action by Otto Daniel against F. W. Dashley and another. Judgment for plaintiff, and defendants bring error. Affirmed.

The defendant in error brought an action against the plaintiffs in error on a supersedeas bond given by the latter as sureties to the defendant in error and one Harry Ruhl in the case of Daniel v. Hoogendorn et al., affirmed in this court in Hoogendorn et al. v. Daniel, 178 Fed. 765, 102 C. C. A. 213. In that case the complaint alleged that in September, 1906, two certain mining claims and a building known as the Golden North Hotel, belonging to Fred Ruhl, Henry Ruhl, and Harry Ruhl, were conveyed to Hoogendorn; that two days later he executed to the grantors a written option, reciting that, in consideration of \$5 paid, Hoogendorn would reconvey to them the said properties upon payment to him of \$3,540 on September 13, 1907, and that the Ruhls were given the right to take possession of the mining claims and prospect and work them for the purpose of determining their value; that on August 24, 1907, the Ruhls conveyed all their right in the option to Daniel, with the agreement that, upon the redemption of the same by Daniel from Hoogendorn, the hotel property should be conveyed to Harry Ruhl; that Daniel made due tender of said sum to Hoogendorn, and demanded of him the conveyance of the properties. The suit was brought to obtain a specific performance of the contract, and the court below decreed that it be specifically performed, and this court affirmed the decree. In that suit Harry Ruhl was made a party defendant, for the reason that he refused to join as plaintiff. He answered the bill, however, admitting the allegations thereof, and he joined in Daniel's demand for relief. The decree of the court was that Hoogendorn execute to Daniel a deed conveying to him the placer mining claims, and a deed to Harry Ruhl conveying to him the Golden North Hotel property, and that each be let into the possession of his property. The present action is brought against the sureties on the supersedeas bond, which was filed in that case on the writ of error to this court, and to recover the damages sustained by Daniel as the result of his being prevented by reason of said bond from working the placer claims. Judgment was rendered in favor of Daniel against the sureties in the sum of \$1,163 and the costs in the court below.

F. E. Fuller, of Nome, Alaska, and J. W. Albright, of Seattle, Wash., for plaintiffs in error.

Ira D. Orton and W. T. Dovell, both of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GILBERT, Circuit Judge (after stating the facts as above). It is contended that the trial court erred in holding that the defendant in error could maintain the present action without bringing in Harry Ruhl as a party thereto. The amended complaint alleges that Harry Ruhl, the co-obligee in the bond, is absent from the District of Alaska and does not reside therein, "and he is made a defendant herein because his consent cannot be obtained to join with the plaintiff," and the said Harry Ruhl, although one of the parties to whom said supersedeas bond was given, has no interest in the action, "and was not damaged in any way by said judgment being superseded." The Code of Alaska provides (Carter's Annotated Alaska Code, § 39, part 4, p. 151:

"Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined cannot be obtained, he may be made a defendant."

And the following section provides that:

"The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others."

[1] Where a bond is made to two or more obligees jointly, and there is nothing in the instrument itself to show that the interest of such obligees is several, the rule is they must all join as plaintiffs in an action thereon. 5 Cyc. 820, and cases there cited; *Farni v. Tesson*, 1 Black, 309, 17 L. Ed. 67. If one of the joint obligees be dead, the action must be brought in the name of the survivor or survivors. *Farni v. Tesson*, supra. But if the bond, while joint in form, expresses distinct obligations as to the different obligees, separate actions may be maintained by each. *Sprague v. Wells*, 47 Minn. 504, 50 N. W. 535; *Atlanta v. Thomas*, 60 Fla. 412, 53 South. 510; *Cecil v. Laughlin*, 4 B. Mon. (Ky.) 30.

[2] In the present case the bond, while joint in form, is nevertheless an instrument which creates separate and distinct obligations as to each of the obligees, for it is a bond to stay a decree which awarded to Daniel certain placer claims and to Ruhl a hotel building. Now the complaint alleges that Ruhl has no interest in the action, and was not damaged in any way by the decree being superseded. But that allegation is denied in the answer, and no evidence whatever was taken to sustain it. To the action as it was commenced Ruhl was not made a party. The plaintiffs in error demurred for defect of parties plaintiff. The demurrer was sustained, and the court directed that Ruhl be joined either as plaintiff or defendant. The amended complaint made him a party defendant, but no service was had upon him. More than a year later the plaintiffs in error moved to dismiss the action for want of prosecution, and on the ground that no process had issued against Ruhl, and that he had not made an appearance. That motion was denied. Again, when the case came on for trial, the plaintiffs in error objected to proceeding, on the ground that no service had been made on Ruhl. When the judgment was rendered, the court ordered that the action be dismissed as to Ruhl, on the ground that

he was a nonresident of Alaska, and the plaintiff in the action had been unable to obtain a service of summons upon him.

The limit of liability on the bond is the sum of \$2,500. So far as we are informed by anything in the record, the damages that Ruhl sustained by reason of the stay of the decree were as great as, if not greater than, those which Daniel sustained. If so, it was error to proceed to the trial and to render judgment in favor of Daniel, without taking any proof whatever as to the extent of Ruhl's claim to damages, if any, under the same instrument. But no exception was taken on that ground in the court below, and no instruction thereon was requested, and no assignment of error presents that ground for reversing the judgment. We may assume, therefore, that although the plaintiffs in error made a general denial of the allegation that Ruhl had sustained no damages, and had acquired no cause of action under the bond, it nevertheless assented to the truth of that allegation, and had no meritorious ground for asserting that it was prejudiced by the omission to bring Ruhl into court. No provision appears to be made in the laws of Alaska for service upon a nonresident defendant in a case such as this. If the defendant in error could prove that Ruhl was dead, he would unquestionably have the right to bring the action as the sole surviving obligee. The same result ought to follow, if he can show that Ruhl is a nonresident of Alaska, and cannot be found therein or served with process. The defendant in error ought not to be wholly deprived of his right of action by the fact that his co-obligee, who takes no interest in the cause of action, absents himself from the jurisdictional territory of the court, and cannot be found or served.

The complaint contained no allegation that the damages sued for had not been paid. After the verdict was returned, and after the court had denied the motion of plaintiffs in error for judgment notwithstanding the verdict, the defendant in error was permitted to amend his complaint and add the allegation that no part of the damages had "been paid by Hoogendorn or any other person." At the same time the court allowed the plaintiffs in error three days in which to answer said amendment, with the understanding that they would be granted a new trial in the event they denied the amendment. No denial was made. The plaintiffs in error now contend that the court erred in permitting the amendment, and they point to the statute (section 92 of the Alaska Code of Civil Procedure), which provides that the court at any time before trial may allow any pleading to be amended by adding a material allegation, and may also permit such amendment at any time before the cause is submitted, when the amendment does not substantially change the cause of action or defense "by conforming the pleading or proceeding to the facts proved." It has been held in several cases that, in assigning the breaches of a supersedeas bond, the pleader must allege that the judgment which had been stayed by the bond had not been paid. Some of these decisions are based upon express provisions of local codes, and they are all cases in which the amount due

on the bond is fixed or computable. In other cases it is held that such an allegation is not necessary. In *Way v. Swift*, 12 Vt. 395, the court said:

"It is further objected that it is not alleged that the judgment, the recognition, the intervening damages, or additional costs remain unpaid. In 1 Chitty, Pl. 356, it is laid down that this allegation is unnecessary. See, also, *Hancocke v. Prowd*, 1 Saund. 330, note 4. If the judgment did not remain unsatisfied, it was matter of defense, and the defendant might have averred it in his plea."

In all such cases, the principal breach to be assigned is the failure of the appealing party to reverse the judgment. In *Higgins v. Parker*, 48 Ill. 445, it was said:

"It was only necessary to aver, in assigning breaches of the bond, that he, the plaintiff, had been deprived of the possession during the pendency of the appeal."

In *Doe v. Daniels*, 6 Blackf. 8, the court held that a sufficient breach was assigned in the allegation that:

"Harris did not prosecute his suit with effect, but, on the contrary, the judgment of the circuit court was affirmed by the Supreme Court."

In *Stanley v. Montgomery*, 102 Ind. 102, 26 N. E. 213, a case in which the damages for breach of the bond were liquidated, the court recognized the rule that in a suit on a contract for the payment of money it must be alleged that the money is due and unpaid, but held it was sufficiently alleged in these words:

"Whereby an action hath accrued to the plaintiff against the defendant to recover said sum of \$1,500, for which he demands judgment."

The court said:

"Such an allegation in such a case is equivalent to an averment that the \$1,500 is due."

[3] The liability to pay damages under such a bond as is here sued upon does not accrue until the amount of the damages has been assessed in a proper proceeding. That is a feature in which the present case differs from those which are cited by the plaintiffs in error. By all the principles of pleading this case comes within the general rule that, in an action for unliquidated damages, it is not necessary to aver that the damages, which have not been assessed, and therefore are not yet due, have not been paid. In *McLaughlin v. Hutchins*, 3 Ark. 207, the court recognized the common-law right of the plaintiff to bring either an action of debt to recover the penalty of a bond or an action of covenant to recover damages for the loss which he had sustained, and held that in the latter action it was unnecessary to allege that the penalty had not been paid. The same was held in *Hughes v. Holton*, 5 Blackf. (Ind.) 180. In *Montana Min. Co. v. St. Louis Min. & Mill. Co.*, 19 Mont. 313, 48 Pac. 305, in an action to recover damages against sureties on an injunction bond, the court, Judge Hunt writing the opinion, held that no allegation of demand and refusal to pay was necessary.

[4] But we need not decide in this case whether the complaint would have been held deficient upon a demurrer for want of the allegation of nonpayment, for, in view of the authorities, we are of the opinion that the defect, if any there was, was a formal one, and that it was waived by the failure of the plaintiffs in error to demur or object, and by their going to trial and submitting the case to the jury, without raising the objection. The very fact that they were called into court to answer to a demand for the payment of the damages was notice to them that the defendant in error claimed that the damages had not been paid, and by their failure to deny the amended allegation they admitted that they had not been paid.

It is contended that the trial court erred in the admission of incompetent evidence of damages, and in instructing the jury thereon. The questions so raised are the same that are discussed and disposed of in the case of *Hoogendorn v. Daniel*, *infra*, decided at the present term of this court.

The judgment is affirmed

HOOGENDORN v. DANIEL.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,075.

1. APPEAL AND ERROR (§ 158*)—WRIT OF ERROR—DISMISSAL—GROUNDS—PAYMENT OF JUDGMENT.

Payment and satisfaction of a judgment is no ground for the dismissal of a writ of error to review the same, since one who voluntarily pays a judgment is not thereby precluded from appealing therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 973-977; Dec. Dig. § 158.*]

2. APPEAL AND ERROR (§ 1042*)—REVIEW—ITEMS OF DAMAGE—PREJUDICE.

In a suit for defendant's failure to convey certain placer mining claims to plaintiff, defendant was not prejudiced by the court's refusal to strike from the complaint elements of damage with reference to the payment of plaintiff's traveling expenses to Alaska, and loss of time and opportunity to earn money incident to his efforts to obtain title to the claims and his prosecution of the suit, where no evidence was offered with reference to the claim of traveling expenses, and the court, after verdict, required a remittitur of a sum more than sufficient to cover any allowance that might have been made for loss of time, etc.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

3. APPEAL AND ERROR (§ 1031*)—REVIEW—PREJUDICE—PRESUMPTIONS.

Unless it can be seen that prejudice has resulted from error of the trial court, prejudice will not be presumed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.*]

4. DAMAGES (§ 68*)—BREACH OF CONTRACT—CONVEYANCE OF MINING CLAIM.

Where, in an action for breach of defendant's contract to convey certain placer mining claims to plaintiff, it appeared that plaintiff, after making the contract, came to Alaska prepared to work the ground in the summer of 1908, and would have done so, had he been able to get pos-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

session of it, he was entitled to recover legal interest on the profits which he might have made from the claims during the period of his exclusion from possession, and for this purpose was entitled to prove the proceeds of the mines after possession was secured and the royalty received therefrom.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 141-143; Dec. Dig. § 68.*]

In Error to the District Court of the United States for the Second Division of the District of Alaska; Cornelius D. Murane, Judge.

Action by Otto Daniel against D. Hoogendorn. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error brought the present action against the plaintiff in error to recover damages alleged to have been sustained by reason of the failure of the latter to convey two placer mining claims to him, in compliance with a contract made with Fred Ruhl, Henry Ruhl, and Harry Ruhl, which contract had been assigned to the defendant in error. The complaint alleged the contract, and the decree of the District Court for the specific performance of the same, which decree was affirmed by this court in *Hoogendorn v. Daniel*, 178 Fed. 765, 102 C. C. A. 213. The items of damages claimed are (1) \$1,500 for expenses paid and time lost by the defendant in error in going from Portland, Or., to Alaska, to make payment for and perfect title to the mining claims, and expenses paid and time employed in returning from Alaska; (2) \$1,500 on account of his failure to secure employment as a marine engineer during the time so engaged in going to and returning from Alaska; (3) \$150 loss arising from the purchase and transportation of a boiler for use on the mining claims; (4) \$1,000 for expenses and loss of time during the pendency of the suit; (5) \$30,000 for being deprived of the use and occupation of the mining claims and the opportunity to mine the same from September 13, 1907, to June 26, 1910. Included in this item are the damages which were recovered against the sureties in the case of *Dashley et al. v. Daniel* (No. 2,074) 202 Fed. 426, just decided by this court. On the trial the jury returned a verdict for the defendant in error for \$10,275. From this verdict the court below ordered that \$3,525 be remitted. Thereupon judgment was rendered for \$6,750 and costs.

F. E. Fuller, of Nome, Alaska, and J. W. Albright, of Seattle, Wash., for plaintiff in error.

W. T. Dovell and Ira D. Orton, both of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] A motion is made to dismiss the writ of error, on the ground that the plaintiff in error has paid and satisfied the judgment. The motion must be denied. One who voluntarily pays a judgment is not precluded from taking an appeal therefrom. *County of Dakota v. Glidden*, 113 U. S. 222, 5 Sup. Ct. 428, 28 L. Ed. 981; *Erwin v. Lowry*, 7 How. 172, 12 L. Ed. 655; *O'Hara v. McConnell*, 93 U. S. 150, 23 L. Ed. 840; *Edwards v. Perkins*, 7 Or. 149.

[2, 3] Error is assigned to the refusal to strike from the complaint those allegations which set up as elements of damage the payment of traveling expenses and loss of time and loss of opportunity to earn money by the defendant in error, incidental to his efforts to obtain title to his mining claims and his prosecution of his suit. Those allega-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tions should have been struck from the complaint. But the defendant in error suffered no prejudice from the denial of his motion. No evidence whatever was offered to the jury to support the allegation as to the first item of damages. Nor did the court submit to the jury that item for their consideration. After the verdict was rendered, the court struck from the amount thereof \$3,525, a sum more than sufficient to cover the amount of the other objectionable items. It should be presumed that, in so reducing the amount of the verdict, the court intended to and did exclude therefrom all items of damage which had been illegally submitted to the jury. *Johnson v. Johnson*, 104 Ky. 714, 47 S. W. 883. Unless it can be seen that prejudice has resulted from error of the trial court, prejudice will not be presumed.

But it is said that the court erred in instructing the jury concerning the loss sustained by defendant in error as the result of his purchase of a boiler. The court instructed the jury to take into consideration the fact, if they so found from the testimony, that the plaintiff purchased a boiler and transported it to the claims, and said:

"And the same method should be employed in computing the damages in this case, if you should find said boiler was purchased, and that the plaintiff was prevented from using the same, for the price of such boiler."

This it is contended was equivalent to charging the jury that they might find for the plaintiff in the action damages measured by the purchase price of the boiler. It was evidently not so understood at the time, and no exception was taken to the instruction, and no assignment of error is based thereon. It is obvious that the language of the court is not correctly reported. Elsewhere the court clearly instructed the jury that the measure of damages as to the boiler and other machinery was the interest on the money invested therein during the time that the plaintiff was kept out of possession by reason of the acts of the defendants.

[4] The court instructed the jury as follows:

"If you find from the evidence that the plaintiff could have worked said mining claims at a profit during the winters of 1907 and 1908 and of 1908 and 1909, and the summers of 1908 and 1909, he would be entitled to legal interest at the rate of 8 per cent. per annum upon the profits that he would have made, if any, during the period that he was kept out of the use of the money."

Error is assigned to this instruction, and to the admission of certain testimony, as follows: The defendant in error was asked if he had made any preparations for mining the property in the way of purchasing mining machinery and supplies. He answered that he had bought a boiler in Tacoma, for which he paid \$300, and had shipped it to Alaska. He was asked what arrangements, if any, he had made in the winter of 1908 and 1909, and the spring of 1909, with the Fairhaven Water Company to work the ground, if he could have obtained possession thereof. He answered that he had arranged with the company to work the ground, on a royalty of 40 per cent., with hydraulic elevators; that the company had a supply of water, ditches, and pipe lines in such manner that it could have worked the ground; that in the summer of 1910 the company did work the ground, and paid him

a royalty of 40 per cent. on \$36,358.35 taken therefrom, and in 1911 mined the ground, and paid him a royalty upon more than \$70,000.

It is contended that this evidence should have been excluded, for the reason that it does not afford competent proof of the profits which would have accrued if the claims had been mined during the time mentioned, and because there is no evidence that the defendant in error could or intended to work the ground in the summer of 1908. The reasons suggested for the exclusion of the evidence are not sufficient. The defendant in error was there to work the mining property, if he could get possession of it. The plaintiff in error inequitably excluded him from the possession, and during the period of such exclusion the defendant in error might have mined the ground, and he testified that he had made an arrangement to mine it with the corporation which subsequently did mine it. The position of the plaintiff in error seems to be that the owner of a mining claim suffers no damage by being prevented from working it, for the reason that the gold is all there in the ground, and will be there when he does get the opportunity to work it, or that the measure of his damages is, at most, the interest on the purchase price of the mine. But the mineowner is entitled to the benefit of the use of the money which he can take from his mine, and the plaintiff in error has no ground to complain in this case that the court admitted the evidence which was objected to, and instructed the jury that they might charge him with legal interest on the profits which the defendant in error might have made from the mining claims during the period of his exclusion from the possession thereof.

The judgment is affirmed.

ELLIOTT v. PEET.

(Circuit Court of Appeals, Third Circuit. February 3, 1913.)

No. 1,610.

1. APPEAL AND ERROR (§ 1008*)—WAIVER OF JURY—STATUTORY SUBMISSION—EFFECT OF VERDICT.

The findings of the trial judge under a statutory submission have the same effect on appeal as the verdict of a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

2. BANKS AND BANKING (§ 126*)—DRAFTS—CHECKS—OBLIGATION TO PAY—LOANS.

The M. Bank having suffered an impairment of capital, it was arranged that a draft should be drawn on defendant, who was president of plaintiff's bank, individually, to cover the impairment until the danger of governmental examination was over, and that the draft should be made good by the check of a corporation drawn on the M. Bank. The draft was drawn, accepted, and paid through plaintiff's bank; the amount being charged to defendant's individual account, and offset by a credit deposit of the corporation's check for the same amount, which, when presented to the M. Bank for payment, was protested for lack of funds, and on its return defendant directed that it be carried as a cash item of plaintiff's bank, instead of being charged back to his account. *Held*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that, the effect of such transaction being to withdraw the amount of the draft from the assets of plaintiff's bank, the credit of the check should have been canceled, and the draft charged against defendant's account.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 305, 309; Dec. Dig. § 126.*]

3. BANKS AND BANKING (§ 80*)—INSOLVENCY—CLAIMS—REIMBURSEMENT—BURDEN OF PROOF.

Where the president of a bank, in order to tide over a bank's difficulties, borrowed \$50,000, giving both the bank's and his own securities as collateral, the burden was on him to clearly establish the nature and character of his outlays and expenses in securing such loan, in order to recover the same from the bank's receiver.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

4. SET-OFF AND COUNTERCLAIM (§ 61*)—WITHDRAWAL.

Where, in an action by a receiver of a bank against its former president to recover an overdraft, defendant claimed as an offset misappropriation of a certificate of deposit by the receiver, but there was no sufficient evidence that the certificate belonged to defendant, he, having submitted his claim to the court, was not entitled as of right to withdraw the same in order that he might relitigate the matter in another case.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 134; Dec. Dig. § 61.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. B. McPherson, Judge.

Action at law by Milton C. Elliott, as receiver of the Deposit National Bank of Philadelphia, to the use of the stockholders' agent, against F. M. Peet. From a judgment for plaintiff (192 Fed. 699), defendant brings error. Affirmed.

John G. Kaufman and V. Gilpin Robinson, both of Philadelphia, Pa., for plaintiff in error.

F. B. Bracken, of Philadelphia, Pa., for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and RELL-STAB, District Judge.

BUFFINGTON, Circuit Judge. In the court below, Elliott, receiver, brought suit, to the use of the Deposit National Bank of Philadelphia, against Peet to recover an overdraft of some \$6,600 of the latter's account as depositor. Such action Peet defended on three grounds: First, that any alleged overdraft was caused by the wrongful charging to such account of a deposited check which was lost by the bank's alleged negligence in failing to duly forward it for collection; second, that defendant was entitled to credit for \$1,400 for services rendered to, and expenses incurred for, the bank by defendant in raising a loan of \$50,000; and, third, that defendant was, under the Pennsylvania statute, entitled to a certificate in his favor for \$8,000, being the amount of a certificate of deposit, issued by the Manasquan National Bank, which defendant alleged was his property, and which the plaintiff bank, by its receiver, wrongfully converted to its use. By stipulation, under R. S. § 649,† the parties waived trial by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† U. S. Comp. St. 1901, p. 525.

jury. In pursuance thereof the court heard the proofs, found for the full amount of the plaintiff's claim, and denied the defendant's defenses. Thereupon defendant, inter alia, moved for leave to withdraw the claim for the certificate above referred to as his third item of defense. Such leave was refused. The court having entered judgment for plaintiff for the full amount of his claim, defendant sued out this writ.

[1] Without incumbering this opinion with the details of the complicated dealings and relations of the parties and banks involved in this case, and without entering upon a discussion of each of the thirteen assignments of error, we limit ourselves to a statement of facts throwing light on the three questions in which the assignments substantially center. The findings of the judge, under the statutory submission, having the effect of a verdict (*Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373), the first question arises: Was there competent evidence on which to base the finding that Peet's account was overdrawn?

[2] We have carefully examined the evidence, and, while there was conflict on the vital point of whether the delay in the collection of the check was caused by Peet's own directions, or the neglect of his bank, the proofs were such that, if believed, they warranted the finding, which was:

"At the time of the transactions in question Peet was, and had been for about a year, the president of the Deposit Bank, and was taking the part usually taken by such an officer in the management of its affairs. He was also a depositor, and had an active account upon the books. The First National Bank of Manasquan, N. J. (hereinafter called the Manasquan Bank), also maintained such an account, and kept therein a part of the reserve required by the national banking law. The New Jersey-West Virginia Bridge Company (hereinafter called the Bridge Company) was a depositor and a large borrower in the Manasquan Bank, and its business relations with that bank were close and intimate. * * * Late in March, 1908, the Manasquan Bank was undergoing examination by the government. Its affairs were not in a satisfactory condition, but what especially concerns us now is the fact that its reserve was below the legal limit. The sum of \$6,000 was needed at once to make good the impairment, and in order to meet this situation the Bridge Company agreed as a matter of accommodation to assist the Manasquan Bank, and thereupon drew a draft on Peet individually for \$6,000, payable to the order of the Manasquan Bank. This draft was duly indorsed by the bank, and, while it was not formally accepted by Peet, the amount of the draft was charged to his account by his express direction, and was credited upon the account of the Manasquan Bank. Peet was at first unwilling to accept liability upon the draft, but finally agreed to do so upon the verbal promise of Magee, the president of the Manasquan Bank, that the Bridge Company's check would be taken care of in a short, but unspecified, time. After he accepted liability for the \$6,000, and this sum had been credited to the Manasquan Bank, the transaction became a loan from Peet to that bank, and was equivalent to the transfer of that amount in cash. Accompanying the draft was a check of the Bridge Company for \$6,000, drawn upon its account in the Manasquan Bank in favor of Peet. Of course, if this check had been paid, Peet's loan to that bank would thus have been repaid, and the transaction would then have become what it was probably intended to be at the first, namely, an accommodation loan of \$6,000 from the Bridge Company to the Manasquan Bank. But the check was not paid. It was retained in the Deposit Bank until April 30th, when it was credited to Peet's account and forwarded to the Manasquan Bank for collec-

tion. The funds were not there to meet it, and it was duly protested for nonpayment; the Manasquan Bank being then on the point of passing into the hands of a receiver. The check was returned to the Deposit Bank, and if it had been charged, as in the usual course of business a check forwarded for collection and afterwards protested should be charged, against the account of the payee, it would have gone into Peet's account as a debit, and would thus have balanced the previous credit. He would then have been just where he had placed himself when he accepted liability for the draft, namely, in the position of a creditor of the Manasquan Bank (and also of the Bridge Company) for \$6,000, and his account would have been properly diminished by precisely that sum. But the check was not so charged. On the contrary, Peet directed it to be carried as a cash item among the assets of the Deposit Bank, and it was being carried as such an item when this bank also—in July, 1908—was taken charge of by a receiver. Meanwhile Peet continued to draw checks against his account (which, as has been shown, was \$6,000 larger than it should have been); and the result was that, when the bank's doors were closed, he had drawn out the \$6,000 improperly to his credit and \$577.83 in addition."

This finding is supported by the testimony of the cashier of the bank, who says that, after the draft and check were received, he made out and signed a charge check, March 26, 1908, which read, "Pay to First National Bank of Manasquan, \$6,000, for draft of New Jersey-West Virginia Bridge Company's account. Charge F. M. Peet. M. B. V."—and both charged the draft to Peet's account and credited its proceeds to the Manasquan Bank by Peet's directions. He further testified that by this transaction the draft and charge check became a check on Peet's account, and that the Bridge Company's check was held until April 30, 1908, when it was sent forward, by Mr. Peet's direction, for collection. It was not paid. Under these proofs the court rightly held that an overdraft of Peet's account was shown, and his liability therefor established.

[3] Turning to the second question, it appears from the proofs that, shortly before the failure of the Deposit National Bank of Philadelphia, the defendant, for the purpose of tiding over the bank's difficulties, borrowed from a trust company in New York \$50,000, giving as collateral therefor both the bank's and his own securities. The receiver afterwards paid off the loan, but in order to get back his own securities from the trust company Peet alleged he was put to an expense of some \$1,400. Assuming, as we do, the right of Peet to be reimbursed for all reasonable outlays and expenses incurred in securing this loan for his bank, the burden, of course, rests upon him to clearly establish the nature and character of such outlays. In that respect his proofs are deficient, for they furnish no data or facts such as would warrant either this court or the court below in sustaining such a defense. The court below was not in error in disallowing a claim he (the defendant) did not establish.

The third question concerns the right of Peet, individually, to a certificate of deposit issued by the Manasquan Bank, which recited that a certain construction company had deposited \$8,000 in the bank payable to the order of F. M. Peet, president. This certificate afterwards came into the possession of the plaintiff receiver, and he received credit for it in settlement of the accounts of the plaintiff bank with the Manasquan. It will be observed that whether the draft was rightly or wrong-

ly used in such settlement is not here involved. If the certificate was the individual property of Peet, he was entitled to recover for it; on the other hand, if it was not his individual property, the use made of it by the receiver is immaterial. On the controverted question of ownership, however, the court found against Peet, and an examination of the proofs satisfies us that the proofs were such as to warrant such a finding.

[4] The subsequent action of the court in refusing to allow this claim to be withdrawn, if assignable for error, does not, in our view, involve legal or discretionary error. The defendant himself made such a claim by his pleadings, and his proofs were taken and submitted to the court. Having chosen his own forum, and had the opportunity of a finding in his favor, we see no good reason why, when such finding was against him, the defendant should be allowed to relitigate the matter in another case.

Finding no error in the record, the judgment is affirmed.

STONE & WEBSTER ENGINEERING CORPORATION v. MELOVICH.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,160.

1. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—DANGEROUS MACHINERY—ASSUMED RISK.

Plaintiff was injured by having his arm caught in certain unguarded cogwheels on the shaft of a gravel-washing machine, as he was oiling the same. The danger of getting his clothing caught in the wheels was obvious to a person of ordinary vision, but plaintiff did not appreciate the risk of the particular act he was performing at the time he was injured. He was a common laborer, had never before been employed by defendant to work about machinery, and had never seen any such machinery at the time he was directed to oil it, without warning as to the danger. There was but one confined space for him to stand while oiling the bearings, which required that he extend his arm over the unprotected cogs, which were revolving at such speed as not to be clearly visible. *Held*, that plaintiff did not assume the risk, as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

2 EVIDENCE (§ 513*)—EXPERTS—DANGEROUS MACHINERY—EVIDENCE—CUSTOM.

Where plaintiff was injured, while oiling certain shafts, by getting his arm caught in unguarded cogwheels, it was not error to permit an expert to testify whether it was customary for others by whom the witness had been employed to guard the cogwheels on similar machines, under the rule that the customs and usages of well appointed and managed concerns in the business under investigation is competent evidence to show the proper degree of care and diligence required under the circumstances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2317, 2318; Dec. Dig. § 513.*]

3. EVIDENCE (§ 539*)—WITNESSES—EXPERTS—COMPETENCY.

Where a witness testified that he had had extensive experience in putting up machinery and around mixers of concrete, gravel machines, and compressors, and in general construction, and that he knew a good deal about concrete machinery, he was properly permitted to testify as an expert concerning the gravel-washing machine in controversy, by which plaintiff was injured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2349-2352; Dec. Dig. § 539.*]

4. APPEAL AND ERROR (§ 203*)—OBJECTIONS NOT MADE AT TRIAL—QUALIFICATIONS OF EXPERT.

An objection that a witness was not qualified to testify as an expert could not be made for the first time on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1064; Dec. Dig. § 203.*]

5. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—DANGEROUS MACHINERY—CHANGES—EVIDENCE.

On an issue as to whether the defendant was negligent in failing to guard cogwheels of a machine by which plaintiff was injured, evidence as to what changes might have been made to render the machine more safe was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

In Error to the United States District Court for the Northern Division of the Western District of Washington; C. H. Hanford, Judge.

Action by Eli Melovich against the Stone & Webster Engineering Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Kerr & McCord, of Seattle, Wash., for plaintiff in error.

Herbert W. Meyers and Charles A. Enslow, both of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The parties will be designated here as they were in the court below. The plaintiff, while in the employment of the defendant, lost his arm while oiling the bearings of certain cogwheel shafts. In his complaint he alleged negligence, in that the cogwheels were not properly guarded. The defendant denied the negligence, and set up the defenses of assumption of risk and contributory negligence. The jury returned a verdict for the plaintiff, and thereupon judgment was rendered.

The cogwheels in which the arm of the plaintiff in error was injured were used in operating an elevator for carrying gravel from a pit to a gravel-washing machine, and were placed about 25 feet above the ground. About 4 feet beneath the cogwheels was a platform, about 4 feet wide and 6 feet in length, covered with a shed. On either side of the platform timbers or supports were placed, about 4 feet above the platform. Across the platform extended two shafts, which rested upon those timbers. Upon each shaft were two cogwheels. On the outer shaft were two wheels, of 25 inches in diameter, and on the inner shaft were two wheels of 5 inches in diameter each, and the cogs

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

interlaced. In oiling the bearings of the shaftings, the oiler stood upon the platform with his back to a large belt wheel and belt, the belt reaching as high as his neck, and with his face to the cogwheels. He used an oil can about 12 inches in length. The plaintiff oiled the bearings on his right hand facing the cogwheels, and thereafter he undertook to oil the bearings on the left side, and in so doing his clothing was caught in the revolving cogwheels, and his arm was drawn therein and crushed. He testified that he had to reach over to oil the inner shaft bearings, and that the boards were so nailed that he could stand but in one place; that when the wheel was revolving he could not see the cogs. He said:

"It goes fast like the wind is blowing, and you could not see it."

There was evidence that the plaintiff was an uneducated man, very slightly acquainted with the English language; that he was hired in the capacity of a common laborer; that he had no knowledge of machinery or implements other than the pick and shovel; that he had never worked about machinery, and had never seen a set of cogwheels before beginning to work for the defendant; that he had never seen a gravel machine; that he knew nothing about the parts of any machinery for concrete mixing; that he had been working three weeks for the defendant when the injury occurred; that his regular work was to tend a motor machine on the ground; that the said motor machine was boxed, so that its machinery was covered; that he oiled the said motor machine only when it was at rest; that he had been sent up to oil the cogwheels on the platform above two or three times before the time of the accident, but that he was given no instructions as to the manner of doing the work, nor of the danger that he might encounter in doing it.

[1] The defendant urgently insists that its motion for an instructed verdict should have been allowed, on the ground that the dangers of the situation were known to the plaintiff and appreciated by him, and were therefore assumed by him as the risks of his employment; that the plaintiff had ordinary vision, and the machinery was plainly visible, and reference is made to his testimony, in which he said he knew that if he deliberately put his hand in a revolving wheel it would injure him, and added, "Any crazy man would know better." But there was testimony tending to show that the risk of the particular act which the plaintiff was engaged in performing at the time when he was injured was not known or appreciated by him. If it were true, as he testified, that he was but a common laborer, had never, before his employment by the defendant, worked with machinery, had never before seen that kind of machinery, and he was directed to climb upon the platform to oil the cogwheels, without any warning as to his danger or any instruction as to the precautions which he should observe to avoid injury, that there was but one confined space for him to stand in while oiling the bearings, so that he must needs extend his arm over the revolving, unprotected cogs, and that those cogs were revolving at such a speed as not to be clearly visible, and that he did not realize the danger therefrom, the court would not have been justified in indulging

the legal presumption that he must have known and appreciated the risks. Nor does such a presumption arise from the fact that the plaintiff knew it was dangerous to thrust his hands into the revolving cogs. The most ignorant laborer would have known that. The plaintiff was engaged in doing the act which he was instructed to do; and it is inferable from the testimony that while doing it he did not realize how far from the shaft the reach of the fingers of the revolving cogs extended, nor how inexorably they dragged to destruction any substance that came within their grasp. In *Butler v. Frazee*, 211 U. S. 459-466, 29 Sup. Ct. 136, 138 (53 L. Ed. 281), the court said:

"Where the elements and combinations out of which the danger arises are visible, it cannot always be said that the danger itself is so apparent that the employé must be held, as a matter of law, to understand, appreciate, and assume the risk of it."

[2] Nor was there error in permitting the witness Savage to answer, as an expert, the question whether it was customary for companies for whom he had been employed, operating machines such as that of the defendant, to guard the cogwheels. It is the general rule, subject to certain exceptions not pertinent here, that the custom and usage of well-appointed and well-managed concerns, in the business which is under investigation, is competent evidence as tending to show the proper degree of care and diligence required under the circumstances. *Ohio Copper Mining Co. v. Hutchings*, 172 Fed. 201, 96 C. C. A. 653; *Chicago, G. W. Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 176 Fed. 237, 100 C. C. A. 41, 20 Ann. Cas. 1200; *Lake v. Shenango Furnace Co.*, 160 Fed. 887, 88 C. C. A. 77; *Northam v. Boston & Montana C. C. & S. Min. Co.*, 190 Fed. 722, 111 C. C. A. 450. In *Texas & Pacific Ry. Co. v. Behymer*, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905, it was said:

"What usually is done may be evidence of what ought to be done. But what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

In *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 416, 12 Sup. Ct. 679, 682 (36 L. Ed. 485), the court approved the following charge to a jury:

"You fix the standard for reasonable, prudent, and cautious men, under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard."

[3, 4] There is no merit in the contention that the witness was not shown to have the necessary qualifications or experience to testify as an expert. He testified that he had had an extensive experience in putting up machinery, and around mixers of concrete and gravel machines and compressors, and in general construction, and that he knew a good deal about concrete machinery. No objection was made to his testimony on the ground that he was not shown to be qualified as an expert.

[5] It follows that the court did not err in admitting the testimony of the same witness as to what changes might have been made to render the machinery more safe. One of the issues in the case was

whether the defendant had been negligent in failing to guard the cogs, and upon that issue it was proper to show how it might have done. *New York Biscuit Co. v. Rouss*, 74 Fed. 611, 20 C. C. A. 555; *Ohio Copper Mining Co. v. Hutchings*, supra, 172 Fed. 206, 96 C. C. A. 653.

We find no error. The judgment is affirmed.

MILLER v. SPRING GARDEN INS. CO.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,140.

1. EVIDENCE (§ 455*)—INSURANCE—POLICY—AMBIGUITY—PAROL EVIDENCE.

Where a rider attached to a fire policy granted permission to make ordinary alterations and repairs, while the policy stipulated that it should be void if mechanics were employed in altering or repairing the premises for more than 15 days, the contract was ambiguous as to what constituted ordinary alterations and repairs and justified the admission of parol evidence that at the time the policy was solicited the contemplated repairs were fully explained to defendant's agents, and that they knew of the nature thereof, and what would be necessary to complete the repairs as contemplated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2104; Dec. Dig. § 455.*]

2. INSURANCE (§ 129*)—POLICY—ATTACHMENT OF RIDER—PURPOSE.

Where a rider was attached to a fire policy authorizing ordinary alterations and repairs in order to permit repairs contemplated by the insured and explained to the agent who delivered the policy, plaintiff was entitled to assume that the insurer had knowledge of the contemplated repairs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 180-182, 1849, 1850; Dec. Dig. § 129.*]

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin Judge.

Action by Jacob Miller against the Spring Garden Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On November 17, 1910, the defendant executed and delivered to the plaintiff a policy of insurance, insuring him for the term of one year from that date against all direct loss or damage by fire, in the sum of \$5,000, on his stock of goods, wares, and merchandise while contained in his one and two story frame, shingled roof building, and additions adjoining and connecting, or in cellars or basements thereto. On January 2, 1911, the insured property was totally destroyed by fire. The present action was brought to recover the amount of the insurance. To the complaint two defenses were pleaded: First, that after the issuance and delivery of the policy the plaintiff, contrary to the terms thereof, kept, used and allowed gasoline on the premises described in the policy, and that thereby the policy was rendered void and of no force or effect; second, that between October 18, 1910, and January 2, 1911, plaintiff built on to the building described in the complaint an addition thereto 30 feet wide by 50 or 60 feet long, at an expense of about \$5,000, and in so doing employed a mechanic and eight or ten laborers and assistants, changed the partitions and doors of the building, put in shelves and other permanent and temporary fixtures and improvements, whereby the policy was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs 1907 to date, & Rep'r Indexes

rendered void. The policy provided that it should be void, unless otherwise provided by agreement indorsed thereon or added thereto, if the hazard were increased by any means within the control or knowledge of the insured, "or if mechanics be employed in building, altering or repairing the within described premises for more than 15 days at one time," or if gasoline were used or allowed on the premises. There was a typewritten slip, or rider, attached to the policy, which contains this provision: "Permission granted to effect other insurance; to make ordinary alterations and repairs; to burn kerosene of standard quality for lights, lamps to be filled during daytime only." The case was tried before the court without a jury. At the close of the case, the defendant moved for judgment, which motion was denied, and judgment was rendered for the plaintiff.

W. W. Hindman and Happy, Cullen, Lee & Hindman, all of Spokane, Wash., for plaintiff in error.

Cannon, Ferris & Swan and Edelstein & Weinstein, all of Spokane, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). Error is assigned to the admission of testimony as to conversations between the plaintiff and the insurance agent who procured the policy concerning the alterations that were being made in the plaintiff's building, and error is assigned to the conclusion of the court that the plaintiff had not violated the provisions of the policy by having carpenters and mechanics engaged in building the premises for a period of more than 15 days after the policy was executed and delivered, without the consent of the defendant, and in holding that the work done upon the building was ordinary alterations and repairs within the permission contained in the rider to the policy. At the time when the policy was issued, one Harvey was the local agent of the defendant at Spokane, and Rogers & Rogers were insurance agents and brokers representing certain other insurance companies at Spokane. Prior to the issuance of the policy, one Pool was an insurance solicitor representing Rogers & Rogers. He went to the plaintiff while the building was in progress in October, 1910, and solicited insurance. The plaintiff took a pencil, and showed him the alterations of the building which he was in the process of making. Afterwards, Mr. Rogers, of the firm of Rogers & Rogers, came to see the plaintiff, and in his conversation with the plaintiff the latter explained to him how he was changing and adding to the building. Rogers & Rogers placed all the insurance of the plaintiff's property that the companies they represented would carry, and then they applied to the defendant for insurance, and the defendant issued and delivered to Weidenbacher, their agent, the policy sued on in this action. Shortly after the issuance of the policy, Harvey sent in his daily report to the defendant's office at Seattle, in which report was shown the location of the building mentioned in the policy with reference to other buildings in that locality, and the statement was made that Harvey had personally inspected the risk, and that the building was three months old and in good repair. The testimony was that prior to the alterations the building was a two-story frame building 20 feet wide by 58 feet long; that the second story was used as a dance hall; that about the middle of October,

1910, mechanics and laborers were employed to make alterations therein; that the second story was converted into a hotel and rooming house, and was entirely remodeled and partitioned off into rooms, and new floors were put in; that the stairway which formerly was on the outside of the building was changed and placed within the building; that an addition 30 feet by 58 feet with a shingle roof was built on one side of the building; that certain walls or partitions were taken out of the first story; that shelvings were built on the inside walls; that a porch was built across the front of the building; that during the time of the alterations from three to ten men were employed, and the improvements cost from \$4,500 to \$5,000, and that the work was carried on continuously up to the date of the fire.

[1] The disposition of the case in this court depends upon the question of the admissibility of the oral testimony which was taken to show that the plaintiff fully explained to the insurance agents, and the latter understood, the nature of the alterations which were being made in the building and the time which would be necessarily taken in completing the same. Testimony of that nature was admitted by the court below as explanatory of an ambiguity in the policy, and we think it was properly so admitted. The defendant, after stipulating in the printed policy that the employment of mechanics in building, altering, or repairing the premises for more than 15 days should avoid the contract of insurance, attached to the policy a typewritten slip or rider, "Permission granted to make ordinary alterations and repairs." The fact that this provision was attached by a typewritten slip to the policy shows that it was to express the intention of the parties, and that the printed provision in regard to the employment of mechanics for more than 15 days did not express their intention. Having made one provision which limited the time of the employment of mechanics, and attached another special provision which made no limitation of time whatever, the question arose, what was meant by the second, and what were the "ordinary alterations and repairs" in the contemplation of the parties? No rule of evidence was violated by admitting testimony to show what that intention was, and what were the circumstances under which the rider was attached to the policy. In cases of doubt or ambiguity the negotiations between the parties are properly considered in giving construction to their agreement. *Fire Insurance Co. v. Wickham*, 141 U. S. 564, 576, 12 Sup. Ct. 84, 35 L. Ed. 860; *Seitz v. Brewers R. M. Co.*, 141 U. S. 510, 517, 12 Sup. Ct. 46, 35 L. Ed. 837; *Lindblom v. Fallett*, 145 Fed. 805, 76 C. C. A. 369; *Lilienthal v. Cartwright*, 173 Fed. 580, 97 C. C. A. 530; *Kilby v. Hinchman-Renton Fire Proofing Co.*, 132 Fed. 957, 66 C. C. A. 67. And the language of the policy must be interpreted in the sense in which the insurer knew, or had reason to know, that the insured understood it. Said Mr. Justice Harlan in *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 297, 10 Sup. Ct. 1019, 1023 (34 L. Ed. 408):

"If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because those instruments are drawn by the company."

It was proper to show, therefore, that by the term "ordinary alterations" was meant the very alterations and changes which were then being made. The word "alterations" is an elastic one, and, if the parties so understood its use, it was proper to show their understanding by oral testimony.

[2] But it is urged that the defendant was not represented in or bound by the conversations which took place between the plaintiff and the agents of other insurance companies, and that it is bound only by the express terms of its written contract. But the defendant issued a policy which contained a rider which altered the terms of its policy. It was charged with the duty of ascertaining for what purpose that typewritten slip was attached to the printed contract. The plaintiff had the right to assume that the defendant knew for what purpose the rider was attached, for the policy was delivered through an agent who knew. Section 6191, 2 Rem. & Bal. Code of Washington, provides:

"Any person through whom any insurance company writing insurance upon any property in this state shall deliver a policy of insurance, shall be deemed the agent of such company as to all transactions relating to such insurance had between such person and the insured named in the policy prior to and at the delivery thereof."

We find no error. The judgment is affirmed.

M. A. PHELPS LUMBER CO. v. McDONOUGH MFG. CO.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,167.

1. MECHANICS' LIENS (§§ 271, 281*)—FORECLOSURE—SAWMILL MACHINERY—REAL PROPERTY.

Where, in an action to foreclose a mechanic's lien for sawmill machinery, it was alleged that the machinery and material were used by defendant in the erection of a sawmill on the real property described, and the lien notice stated that the machinery was used "upon said premises in the erection of a sawmill" and claimed a lien on the building, land, and premises, and the evidence showed that the material and machinery were designed and manufactured to fit a certain building, that it was placed therein to become a part of the mill, being bolted to bridge ties that were run out from the sides of a mill, and that the boilers were set therein on masonry, it was sufficiently alleged and proved that the machinery became a part of the realty.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 494-513, 565-572; Dec. Dig. §§ 271, 281.*]

2. MECHANICS' LIENS (§ 212*)—MATERIAL AND MACHINERY—CONDITIONAL SALE.

Where material and machinery designed and constructed for a particular sawmill were delivered and set up in such a manner that they became a part of the real estate, though they could have been removed without appreciable injury thereto, the seller, by retaining title until the machinery was paid for, did not waive its right to a mechanic's lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 393-397, 399; Dec. Dig. § 212.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MECHANICS' LIENS (§ 158*) — FORECLOSURE — COMPLAINT — AMENDMENT — LIEN NOTICE.

Where a lien notice and a complaint for foreclosure of a mechanic's lien for sawmill machinery and materials sold to defendant allowed a credit of \$1,601.25 for certain materials within the contract, which defendant purchased elsewhere, but defendant declined to accept such credit and pleaded a set-off, in its answer to a complaint in a law action to recover on the notes given for the machinery, of a much larger sum than the credit, and consented to an amendment of the complaint in the lien action, withdrawing the credit allowed, such consent obviated the necessity of an amendment of the lien notice.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 275-278; Dec. Dig. § 158.*]

4. MECHANICS' LIENS (§ 158*)—LIEN NOTICE—AMENDMENT.

Rem. & Bal. Code Wash. § 1134, provides that a mechanic's lien claim may be amended, in case of action brought to foreclose the same, by order of the court, as pleadings may be, in so far as the interest of third persons shall not be affected by the amendment; and section 1147 declares that the lien laws, and all other proceedings thereunder, shall be liberally construed with a view to effecting their object. *Held*, that amendments of a mechanic's lien notice are in the nature of amendments of pleadings, and should be allowed as between the parties, unless the defendant would be prejudiced thereby.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 275-278; Dec. Dig. § 158.*]

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by the McDonough Manufacturing Company against the M. A. Phelps Lumber Company to enforce a lien for certain sawmill machinery. Decree for plaintiff, and defendant appeals. Affirmed.

The appellant purchased from the appellee certain machinery and materials for a sawmill. The contract provided that upon the arrival of each car load of machinery the appellant should pay freight thereon and one-half the invoice price of the car load; the remainder to be covered by promissory notes. In accordance with the contract, the appellant executed its promissory notes, aggregating \$4,500.24, and it paid in freight and cash \$10,514.75. A portion of the material contracted to be delivered was "necessary iron for conveyors," etc., but by agreement between the parties the appellant purchased that material elsewhere, and charged the cost thereof to the appellee. The appellee credited the account of the appellant with the sum of \$1,601.25, which it deemed the maximum value of said material so purchased by the appellant. This sum, added to the amount of the freight and cash paid, raised the appellant's credits to \$12,016. The appellee filed a notice of claim of lien on January 30, 1911, stating therein that the agreed price of the material so sold and delivered to the appellant was \$22,498.97; that \$12,116 had been paid in money and credits, and that for the sum of \$4,500.24 the appellant had executed its five promissory notes; and that there remained due to the appellee on account of such sale and delivery, and in addition to said promissory notes, \$5,882.63. The present suit was commenced to foreclose the lien before the maturity of the notes. When the notes matured, a separate action was commenced thereon. As a defense to that action, the appellant set up as a counterclaim the cost of the necessary iron for conveyors, which it had purchased and charged to the appellee's account. After the trial of the present suit, and at the time of entering the decree, the court below gave the appellee permission to amend its bill in such a way as to withdraw the credit of \$1,601.25 and to increase the demand of its lien

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

notice and of its bill of complaint by that sum. In the final decree the appellee was adjudged to have a lien on the sawmill building and machinery therein for the sum of \$6,997.34, and \$500 attorney's fees and the costs of the suit; and it was decreed that the property be sold for the satisfaction of said lien and costs.

Danson, Williams & Danson, of Spokane, Wash., for appellant.
McCarthy & Edge, of Spokane, Wash., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant contends that there was no allegation in the bill and no evidence to show that the property furnished by the appellee ever became a part of the realty; and that therefore the appellee was not entitled to a lien thereon. We think there was an allegation and evidence in that respect sufficient to justify the decree of the court below. It appears from the testimony, that the material and machinery were designed and manufactured to fit a certain building; that the machinery was all placed in the building and became a part of the mill; that bridge ties were run out from the sides of the mill after the machinery was placed in it, to which the machinery was bolted; that there were three large stationary steam boilers; that steam and water pipes connected them with other portions of the machinery; and that the boilers were set upon a masonry foundation with "Dutch oven work" of brick and fire clay underneath them, and that the entire plant was put into actual operation for the manufacture of lumber, lath, and planing mill products. In the bill it is alleged that the machinery and material were used by the appellant in the erection of a sawmill upon the real property described therein, and the lien notice contained the statement that the material was used "upon said premises in the erection of a sawmill," and it claimed a lien upon the building, land, and premises. There was nothing in the answer to raise an issue upon the question of the permanent nature of the plant as a fixture to the sawmill property. The question now presented does not appear to have been raised in the court below.

[2] It is contended that the appellee waived the right to claim a mechanic's lien by inserting in the contract the condition that the machinery and property supplied should remain its property until fully paid for. To sustain their contention, counsel cite authorities to the proposition that by agreement between the parties personal property may be made to retain its character as such, notwithstanding that it be attached to the realty, and that such an agreement may be implied from a conditional sale, and decisions are cited which determine the respective rights of the contracting parties and third persons as to property so conditionally sold and attached to real estate. Those authorities are all aside from the question which is before us. The question here is whether the appellee's right to claim a mechanic's lien has been waived by the terms of the contract. The authorities are uniform in holding that such a condition in a contract is but additional security to the vendor, and does not in any way affect his right to claim a mechanic's lien upon the machinery and the property to which

it may have become attached as part thereof. *Hooven, Owens & Rentschler Co. v. John Featherstone's Sons*, 111 Fed. 81, 49 C. C. A. 229; *Salt Lake Hdw. Co. v. Chainman Min. & Elect. Co.* (C. C.) 128 Fed. 509; *Case Manufg. Co. v. Smith* (C. C.) 40 Fed. 339, 5 L. R. A. 231; *C. & A. R. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081; *Cooper v. Cleghorn*, 50 Wis. 113, 6 N. W. 491. When machinery is sold under a contract such as is in evidence in this case, and is placed in or upon real estate with the intention of being permanently used as a part thereof, it becomes a part of the realty; and it is immaterial that it may be so insecurely attached to the realty that it may be removed without appreciable injury thereto. *Armstrong Cork Co. v. Refrigerating Co.*, 184 Fed. 199, 107 C. C. A. 93; *Hooven, Owens & Rentschler Co. v. John Featherstone's Sons*, 111 Fed. 81, 49 C. C. A. 229; *Pressed Brick & Machinery Co. v. Brick & Quarry Co.*, 151 Mo. 501, 52 S. W. 401, 74 Am. St. Rep. 557.

[3] It is contended that an excessive amount was allowed in the decree. In making out the lien notice, the credits allowed by the appellee were \$12,116.10, of which amount \$1,601.25 represented the appellee's estimated cost of certain items which, under the contract, it was to furnish, but which, by subsequent agreement of the parties, the appellant purchased elsewhere. The appellant having declined to accept that credit, and having pleaded as an offset, in its answer to the complaint in the law action brought to recover on the promissory notes, the cost of those items in a sum much larger than \$1,601.25, it was proper, on the final decree in the present case, to correct the account between the parties, and to deduct the credit so falsely made. On the trial, and while the testimony was being taken, counsel for the appellant stated, in open court, that he had added to his claim in this case \$1,601.35, and that he had also added a prayer in the complaint for that amount, making the total demand \$7,483.98. When the final decree was entered, a formal order was made permitting the amendment of the complaint and the amendment of the lien notice to agree with this change in the account. So far as pleadings are concerned, there can be no question of the power or duty of a court to permit such an amendment to conform to facts. But the appellant contends that the court below had no power to permit such amendment of the lien notice. In an affidavit of appellant's counsel, which was filed in connection with his motion to strike out the order which the court made, the admission is made that the appellant did consent at the trial to the amendment of a paragraph of the bill "so as to admit a less amount of credit than was conceded therein," and that the appellee had asked leave "to change the amount of credit so as to be \$1,601.25 less." This is sufficient to show that there was express consent to the amendment of the complaint. A consent to such amendment of the complaint obviated the necessity of amending the lien notice.

[4] But the statute of the state of Washington (*Remington & Ballinger's Codes*, § 1134) provides: "Such claim of lien may be amended in case of action brought to foreclose the same, by order of the court, as pleadings may be, in so far as the interests of third persons

shall not be affected by such amendment;" and section 1147 declares that the lien laws "and all proceedings thereunder shall be liberally construed with a view to effecting their object." In *Stetson & Post Lumber Co. v. Sloane*, 61 Wash. 180, 112 Pac. 248, the court said:

"The rule of amendment established by this court is that amendments of this character are in the nature of amendments of pleadings, and the same liberal rule as to substance and time should be followed, where the interests of third parties are not injuriously affected. Such is the plain import of our statute."

The appellant cannot complain that he was prejudiced by the amendment. He knew at the outset of the credit which had been given him in the lien notice, and he repudiated it and availed himself of that amount and more as an offset to a demand of the appellee in another action.

The decree is affirmed.

M. A. PHELPS LUMBER CO. v. McDONOUGH MFG. CO.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,168.

1. SALES (§ 181*)—DELAY IN DELIVERY—EVIDENCE.

Where, in an action on notes for the price of certain machinery to be delivered about April 1, 1911, defendant claimed damages for delay, and proved that two months ought to be a reasonable time for furnishing an extra boiler, not within the specifications, also tending to show efforts to induce plaintiff to deliver the machinery on time, plaintiff was entitled to show in rebuttal that the delay was caused by defendant desiring a third boiler, which necessitated a change in the work provided for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.*]

2. SALES (§ 181*)—CONTRACT—CONSTRUCTION—EVIDENCE.

Where a contract provided for delivery of machinery "about March 15," subject to strikes, accidents, or other delays beyond the control of the seller, and defendant denied liability for the balance of the price because of an alleged delay, parol evidence that it was caused by defendant's change in the specifications and election to purchase an additional boiler was admissible as tending to show that there was no delay, within the meaning of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.*]

3. APPEAL AND ERROR (§ 1050*)—REVIEW—EVIDENCE—PREJUDICE.

Where a contract for the sale of machinery provided for delivery about March 15, 1911, and also declared that the unloading of machinery, when received, should constitute a waiver of any claim for damage from delay, and it was undisputed that when the machinery was delivered May 24, 1911, it was unloaded and notes executed for the balance of the price on various dates between May 15th and July 20th, defendant was not prejudiced by the admission of evidence tending to show that the delay resulted from defendant's change of the specifications and the ordering of an additional boiler, and not by plaintiff's neglect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
202 F.—29

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by the McDonough Manufacturing Company against the M. A. Phelps Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The parties will be designated plaintiff and defendant, as in the court below.

The action in the present case was brought by the plaintiff to recover on certain promissory notes executed by the defendant in payment for saw-mill machinery and supplies furnished under a contract. The defendant answered, admitting the execution of the notes, and setting up as a defense to the action the failure of consideration thereof, in that the plaintiff failed to perform its contract within the time therein agreed. The same matter was alleged as a counterclaim for damages by the defendant. The answer alleged that on September 15, 1910, a preliminary written memorandum of contract was entered into between the parties, which contained, among other things, the following: (1) "Subject to strikes, accidents, or other delays beyond its control," the plaintiff was to ship in good order, about April 1, 1911, certain described machinery, for which the defendant was to make settlement within 10 days after the date of shipment, and to give promissory notes for a certain proportion of the purchase price. (2) "That a retention of the property forwarded after 30 days from date of shipment shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and void all its contracts of warranty, express or implied." (3) "The unloading of machinery when received shall constitute a waiver of any claim for damage from delay." The answer further alleged that thereafter, and about November 4, 1910, the details and terms of the contract were agreed upon, one of which was that the contract should be performed within a reasonable time, at a date not later than March 15, 1911, "and that there should be included in the machinery furnished, should defendant desire, and delivered at the same time, but at an extra charge, one or two extra boilers, with all fittings and connections;" that said agreement was entirely oral, except as shown by said preliminary agreement; that thereafter, and on or about December 1, 1910, there was an oral agreement between the parties, by which the plaintiff was to furnish one extra boiler, together with connections, fittings, casings, etc., not later than March 15, 1911; that the machinery was not delivered until May 24, 1911; and that the defendant suffered damage by reason of such delay in the sum of \$15,000. The reply denied that there was an oral contract made on or about November 4, 1910, or that there was an oral contract for supplying one or two extra boilers, with fittings and connections.

From the bill of exceptions it appears that the contract of September 15, 1910, was not made complete by an agreement upon the specifications until November 12, 1910, and that the machinery therein provided for was to be delivered on or about March 15, 1911. The specifications called for two Muskegon boilers, with steel settings, etc. The defendant subsequently desired to add one more boiler, with fittings. The defendant offered in evidence letters, one of December 5, 1910, from the plaintiff, suggesting that if any changes were to be made in the boiler proposition they should be made as early as possible; and there was further correspondence, until, on February 25, 1911, the defendant wrote to the plaintiff, asking it to give the boiler matter immediate attention. On April 6, 1911, the plaintiff wrote the defendant: "We are in receipt of advice from the Muskegon Boiler Works that the boilers are going forward." Four days later it wrote: "We are right after the boiler people to rush out the balance with the least possible delay." On the trial of the case the plaintiff was allowed to introduce evidence to explain its delay in failing to perform the contract "on or about March 15." The court instructed the jury that such explanation might properly be considered by them. The evidence which was admitted consists of

the following testimony of the president of the plaintiff: "A. Well, at the time this order was drawn up, it specified two boilers. After it was drawn up, Mr. Phelps asked us—said he that he would use—decided afterwards that he would use three boilers instead of two, and asked us to get a proposition from the Muskegon Boiler Works on three boilers instead of two, increasing it one-half. We immediately started to get this, and we got the boiler proposition after about 30 days from the Muskegon Boiler Works, and sent it to Mr. Phelps. He accepted it some time later, as shown in the correspondence. I don't remember how much later. And the contract says also that the drawings were to be made subject to Mr. Phelps' approval. They changed the boiler room entirely. It increased the size of it, and increased the bridging; it increased the steel casing, which was a special steel casing made around this boiler, and added another boiler to the equipment; and as soon as we got this boiler proposition we asked Mr. Phelps to check it over."

Danson, Williams & Danson, of Spokane, Wash., for plaintiff in error.

McCarthy & Edge, of Spokane, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above).
[1] The single question is presented whether the court below erred in admitting the testimony which is mentioned in the foregoing statement of facts, and in instructing the jury that they might properly consider the same as tending to show that the defendant acquiesced in the delay in fulfilling the contract. The defendant contends that the testimony was incompetent, for the reason that the plaintiff had denied the allegation in the answer, which averred that it had failed to perform its contract; that such a denial was equivalent to an allegation on its part that it had performed the contract; and that it had not pleaded any excuse or waiver of performance. The trial court ruled that the testimony was admissible in rebuttal of testimony offered by the defendant, regardless of the pleadings. The original contract called for two boilers, made with steel fittings, etc. The defendant had put in evidence a letter written by it on February 25, 1911, discussing the proposed change in the contract so as to call for the delivery of three boilers instead of two, and other alterations in the machinery to be supplied, and offered testimony as to what would be a reasonable time for furnishing the extra boiler, together with the bridging that goes with the boiler, so as to change the installation from two to three boilers, including the construction of the extra boiler, and the delivery thereof. The said testimony was to the effect that two months ought to be a reasonable time. In view of that testimony, it was not improper to show in rebuttal that the delay was caused by the defendant; that as soon as the plaintiff knew that the defendant wished to have three boilers instead of two it obtained terms from the manufacturers, the Muskegon Boiler Works; that it required 30 days for the boiler works to answer the proposition, which answer was then submitted to the defendant; and that the defendant, in changing the boiler room, increased its size, increased the bridging, and increased the steel casing. This evidence tended to show

that the delay was occasioned by the act of the defendant, and was not the fault of the plaintiff.

[2] The testimony was admissible, also, as tending to show that there was no delay, within the meaning of the contract, in which it was recited that delivery was to be made "about March 15," subject to strikes, accidents, or other delays beyond the control of the plaintiff.

[3] But, irrespective of the question whether or not the evidence was admissible under the pleadings, it is very clear that if there was error in its admission it was harmless. The contract contained the following:

"The unloading of machinery when received shall constitute a waiver of any claim for damage from delay."

It is not disputed that when the machinery was unloaded it was accepted and installed by the defendant. Again, the promissory notes which are sued upon were signed by the defendant on May 15th, May 17th, May 24th, July 20th, all in 1911, from two to three months after the date at which the machinery was to be delivered. Had the plaintiff deemed that the case was one which required an amendment of its pleadings to conform to the proofs, there can be no doubt that the court below would, upon application therefor, have granted leave to amend. The defendant was not prejudiced by the ruling of the court. It was not taken by surprise. It was aware of all the facts and negotiations which intervened to cause the delay. It had a fair trial upon the merits of the controversy, and an appellate court would not be justified in reversing the judgment on the error assigned.

The judgment is affirmed.

OTIS ELEVATOR CO. v. LUCK.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,157.

1. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—ASSUMED RISK.

Plaintiff, while spreading gravel at the bottom of an elevator well in the installation of an elevator, was injured by the fall of the dirt bucket due to the defective character of the hook by which it was attached to the cable. Plaintiff's duties were confined to work at the bottom of the well, including the removal of the bucket from the hook and replacing it as each load was received. There was nothing in the character of his work to direct his attention to the fastening or structure of the hook, and he did not in fact know that it was defective. *Held*, that plaintiff did not assume the risk of the defect as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 235*)—TOOLS—DUTY TO INSPECT.

A servant is not required to exercise care in inspecting tools before he starts to use them, being entitled to assume that the master has exercised reasonable diligence to provide suitable tools unless the servant knows that the duty has not been performed or the fact is obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

3. MASTER AND SERVANT (§ 270*)—SIMILAR ACCIDENT—DEFECTIVE APPLIANCE.

Plaintiff, while assisting in the construction of a plunger elevator well, was injured by the fall of a dirt bucket due to the defective character of the hook by which it was attached to the cable. Defendant had installed in the preceding 15 months but two plunger elevators before installing the one in question, and the same hook had been used for all. *Held*, that evidence, that in constructing a well for one of such elevators 15 months before the accident to plaintiff a similar accident happened to another employé due to the defectiveness of the same hook, was admissible to show that the appliance was defective.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

4. EVIDENCE (§ 145*)—MATERIALITY—REMOTENESS.

Such evidence was not objectionable for remoteness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 434; Dec. Dig. § 145.*]

5. TRIAL (§ 282*)—EXCEPTIONS—EFFECT.

An exception to the refusal "to give defendant's requested instructions in the form asked" was insufficient to call the court's attention to any particular error involved in the refusal to give the instructions and was not available if any of the instructions requested were erroneous or superfluous because covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 695, 696; Dec. Dig. § 282.*]

6. TRIAL (§ 252*)—INSTRUCTIONS—REQUESTS TO CHARGE—APPLICABILITY TO EVIDENCE.

Where, in an action for injuries to a servant, it was assumed throughout the trial and in the instructions that the proximate cause of plaintiff's injury was defendant's act in supplying a defective hook, and there was no attempt to show that it was anything else, a request to charge, that in order to recover the jury must find that defendant's negligence as charged in the complaint was the proximate cause of the accident, etc., was superfluous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

In Error to the District Court of the United States for the District of Oregon; R. S. Bean, Judge.

Action by Christian Luck against the Otis Elevator Company. Judgment for plaintiff, and defendant brings error. Affirmed

The defendant in error brought an action against the plaintiff in error to recover damages for personal injuries. For convenience the parties will be designated herein as they were in the court below. The plaintiff was employed by the defendant to assist in installing a plunger elevator in a building. In doing this, it was necessary to dig a well some 86 feet in depth, and to construct a tubular casing therein. After the casing was placed in the well, it was necessary to fill the well around the casing with earth and gravel, which was let down into the well by means of an iron bucket attached to a cable. The negligence alleged was that the defendant carelessly and negligently used, for the purpose of attaching the bucket to the cable, an unsuit-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

able and unsafe iron hook, which permitted the bucket when striking the casing to become detached from the hook, and the complaint alleged that, as the result of such negligence, the bucket slipped off the hook and fell upon the plaintiff, while he was working in the well. The answer denied negligence, and alleged as a defense that the plaintiff was foreman in charge of the work, and in charge of the tools and appliances used therein, and that it was his duty to inspect the same and to see that they were safe and suitable for the work, that the plaintiff selected the hook which was in use, and that he was guilty of contributory negligence in so doing. The second defense was that the act of negligence was that of a fellow servant in carelessly and negligently fastening the hook on the bucket. The third defense was assumption of risk. The reply denied the affirmative defenses. The jury returned a verdict for the plaintiff for \$7,000.

Griffith, Leiter & Allen, of Portland, Or., for plaintiff in error.

C. W. Fulton, of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] Error is assigned to the refusal of the court below to instruct the jury to return a verdict for the defendant. The contention that this was error is based on the evidence, which it is claimed showed that the plaintiff assumed the risk, and that he was bound to take notice of the obviously dangerous and defective character of the hook. The plaintiff in his testimony denied that he was the foreman of the defendant, or had charge of its appliances, and testimony of others was adduced to corroborate him. There was evidence that his duties were confined to work at the bottom of the well, and that he did no work outside of the well, that he simply took care of the dirt when it was lowered into the well, and saw that it was securely stowed and filled in and around the casing. In so doing he had occasion to remove the bucket from the hook and replace it as each load was received. It does not appear that there was anything in the character of his work necessarily to direct his attention in any special way to the fashion or structure of the hook.

[2] The law does not require a servant to exercise care in inspecting tools before he goes to work with them. He has the right to assume that his master has exercised reasonable care and diligence to provide suitable appliances, unless he knows, or the fact is obvious, that the duty has not been performed. The trial court would not have been justified in holding as a conclusion of law that it was obvious to the plaintiff that the duty had not been performed with reference to this hook. The plaintiff had testified that he thought the hook perfectly safe; that it never crossed his mind that the hook might slip off. He testified:

"Mr. Shepard had that hook made, and that was the hook that was going to be used there, and I thought he knew everything about it—that the hook was safe."

Another employé testified that he had worked with the hook for a time with full confidence that it was safe to use it, but that he had finally become apprehensive. But he did not impart his doubts to the plaintiff. In view of all the evidence, it should not be held that the

plaintiff assumed the risk, and the court below committed no error in refusing to instruct the jury to return a verdict for the defendant.

[3, 4] It is contended that the court erred in admitting testimony of a prior similar accident. One Taylor testified that in October or November, 1908, 15 months before the accident to the plaintiff, he was in the employment of the defendant, engaged in installing a plunger elevator in a building, and was digging the shaft; that the same hook was used on that work as on the plaintiff's work; and that on one occasion, while the bucket was descending, it came off the hook and fell upon him. It is contended that the testimony was incompetent, that the evidence did not disclose that the conditions were the same, and that the circumstance was too remote. But it does sufficiently appear from the evidence that the conditions were substantially the same. The defendant had installed in all but two plunger elevators before installing that in which the accident occurred, and the testimony was that the hook used by the plaintiff was the same hook that was used when Taylor was injured. It is true, there was some conflict in the testimony as to whether or not the hook was in the same condition on both occasions. One Hyde, an employé of defendant, testified that he had had the hook made, and that it was a safe hook when he turned it over to the defendant, that he next saw it when he was working on the job on which the plaintiff was injured, and that then it had spread, that the defendant's superintendent told him it had been sent to the shop to make it spread, because it was too hard to unhook, but the superintendent denied this, and testified that no change had been made, and that the hook was the same as when Hyde turned it over to the defendant. But it is said that the evidence of the accident to Taylor is too remote in time. In certain classes of cases, no doubt evidence of an injury occurring 15 months prior to the accident in question is open to objection as too remote; but there is no reason why it should be held too remote in a case such as this. There was evidence that the hook was the same, and in the same condition. It was an iron "pigtail" hook, with a single turn. In its nature it was not a device that was subject to change. The testimony was admitted only as tending to show that, at the time of the injury to the plaintiff, a defect existed in the hook. As to such an appliance, a similar accident occurring 15 months before was just as instructive as to its defective condition as one which occurred 15 days before. While not admissible to show negligence itself, by the decided weight of authority, evidence of other accidents or injuries occurring from the same cause is admissible to show that a defect in the appliance existed. 29 Cyc. 611; *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618; *Chicago & N. W. Ry. Co. v. Netolicky*, 67 Fed. 665, 14 C. C. A. 615; *City of Winona v. Botzet*, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204; *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812; *Shea v. Glendale Elastic Fabrics Co.*, 162 Mass. 463, 38 N. E. 1123; *Findlay Brewing Co. v. Bauer*, 50 Ohio St. 560, 35 N. E. 55; *Chicago Great Western Ry. Co. v. McDonough*, 161 Fed. 657, 88 C. C. A. 517.

[5] Error is assigned to the refusal of the court to grant certain instructions requested by the defendant. These instructions are four in number, and relate to different phases of the case. The exception taken was to the refusal "to give the defendant's requested instructions in the form asked." This was not sufficient to direct the attention of the court to any particular error involved in the refusal to give the instructions. The court gave general instructions, presumably on all the features of the case. If there was any omission to instruct as to any question of law or fact involved, it was the duty of the defendant to point it out, that the court might have the opportunity to remedy the defect. This is the object and purpose of exceptions to instructions. An exception taken in gross to the refusal to grant several instructions will not be noticed on appeal if any of the instructions was erroneous or superfluous because covered by the charge which was given. *Baggs v. Martin*, 108 Fed. 33, 47 C. C. A. 175; *St. Louis Brewing Ass'n. v. Hayes*, 107 Fed. 395, 46 C. C. A. 371; *Kaufman v. United States*, 113 Fed. 919, 51 C. C. A. 549; *Hodge v. Chicago & A. Ry. Co.*, 121 Fed. 48, 57 C. C. A. 388; *H. D. Williams Cooperage Co. v. Scofield*, 125 Fed. 916, 60 C. C. A. 564; *Southern Pacific Co. v. Hetzer*, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288.

[6] One of the four instructions so requested by the defendant was this:

"If you find that defendant was negligent as charged in the complaint, before plaintiff can recover in this action, you must further find that defendant's negligence was the proximate cause of the accident, that cause which conduced directly to the accident, without which the accident would not have occurred."

There was no occasion whatever to instruct the jury on the proximate cause of the accident. The evidence showed, and it was assumed throughout the trial, and in the instructions of the court, that the proximate cause was the act of the defendant in supplying a defective hook. There was no attempt to show that it was anything else. It was not a case in which there was a combination of several causes. The court charged the jury:

"The law is that an employer is required to exercise reasonable care and diligence to provide his employé or employées with reasonably suitable tools and appliances to work with, and it was therefore the duty of the defendant in this case to exercise reasonable care and caution to provide suitable appliances with which to handle this bucket, and if it did not do so, and by reason of that fact the bucket fell and injured the plaintiff without any fault on his part, it would be liable to him for such injury."

No exception was taken to this portion of the charge, nor to other portions in which the court properly instructed the jury as to all the features of the case. The court instructed them that it was for them to determine whether the hook was reasonably suitable for the purpose for which it was used, that negligence was not to be imputed from the fact of the accident, but that the burden of proof was on the plaintiff to show by a preponderance of the testimony that the hook was not suitable, and the court, with proper instructions, left to the jury the decision of the question whether the accident occurred

through the negligence of a fellow servant, whether the plaintiff was guilty of contributory negligence, and whether he assumed the risk. Such being the case, the first requested instruction would have been superfluous and inappropriate, and the defendant cannot complain therefore that there was error in denying any of the instructions so requested.

We find no error.

The judgment is affirmed.

SUMMERS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,177.

INDICTMENT AND INFORMATION (§ 127*)—OFFENSES—JOINDER—STATUTES—APPLICATION TO ALASKA.

Carter's Ann. Code Cr. Proc. Alaska, § 43 (Act March 3, 1899, c. 429, 30 Stat. 1290), providing that an indictment must charge but one crime and in one form only, was applicable only to the crimes and offenses specifically defined in the act providing the criminal laws for the District of Alaska, and did not prevent the application of United States Rev. St. § 1024 (U. S. Comp. St. 1901, p. 720), providing that when there are several charges against any person for the same act or transaction, or for two or more connected acts or transactions, or of the same class of crimes or offenses which may be joined, the whole may be joined in one indictment in separate counts, to an indictment for violation of the National Bank Act (Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497]), applicable to the whole United States.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 401, 402; Dec. Dig. § 127.*]

In Error to the District Court of the United States for Division No. 1 of the District of Alaska; Thomas R. Lyons, Judge.

C. M. Summers was convicted of violating the national bank act, and he brings error. Affirmed.

L. P. Shackleford and Shackleford & Bayless, for plaintiff in error.
John Rustgard, U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The plaintiff in error was indicted under section 5209 of the Revised Statutes [U. S. Comp. St. 1901, p. 3497], relating to national banks, and was charged with 56 separate crimes thereunder. He demurred to the indictment on the ground that it violated section 43 of Carter's Alaska Code, p. 52 (Act March 3, 1899, c. 429, 30 Stat. 1290), which provides "that the indictment must charge but one crime and in one form only." The demurrer was overruled. The plaintiff in error elected to stand upon the demurrer, and refused to plead further. He was thereupon adjudged guilty of each one of the fifty-six crimes, and was sentenced accordingly.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The question presented on the writ of error is whether the procedure in the court below was controlled by section 1024 of the Revised Statutes (U. S. Comp. St. 1901, p. 720), or by section 43 of the Alaska Code of Criminal Procedure. Section 1024 provides as follows:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts, and if two or more indictments are found in such cases, the court may order them to be consolidated."

This section was carried into the Revised Statutes from Act Cong. Feb. 26, 1853, c. 80, 10 Stat. 161, entitled "An act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the Circuit and District Courts of the United States, and for other purposes." The act contains numerous provisions for carrying out the purposes thereof, including the regulation of the fees of officers, witnesses, and jurors, and contains the proviso that:

"In the state of California and the territory of Oregon, officers, jurors and witnesses shall be allowed for the term of two years, double the fees and compensation allowed by this act," etc.

It is contended that section 1024 never applied to territorial courts, but only to the United States Circuit and District Courts, for the reason that the title of the act of February 26, 1853, limits its scope to the Circuit and District Courts of the United States, and the enacting clause limits its application to officers, etc., "in the several states," and cases are cited which hold that the territorial court of Alaska is not a District Court of the United States. *M'Allister v. United States*, 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693; *Steamer Coquitlam v. United States*, 163 U. S. 346, 16 Sup. Ct. 1117, 41 L. Ed. 184. It may be conceded that, if the question of the applicability of the statute depends upon the question whether or not the District Courts of Alaska are District Courts of the United States, the section does not apply to procedure in the former. But the question is a broader one, and depends upon other considerations, and, first, we are to regard the intention of Congress as expressed in other legislation. By Act May 17, 1884, c. 53, 23 Stat. 24, entitled "An act providing a civil government for Alaska," it was provided:

"That the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

By that act, Alaska became an organized territory, and was brought within the provisions of section 1891 of the Revised Statutes which declares:

"The Constitution and all laws of the United States which are not locally inapplicable, shall have the same force and effect within all the organized territories and in every territory hereafter organized, as elsewhere within the United States."

In *Kie v. United States* (C. C.) 27 Fed. 351, Judge Deady held that the District Court of Alaska had jurisdiction under sections 5339 and

5341, Revised Statutes (U. S. Comp. St. 1901, pp. 3627, 3628), to try and punish any inhabitants of the district for the crimes of murder or manslaughter, and that the law of Oregon defining those crimes and describing the punishment therefor was not in force in Alaska, that jurors must be selected in the manner provided by Act Cong. June 30, 1879, c. 52, 21 Stat. 43, and have the qualifications prescribed by the laws of Oregon. Said the court:

"No law of Oregon is to have effect in Alaska if it is in conflict with a law of the United States. There is such a conflict within the meaning of the statute, not only when these laws contain different provisions on the same subject, but when they contain similar or identical ones. In the latter case, it is the law of Congress that applies, and not that of the state."

In Act March 3, 1899, c. 429, 30 Stat. 1253, entitled "An act to define and punish crimes in the District of Alaska, and to provide a code of criminal procedure for said district," the enacting clause was:

"That the penal and criminal laws of the United States of America and the procedure thereunder relating to the District of Alaska shall be as follows."

And section 2, c. 1, tit. 1, provides:

"That the crimes and offenses defined in this act committed within the District of Alaska shall be punished as herein provided."

Then follows a code of criminal procedure in which is found, under title 2, the section 43 above quoted "that the indictment must charge but one crime and in one form only." From these provisions standing alone, it seems clear that it was the intention of Congress to make section 43 applicable only to the crimes and offenses specifically defined in the act. The offense with which the plaintiff in error was charged is not one of those crimes or offenses, but is an offense against the laws of the United States, which was defined in section 5209 of the Revised Statutes (U. S. Comp. St. 1901, p. 5209). In brief, the enacting clause provides for the procedure which shall be adopted in enforcing the penal and criminal laws which are contained in the Criminal Code of Alaska, and no others, and section 43 is a provision regulating procedure.

But it is said that a contrary intention is shown in the provisions of section 10 of chapter 4, tit. 2, and section 13 of chapter 5, tit. 2. Section 10 provides:

"That grand juries to inquire into crimes designated in title 1 of this act, committed or triable within said district shall be selected and summoned, and their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts, the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well those that are designated in title 1 of this act, as those that are defined in other laws of the United States."

Section 13 provides:

"That the grand jury have power, and it is their duty to inquire into all crimes committed or triable within the jurisdiction of the court, and present them to the court, either by presentment or indictment, as provided in this act."

Whatever may be said of the meaning of section 10, and it is obscurely phrased in one particular, it cannot be construed as indicating the intention of Congress that the procedure before grand juries shall be governed in all respects by the provisions of the Alaska Criminal Code. As we construe it, section 10 is in harmony with section 2, c. 1, tit. 1, and affirmative of the meaning which we have given that section. It contemplates that the grand jury shall inquire into (a) all offenses designated in title 1, and (b) those offenses that are defined in other laws of the United States, thereby recognizing the dual jurisdiction of the territorial court, and it provides that the grand jury shall be selected and summoned, and that their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the District and Circuit Courts. The dispute is over the meaning of the clause, "and their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts." What is the manner prescribed by the laws of the United States? Clearly as to offenses against the United States, it is the proceeding defined in the statutes of the United States, and as to all offenses coming within the provisions of the Criminal Code of Alaska, which is also a "law of the United States," it is the manner prescribed therein, for it was evidently not the intention of the section to make laws of the United States with respect to procedure before grand juries of the Circuit and District Courts applicable to those offenses. To hold so would be to contradict the very purpose of the act. There is no difficulty in the way of construing section 13 in harmony with section 2 of chapter 1, tit. 1, and section 10 of chapter 4, tit. 2. The clause "and present them to the court, either by presentment or indictment as provided in this act," refers to all offenses committed or triable within the jurisdiction of the court, both offenses against the Criminal Code of Alaska, and offenses against other laws of the United States, and the words, "as provided in this act," do not limit the procedure to that which is defined in the Criminal Code, but extend it to that which is provided for the trial of other offenses against the laws of the United States, as indicated in said section 10, which is also a part of "this act."

But, aside from the intention of Congress as expressed in the acts specifically relating to Alaska which we have just considered, there is no substantial reason why that clause in the act of February 26, 1853, which became section 1024 of the Revised Statutes, does not now apply to all territorial courts as well as to the Circuit and District Courts of the United States in all cases of offenses against the laws of the United States. It is a general provision, and there is to be found in the act itself and in the subsequent amendment thereof ground for holding that it was the intention to apply it to all courts of the United States, whether in states or territories. The principal object of the act of February 26, 1853, was to reduce the fees and costs of clerks, marshals, and attorneys, etc., in the

Circuit and District Courts of the United States, as appears in its title, to which was added "and for other purposes." The enacting clause declares:

"That in lieu of the compensation now allowed by law to attorneys, * * * clerks of the District and Circuit Courts, marshals, witnesses, jurors, commissioners and printers in the several states, the following and no other compensation shall be taxed and allowed."

In the General Appropriation Act March 3, 1855, c. 175, § 12, 10 Stat. 671, it was provided that the provisions of the act of February 26, 1853, "are hereby extended to the territories of Minnesota, New Mexico, and Utah, as fully in all particulars as they would be had the word 'territories' been inserted in the sixth line after the word 'states,' and the same had read 'in the several states and in the territories of the United States.'" It is true that there were at that time other territories of the United States than those which were specifically named. But in the Revised Statutes, in section 823 (U. S. Comp. St. 1901, p. 632), it was provided that the fees as established by the act of February 26, 1853, shall be taxed and allowed "in the several states and territories," and although section 1024, the purpose of which was also to reduce the fees of officers, was detached from its connection with the regulation of fees which it had in the act of March 3, 1855, it should be held that it was intended to be a general provision of criminal procedure applicable to all prosecutions of offenses against the United States committed in the states and territories. In dealing with such offenses the territorial courts, although not included within the designation Circuit and District Courts of the United States, are nevertheless courts of the United States. *United States v. Haskins*, 3 Sawy. 262, Fed. Cas. No. 15,322; *Price v. McCarty*, 89 Fed. 84, 32 C. C. A. 162; *Embry v. Palmer*, 107 U. S. 3, 9, 2 Sup. Ct. 25, 27 L. Ed. 346.

Counsel for the plaintiff in error cite a line of decisions, such as *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; *Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. Ed. 966; *Good v. Martin*, 95 U. S. 90, 24 L. Ed. 341; *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *Miles v. United States*, 103 U. S. 304, 26 L. Ed. 481; *United States v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; *Fitzpatrick v. United States*, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078—as authority for the proposition that both under the act of May 17, 1884, providing for a civil government for Alaska, and under the act of March 3, 1899, the law of Oregon was adopted as the rule of procedure in all cases in the District of Alaska. It is true that these decisions hold that the territorial courts are not courts of the United States, but are legislative courts of the territories, and that in the manner of summoning and impaneling jurors, the practice, pleadings, forms, and modes of procedure, qualifications of witnesses, and forms of indictment prescribed by statute for the Circuit and District Courts of the United States have no application to them, but that they are required to follow the territorial law in all those respects, unless it be otherwise provided

by a statute of the United States. But in *Page v. Burnstine*, 102 U. S. 664, 26 L. Ed. 268, it was held that section 858 of the Revised Statutes (U. S. Comp. St. 1901, p. 659), which declares that "in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court," applies to the courts of the District of Columbia as fully as to the Circuit and District Courts of the United States. The court said:

"These views do not at all conflict with the previous decisions of this court holding that certain provisions of the General Statutes of the United States relating to the practice and proceedings in the 'courts of the United States' are locally inapplicable to territorial courts. Those decisions, it will be seen, proceeded upon the ground mainly that the Legislatures of the territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the General Statutes of the United States referred. It was therefore ruled that the territorial enactments, regulating the practice and proceedings of territorial courts, were not displaced or superseded by general statutes upon the same subject passed by Congress in reference to 'courts of the United States.' *Clinton v. Englebrecht*, 13 Wall. 434 [20 L. Ed. 659]; *Hornbuckle v. Toombs*, 18 Wall. 648 [21 L. Ed. 966]; *Good v. Martin*, 95 U. S. 90 [24 L. Ed. 341]. No such state of case exists here. The reasons assigned for the conclusion reached in those cases have no application to the question before us."

The decision in *Fitzpatrick v. United States*, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078, is not authority for a contrary view, notwithstanding that the crime charged was a murder in a "place or district of country under the exclusive jurisdiction of the United States," as defined in Rev. St. § 5339 (U. S. Comp. St. 1901, p. 3627), and that the court held that the sufficiency of the indictment was to be determined by the law of Oregon as extended to Alaska under the act of May 17, 1884, and not by the common law. There was no question there of the application of a statute of the United States regulating procedure as against the procedure so adopted for Alaska. The purport of the decision was that the Law of Oregon was not inapplicable, and was not in conflict with the provisions of the act of May 17, 1884, or the laws of the United States.

The judgment is affirmed.

SOUTHERN EXPRESS CO. v. LONG et al.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1913.)

No. 2,457.

1. APPEAL AND ERROR (§ 954*)—PRELIMINARY INJUNCTION—DISCRETION—DIS- SOLUTION

While the granting of a preliminary injunction in the exercise of discretion will not be disturbed on appeal, unless it is violative of the rules of equity, yet it will be set aside, if the appellate court is of the opinion

*For other cases see same topic & § NUMBER in *Déc. & Am. Digs.* 1907 to date, & *Rép'r Indexes*

that the complainant was not entitled to an injunction, because the bill was without equity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.*]

2. COMMERCE (§ 89*)—SHIPMENTS OF LIQUORS—INJUNCTION—NECESSITY OF ACTION BY COMMISSION.

Where a bill to restrain an express company from transporting intrastate shipments of liquor in Georgia was based on the theory that such shipments were illegal in toto, as violative of the prohibition law of the state, and did not involve any question of regulation of rates, it was immaterial that the District Court had no jurisdiction to pass on a question of difference in rates applicable to such shipments and interstate shipments until the Interstate Commerce Commission had passed on it.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 89.*]

Regulations as to transportation of property as interference with interstate commerce, see note to *Rupert v. United States*, 104 C. C. A. 259.]

3. INTOXICATING LIQUORS (§ 261*)—INJUNCTION—TRANSPORTATION OF LIQUORS—STATE PROHIBITORY LAW—INJUNCTION.

Where the state of Georgia had practically repealed its prohibitory law by nonenforcement, there was no equity in a bill by citizens of another state to restrain an express company from transporting intrastate shipments of liquor in Georgia.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 400, 401; Dec. Dig. § 261.*]

4. INTOXICATING LIQUORS (§ 261*)—INJUNCTION—PROHIBITION LAWS—AIDING VIOLATION.

The transportation of liquors in Georgia by a common carrier not being an offense, an injunction restraining an express company from transporting intrastate shipments of liquor in that state, which merely aids others in violating the prohibition law, could not be sustained as within the court's jurisdiction to enjoin the commission of a crime, where such commission involves the destruction of a private right, in that plaintiffs, who were nonresidents, and were entitled to ship liquor into Georgia in interstate commerce, could not compete with those who illegally sold and shipped the liquor within the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 400, 401; Dec. Dig. § 261.*]

5. NUISANCE (§ 72*)—PUBLIC NUISANCE—INJUNCTION.

Equity will not interfere by injunction to restrain a public nuisance, except in cases of special and serious injury to the complainant, distinct from that suffered by the public.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

6. INTOXICATING LIQUORS (§ 261*)—INJUNCTION—PUBLIC NUISANCE.

Where residents of Georgia made illegal sales of liquor in violation of the prohibitory law in that state, and were aided in so doing by defendant express company, which carried the liquor from consignor to consignee, and complainants, who were residents of Florida, legally sold liquor in Georgia in interstate commerce, but could not compete with the illegal intrastate sales so made, a bill by complainants to restrain defendant express company from accepting and transporting liquor within the state, failing to allege any of the parties to such illegal shipments or sales, was unsustainable as a bill to enjoin a nuisance.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 400, 401; Dec. Dig. § 261.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. APPEAL AND ERROR (§ 1178*)—REVERSAL—REMAND.

Where a decree granting a preliminary injunction was reversed on appeal, because the complaint did not state facts authorizing equitable relief, the suit would not be dismissed, but would be remanded with leave to amend.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

Appeal from the District Court of the United States for the Southern District of Florida; John M. Cheney, Judge.

Action by D. F. Long and others against the Southern Express Company. Decree (201 Fed. 441) for complainants, and defendant appeals. Reversed, injunction dissolved, and remanded.

Robert C. Alston and Philip H. Alston, of Atlanta, Ga., W. R. Kay, of Jacksonville, Fla., and A. A. Lawrence, of Savannah, Ga. (Wm. W. Osborne, of Savannah, Ga., on the brief), for appellant.

Alexander Akerman, Charles Akerman, and Roland Ellis, all of Macon, Ga. (Richard C. Jordan, of Macon, Ga., R. P. Marks, of Jacksonville, Fla., and John A. McManus, of Macon, Ga., on the brief), for appellees.

Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

SHELBY, Circuit Judge. This is a bill in equity by D. F. Long and 16 others, residents of and in business in the Southern district of Florida, and, for purposes of jurisdiction, all citizens of Florida, against the Southern Express Company, a corporation organized under the laws of Georgia, in business as a common carrier in Georgia and in the Southern district of Florida.

The District Court granted an injunction pendente lite, and this appeal was taken under section 7 of the act of March 3, 1891 (26 Stat. 828, c. 517 [U. S. Comp. St. 1901, p. 550]).

[1] The appellee cites the decisions of this court to the effect that the granting of a preliminary injunction is in the sound discretion of the District Court, and that it will not be disturbed on appeal, unless it is violative of the rules of equity that have been established for the guidance of its discretion. *Texas Traction Co. v. Barron G. Collier, Inc.*, 195 Fed. 65, 115 C. C. A. 82. While that rule is well established, it is also held that if, on such appeal, the appellate court is of the opinion that the plaintiff was not entitled to an injunction, because the bill was without equity, it would not only reverse the decree, but save both parties from the expense of further litigation by a final disposition of the case. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810; *Arkansas Southeastern R. Co. v. Union Sawmill Co.*, 154 Fed. 304, 83 C. C. A. 224.

The material averments of the bill are, in substance, as follows: That, prior to the 6th day of August, 1907, the plaintiffs were engaged in the state of Georgia in the business of buying and selling whiskies, brandies, wines, and other intoxicating liquors, and that, on that day, by an act of the General Assembly of the state of Georgia,

the manufacture and sale of any alcoholic, spirituous, malt, or other intoxicating liquors was entirely prohibited within the state of Georgia; that thereupon the plaintiffs closed their business in the state of Georgia, and moved to the Southern district of Florida, and engaged there in the business of selling liquors, and particularly in receiving orders from, and shipping liquors to, their customers throughout the state of Georgia; that thereafter divers persons, the names of whom are unknown to plaintiffs, unlawfully and in defiance of the said Georgia statute, engaged in the liquor business at Savannah, Augusta, Columbus, and at other places in the state of Georgia, and entered into active competition with plaintiffs for the liquor business in Georgia; that, by the custom of the mail order business, the seller pays the express charges and adds the same to the cost price of the liquors sold; that the average minimum express charge fixed by the Southern Express Company on any quantity of liquors shipped from Jacksonville, Fla., to any place in the state of Georgia, is the sum of 50 cents, with an increasing price according to quantity, and the minimum price of express charges charged by that company on liquor shipments from Savannah, Augusta, or Columbus, to other places within the state of Georgia, is the sum of 25 cents, with an increasing price according to quantity; that the defendant company, conspiring with said illegal dealers at Savannah, Augusta, Columbus, and other places in Georgia, is daily engaged in receiving shipments of liquors from said dealers, consigned to various purchasers in the state of Georgia at said reduced rates, and thereby aids said illegal liquor dealers in an unfair and illegitimate competition with the plaintiffs, and that it is impossible for plaintiffs to pay the higher rates and compete with said dealers, and that the defendant company is aiding and abetting in the open and flagrant violation of the laws of the state of Georgia, and is, therefore, equally guilty with the principals; that this action of the defendant company causes a loss to each of the plaintiffs in excess of the sum of \$3,000; that they have no remedy at law, and that the injury causes irreparable damage

The prayer for specific relief is as follows:

"That the respondent, the Southern Express Company, by an appropriate decree of this court, be permanently enjoined from receiving and transporting, for any consideration whatever, intoxicating liquors of any class or kind from any person or persons engaged in the liquor business within the state of Georgia to persons resident within the state of Georgia."

The cause came on to be heard on the application of the plaintiffs for an injunction restraining the defendant, as prayed for in the bill, and thereupon the court entered an order as follows:

"That the defendant, Southern Express Company, be, and it is hereby, restrained and enjoined, until the further order of this court, from receiving and transporting, for any consideration whatever, intoxicating liquors of any class or kind from any person or persons engaged in the liquor business within the state of Georgia to persons resident within the state of Georgia."

The Southern Express Company appealed, and assigns, with specifications, that the court erred in making this order.

[2] As to the allegations that the defendant company was carrying intrastate shipments of liquors at lower rates than those charged for interstate shipments from Jacksonville, Fla., to points in Georgia: It is urged by the appellant that this averment cannot be looked to as giving the bill equity, because the District Court had no jurisdiction to pass on the question of rates till the Interstate Commerce Commission had passed on them. *Balt. & Ohio R. R. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292. But we find it wholly unnecessary to consider this question, as the bill does not seek to have the rates changed, nor does the decree appealed from relate to an equalization of rates. The bill seeks to permanently enjoin the defendant company from receiving and transporting liquors for persons engaged in the liquor business in Georgia to persons resident within Georgia "for any consideration whatever." The decree is to that effect. No question of the regulation of rates is involved, and the averment as to rates cannot be looked to to uphold the decree.

[3] The foundation of the bill is the alleged violations of the prohibition laws of Georgia. The manufacture or sale of intoxicating liquors is prohibited in that state (2 Georgia Code 1910, § 426); and a violation of the statute is made a misdemeanor (*Id.* § 432). If these statutes did not exist, the plaintiffs would have no cause of complaint, and there would be no color of reason for the process of injunction. If the court, on final decree, were to grant a permanent injunction in the terms of the order appealed from, and the Georgia prohibition statutes were to be repealed, no possible reason would then exist for forbidding a common carrier to transport liquors from one point in Georgia to another. Taking the bill as true, it shows that Georgia has chosen to practically repeal these laws by nonenforcement. Can the citizens of Florida, whether liquor sellers or not, make Georgia's failure to enforce these statutes the basis of a bill in equity?

[4] The contention on behalf of the appellees is that the court has the right to enjoin the commission of a crime, where the commission of the crime involves the destruction of a private right. It is true that, if a plaintiff shows proper grounds for jurisdiction in equity and a proper case for relief by injunction, that relief will not be refused because the injunction will restrain an injurious act, which is also a crime. But the only injunction specifically asked for and granted is one restraining the defendant company as a common carrier from transporting liquors in Georgia. The act enjoined is not criminal under any statute of the state of Georgia to which our attention is called. All that can be said is that it is an act, according to the averments, that aids others in violating the prohibition laws.

[5] Another view is presented to sustain the decree. It is alleged, in substance, that unknown persons are shipping intoxicating liquors from one point to another in Georgia, consigned to unknown persons, and that the defendant company is the carrier transporting these liquors, and "is thereby equally guilty with the principals." It is averred that these shipments are made by "illegitimate and unlawful dealers." The argument is that the business described creates a nuisance,

and that equity, on the facts alleged, has jurisdiction to enjoin and abate it.

If the averments of the bill charge a nuisance, it is a public nuisance, because it is one caused by acts done in violation of law. *Hinchman v. Paterson Horse Railroad Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; 1 Wood on Nuisances, § 14. But a public nuisance may be said to partake also of the nature of a private nuisance when it causes injury to private rights. 1 Wood on Nuisances, § 16. A public nuisance is the subject of criminal jurisdiction, and the ordinary and regular way to abate it and to punish those who caused it is by indictment or information. If any one has suffered special damage, he may maintain an action at law for the damage. And where the circumstances of the case are such that the remedy at law would not be adequate, the person injured may maintain a bill in equity. *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012; *Irwin v. Dixon et al.*, 9 How. 10, 13 L. Ed. 25. But equity will not interfere by injunction, except in cases of special and serious injury to the plaintiff, distinct from that suffered by the public (*Hinchman v. Paterson Horse Railroad Co.*, supra); and, to authorize interference, the injury must be direct and material (*Morris & Essex Railroad Co. v. Prudden*, 20 N. J. Eq. 530). In such cases the jurisdiction exists, but great caution should be observed, before granting the writ, to see that the facts are such as to authorize the process; for, as Chancellor Kent said, when asked to enjoin an alleged criminal act:

The jurisdiction to enjoin "is the strong arm of the court; and, to render its operation benign and useful, it must be exercised with great discretion, and when necessity requires it." *Attorney General v. Utica Insurance Co.*, 2 Johns. Ch. 371, 378.

[6] The bill, we think, is not one that can be sustained as a suit to enjoin a nuisance. The act of the express company which is enjoined is not a nuisance. If it is meant that the sales at the points in Georgia to which the liquors are shipped constitute a nuisance, then the allegations should be more specific as to persons and places. It is true that the statement is made that the dealers are unknown to the plaintiffs. But the theory of the bill is that the plaintiffs are damaged by illegal sales to persons who would otherwise buy from them; and it is argued that the illegal business is so conducted as to create a nuisance. It is, therefore, inconceivable that the persons, whether consignors or consignees, or at least some of them, responsible for the alleged business, could not be ascertained by the plaintiffs, and made defendants. Their business, whatever it is, would be stopped, if relief were granted on the theory of the abatement of a nuisance. They are certainly entitled to an opportunity to defend. It is not just that a business or place of business should be adjudged a nuisance, without giving the occupants or the persons carrying on the business an opportunity to be heard.

Houses of ill fame, gaming houses, and illegal liquor stores are public nuisances at common law. But we do not think that a common carrier, as a sole defendant, even at the suit of one damaged by the nuisance, should be enjoined from carrying food and furniture or sup-

plies intended to be used in houses alleged to belong to that class. To abate or to enjoin such nuisances, proceedings criminal or civil should be directed by distinct and clear allegations towards the house and its occupants, those committing the nuisance, the immediate and direct violators of the law. Occupants of a house, or conductors of a business, should not be branded as criminals without an opportunity to defend. Yet this would be effected if the suit omits the parties directly involved and proceeds against one only remotely or indirectly connected with the nuisance.

Private parties have no standing in court to abate or enjoin a public nuisance, unless their property rights are certainly affected by it. Here we have 17 liquor dealers in business in Jacksonville, Fla., who seek to permanently enjoin the defendant express company from carrying packages of liquor in Georgia, alleged to be shipped illegally, and the only averment tending to show injury to property interests is, in effect, that the persons to whom the liquors are illegally sold would be buyers from plaintiffs, if the illegal shipments are enjoined. When it is considered that no names are given of shippers or buyers, or of plaintiffs' former customers, and that it is not stated that they have the same customers, the interest of the plaintiffs, as asserted, is too remote, and the averments too vague and general, to show with the requisite certainty pecuniary interest and damage, and whether such interest and damage is several to each plaintiff or joint. *Stufflebeam v. Montgomery*, 3 Idaho (Hasb.) 20, 26 Pac. 125; *Hinchman v. Paterson Horse Railroad Co.*, supra; *Hudson v. Madison*, 12 Simons, 416.

The mere transporting of the liquors, standing alone, is certainly not a nuisance. Conceding that the averments are sufficient to show that the express company is carrying liquors to points where the sale or use of them makes a nuisance, would such sale or use be any less a nuisance if the plaintiffs sent the liquors to the same places to be so used or sold? And that is what they seek to do. There is at least nothing to show that there would be any difference, whether the liquors were furnished by the unknown persons or by the plaintiffs. The only difference is that the plaintiffs have the legal right to make shipments from Florida, and the unknown persons, it is claimed, have not the right to ship them within Georgia. But, if a nuisance is created by the use of the liquors, the effect of the carrier's action would be the same.

[7] We are of the opinion that the bill is without equity. We would make the order here dismissing the bill, except that we are reluctant to cut off the right to offer amendments. We do not see how the bill can be amended within the jurisdiction of the District Court and within its jurisdiction in equity; but the right to amend is liberally administered, and probably we should not now bar the right.

The decree is reversed, the injunction dissolved, and the cause remanded for further proceedings conforming to this opinion.

ROSENFELD v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912. Rehearing
Denied December 24, 1912.)

No. 1,790.

1. INTERNAL REVENUE (§ 47*)—REMOVAL OF SPIRITS—CONTRARY TO LAW—
INDICTMENT.

An indictment charging the defendant with a violation of Rev. St. § 3296 (U. S. Comp. St. 1901, p. 2136), by aiding in the concealment of distilled spirits on which the tax had not been paid, and which had been removed from the distillery to a place other than the distillery warehouse provided by law, is sufficient if it charges each element of the crime enumerated in the statute and substantially in the same language, and it need not aver that the removal of the spirits was with intent to defraud the United States.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.*]

2. INTERNAL REVENUE (§ 47*)—VIOLATION OF REVENUE LAWS—INDICTMENT.

Under the provision of Rev. St. § 3317 (U. S. Comp. St. 1901, p. 2164), making it an offense for any person "to purchase or receive or rectify any distilled spirits which have been removed from a distillery to a place other than the distillery warehouse provided by law, knowing or having reasonable grounds to believe that the tax on said spirits required by law has not been paid," an indictment which follows such language is sufficient, although it does not directly aver that the tax was not paid, since, being sufficient to advise the defendant of the charge against him, the defect, if any, is one of form only and cured by Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720).

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.*]

3. CRIMINAL LAW (§ 538*)—SUFFICIENCY OF EVIDENCE—PROOF OF CORPUS DELICTI.

While an extrajudicial confession or statement by a defendant is not alone sufficient to establish the corpus delicti, it will be sufficient if corroborated by such extrinsic testimony or circumstances as will, taken with the confession, establish defendant's guilt in the minds of the jury beyond reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1227-1229; Dec. Dig. § 538.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Criminal prosecution by the United States against Hyman Rosenfeld. Judgment of conviction, and defendant brings error. Affirmed.

The indictment herein contained eight counts charging violations of several sections of the Revised Statutes of the United States, having reference to the handling of distilled spirits. Defendant went to trial on the plea of not guilty. At the close of all the evidence defendant moved the court to instruct the jury to exclude the evidence, and find a verdict of not guilty as to each of the counts. Thereupon the government entered a nolle prosequi as to counts 1, 2, 3, 6, and 7. The court denied the motion as to counts 4, 5, and 8, and the case went to the jury upon those counts. The jury rendered a verdict finding defendant guilty as charged as to counts 4 and 8, and not guilty as to count 5. Motions for new trial and in arrest were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

made and overruled, and defendant was adjudged guilty and sentenced to imprisonment in the penitentiary for a term of 15 months, and to pay a fine of \$2,000. Thereupon this writ of error was sued out, and the cause is duly before us for review.

Count 4 of the indictment reads as follows, viz.: "(4) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said Hyman Rosenfeld, late of the city of Chicago, in the said division and district, on, to wit, the first day of April, in the year of our Lord nineteen hundred and ten, at Chicago aforesaid, in the division and district aforesaid, unlawfully, knowingly, and willfully, and with intent to defraud the United States, did conceal and aid in the concealment of certain large quantities, to wit, one thousand proof-gallons, of distilled spirits on which the internal revenue tax then imposed by law upon such spirits had not been paid, and which said spirits had theretofore unlawfully been removed from a certain distillery there situate, to wit, from the distillery of the Illinois Fruit Distilling Company in the said city of Chicago, Illinois, to a place other than the distillery warehouse provided by law, to wit, to the place of business of him, the said Hyman Rosenfeld, in the said city of Chicago, Illinois; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided"—and is based upon section 3296 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2136), which reads: "Whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years."

Count 8 reads as follows: "(8) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said Hyman Rosenfeld, at Chicago aforesaid, in the said division and district, on, to wit, the first day of April, in the year of our Lord nineteen hundred and ten, unlawfully, knowingly, and willfully did purchase and receive certain large quantities, to wit, one thousand gallons of distilled spirits, which said distilled spirits had theretofore been removed from a distillery, to wit, from the distillery of the Illinois Fruit Distilling Company, in the said city of Chicago, Illinois, to the place other than the distillery warehouse provided by law, to wit, to the place of business of him, the said Hyman Rosenfeld, in the said city of Chicago, Illinois, and on which said distilled spirits the said Hyman Rosenfeld then and there well knew, and had reasonable grounds to believe, the internal revenue tax then imposed by law had not been paid; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided"—and is based upon section 3317 of the statutes (U. S. Comp. St. 1901, p. 2164), which is as follows, viz.: "Every person who engages in, or carries on, the business of a rectifier with intent to defraud the United States of the tax on the spirits rectified by him, or any part thereof, or with intent to aid, abet, or assist any person or persons in defrauding the United States of the tax on any distilled spirits, or who shall purchase or receive or rectify any distilled spirits which have been removed from a distillery to a place other than the distillery warehouse provided by law, knowing or having reasonable grounds to believe that the tax on said spirits, required by law, has not been paid, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years."

On the trial, Max Bronstein, a witness called by the government, testified: That he and others had manufactured large quantities of spirits at the plant

of the Illinois Fruit Distilling Company upon a great part of which no tax was paid. This was between August, 1898, and February, 1910. That on one occasion he sold defendant spirits in jugs for \$1.20 a proof gallon, that being only 10 cents above the amount of the government tax. That defendant wanted to know how he could do it and whether it was safe, and was told by witness that "we have a retail room in our establishment." That he explained to defendant how the spirits could be taken out without payment of the tax. That afterwards he would take the spirits in jugs to defendant and would go in the morning to get the jugs. He usually paid on Sundays. That the brandy he delivered to defendant came from the distillery without going into the warehouse, and without payment of taxes. That about 1,500 gallons were delivered between January, 1909, and February 15, 1910, and that he had always carried bills made out at the market price to deceive the government officer if he happened along.

Bronstein further testified that the distillery delivered to defendant brandy of 100 proof and of 150 proof, and that he helped Rosenfeld figure out how many jugs of 100 proof and how many jugs of 150 proof should be put by defendant into a barrel of 120 proof, which he had in his place of business, in order that the mixture should correspond in proof with the spirits then in the barrel. Rosenfeld admitted to witness he had a barrel in the saloon of 120 proof goods.

Frank Weiss, also a witness for the government, testified that he worked for the Illinois Fruit Distilling Company from August or September, 1908, until February or March, 1910, as engineer; that he met defendant in his store with Bronstein in January, 1909; that defendant was buying goods from the distillery; that defendant did not want Shapiro (a wholesale liquor dealer) to know he was buying from the distillery; that the latter was selling its goods to Shapiro in quantities of 500 or 600 gallons a week on which tax was not paid; that about 1909 defendant said Bronstein should be careful about the goods "we were delivering to him," because he owed Shapiro money, and did not want to have trouble with him; that in December, 1909, he delivered to defendant 10 jugs of brandy from the Illinois Fruit Distilling Company, 100 proof, upon which the tax was not paid. Witness took down the jugs from wagon and put them in the back room of defendant. He said to defendant: "I would like to have the jugs back, Mr. Rosenfeld." Rosenfeld replied: "I never empty them in the daytime. I always empty them after I close the saloon, and I cannot empty them in the daytime." Witness left the jugs there and was told by defendant: "In the morning you can get the jugs."

Abraham Weiss, also a witness for the government, testified that on one occasion, at defendant's place, he heard Frindel ask defendant for some jugs to deliver some brandy. Defendant said he could not give the jugs back in the same day because he had to empty them after the store closed at night.

Harry Spero testified for the government as follows, viz.: That he was an employé of the distilling company; that on the second Sunday he worked there he made a delivery of five jugs to defendant; that he carried them in the back way into the saloon; that the second time he took it into the saloon and a second man took it into the basement; that the witness then got jugs in return. This brandy came from the distillery in the warehouse, filtered up from two big tubs.

The defendant denied the statements of the government's witnesses. He testified he had no knowledge of the want of payment of tax and claims he paid at least \$1.31 per gallon for spirits and brandy.

The errors assigned are:

- (1) That the court denied defendant's motion in arrest of judgment.
- (2) That the court overruled the motion to direct a verdict as to both and each of counts 4 and 8.
- (3) That the verdict and judgment are not supported by the evidence as to said counts 4 and 8.
- (4) That both and each of said counts is insufficient and void.

Further facts appear in the opinion.

Benj. C. Bachrach, of Chicago, Ill., for plaintiff in error.

Harry A. Parkin, Henry W. Freeman, and James H. Wilkerson, all of Chicago, Ill., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLAAT, Circuit Judge (after stating the facts as above). The motion in arrest of judgment is based upon the contention that counts 4 and 8 of the indictment in question do not state an offense against the United States; that no offense against the statute is stated with certainty; that count 8 fails to charge that the act complained of was done with intent to defraud the United States, and contains no sufficient allegation that the tax had not in fact been paid when the acts charged to constitute the offense took place.

[1] Count 4 charges the violation of that clause of section 3296 wherein it is made a criminal act for any person to conceal or aid in the concealment of any distilled spirits upon which the tax has not been paid, and which have been removed to a place other than the distillery warehouse provided by law, in that it is charged that defendant unlawfully, knowingly, and willfully, and with intent to defraud the United States, did conceal and aid in the concealment of certain distilled spirits on which the tax had not been paid, and which had theretofore unlawfully been removed from the Illinois Fruit Distilling Company to defendant's place of business. The language follows the statute and accords with the language of the indictment approved by the Supreme Court in *Pounds v. United States*, 171 U. S. 35, 18 Sup. Ct. 729, 43 L. Ed. 62. The court says:

"The offense was purely statutory. In such case it is generally sufficient to charge the defendant with acts coming within the statutory description in the substantial words of the statute without any further expansion of the matter"—citing *United States v. Simmons*, 96 U. S. 360, 24 L. Ed. 819, and *United States v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520.

The point there made was that the indictment failed to allege that there was a warehouse provided by law to which the spirits alleged to have been concealed should have been removed. The point made here is that count 4 does not charge that the spirits in question had theretofore been removed from a certain distillery to a place other than a distillery warehouse, with intent to defraud the United States.

In *Miller v. United States*, 136 Fed. 581, 69 C. C. A. 355, this court adopted the rule above quoted, but held that it did not apply to the facts of the case before it, since the defendant was there charged with knowingly and willfully procuring the presentation to the Commissioner of Pensions of a certain false and fraudulent affidavit without naming the person who made the presentation, or stating that his name was unknown, etc. The indictment was therefore held insufficient under the rule laid down in *United States v. Simmons*, supra. Here no such condition exists. Defendant was fully advised by count 4 of the charge which he was required to meet. The allegations of the indictment under consideration in *Bartlett v. United States*, 106 Fed. 884, 46 C. C. A. 19, so differentiates that case from count 4 as to make the case inapplicable here.

The sufficiency of count 8 is challenged upon the grounds: (1) That it contains no direct averment that the revenue tax had not been paid. (2) That it contains no direct averment that defendant bought and received the distilled spirits with intent to defraud the United States. (3) That it lacks any averment that defendant knew that the said distilled spirits had been removed from the distillery to a place other than the distillery warehouse provided by law.

It is true that count 8 does not charge directly that the revenue tax on the distilled spirits had not been paid at the time of removal. The allegation is that the removal was made of distilled spirits on which the defendant "then and there well knew and had reasonable grounds to believe that the internal revenue tax then imposed by law had not been paid." In *Bartlett v. United States*, *supra*, defendant therein was charged with the commission of perjury, in that he made a false oath to a schedule, which he as a voluntary bankrupt filed in bankruptcy. The indictment charged that he knew his statement was not true, but that he "then and there well knew that, in addition to the said estate so set forth as aforesaid in the schedule aforesaid, he was then and there the owner of the sum of \$5,000 in money," etc. This was held not to be an allegation that he owned other property than that scheduled; that it stated only a condition of mind of the accused, and was therefore insufficient—citing *Harrison v. State*, 41 Tex. Cr. R. 274, 53 S. W. 863, and three Kentucky cases. *Sauser v. People*, 8 Hun (N. Y.) 302; *Prichard v. People*, 149 Ill. 50, 36 N. E. 103. The sufficiency of an indictment must, in large part, be tested by the fact as to whether it accurately advises the defendant, as well as the court, of the acts of which the former is accused, so that he may make full defense thereto. *Cochran & Sayre v. United States*, 157 U. S. 290, 15 Sup. Ct. 628, 39 L. Ed. 704.

[2] In *Bartlett v. United States*, *supra*, defendant was not definitely advised as to what property he had omitted from his schedule, or that he had other property. He was charged with being of the mind that he had other property. It was of the essence of the charge against him that he should actually have other property. There must, in case of indictment for perjury, exist no material fact to be reached by way of inference or argument. In the present case the court follows section 3317 in its allegation with regard to the nonpayment of the tax. It left defendant in no uncertainty as to what, and just what, he was charged with. It may well be doubted whether the language, "with intent to defraud the United States," of section 3317, applies to the clause of the section upon which the indictment is laid. To unlawfully, knowingly, and willfully purchase distilled spirits which defendant knew or had reason to believe had been removed from a distillery to his own store without the payment of the internal tax thereon imports an intent to defraud the United States. The several respects in which defendant assails the two counts upon which he stands convicted, if open to objection, consist only in matters of form, and in no manner prejudice him. Granting that they are such, they come within the provisions of section 1025 of the Revised Statutes (U. S. Comp. St. 1901, p. 720), which reads:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

It is therefore held that the matters charged in said counts 4 and 8 severally constitute an offense against the United States as therein respectively set forth, and are respectively, sufficient in form to sustain the judgment of the district court thereon, and the several assignments of error in relation to sufficiency are held to be not well taken.

[3] It is defendant's contention that the only proof of the body of the offense or corpus delicti of count 4 of the indictment consists of uncorroborated confessions of the defendant. There is no denial of the claim that the distillery was illegally operated, nor is it disputed that the distilled spirits in question had been removed from the warehouse contrary to law, without payment of taxes thereon. Were it otherwise contended, the record abundantly establishes these facts. Neither is it disputed that defendant purchased goods of the distillery, the only controversy being whether defendant knew this, and, knowing it, concealed or aided in the concealment of the spirits here involved. The incriminating statements of defendant may not properly be called confessions. They were made from time to time to several persons, witnesses in this case, who were aiding in the acts complained of, as part of the *res gestæ*, with no intention of admitting a crime. True, the witnesses were also involved in the criminal acts, and to that extent, perhaps, not entitled to as full credence as might otherwise prevail. Their accounts, however, of the several transactions, together with their statements that they expected to be punished for their offenses, as though they had not given testimony, the many facts above recited, and the numerous earmarks of truth which attend them—the whole evidence considered—constitute convincing evidence of their veracity. The extrinsic corroborating circumstances set out in the record in our judgment are sufficient to establish the truth of defendant's declarations to the several witnesses, even though those declarations be taken as confessions. Thus the corpus delicti is clearly established.

"A conviction cannot be had on the extrajudicial confession of the defendant, unless corroborated by proof aliunde of the corpus delicti. Full, direct, and positive evidence, however, of the corpus delicti is not indispensable. A confession will be sufficient if there be such extrinsic corroborative circumstances as will, when taken in connection with the confession, establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt." *Flower v. United States*, 110 Fed. 241, 53 C. C. A. 271; 6 Am. & Eng. Ency. of Law (2d Ed.) p. 582; *Bines v. State*, 118 Ga. 320, 45 S. E. 376, 68 L. R. A. 33.

We approve of the statement of the law and have given defendant the benefit of it. The evidence adduced, as shown by the record, to sustain the two counts of the indictment upon which trial was had, is ample to sustain the verdict of the jury. We find no error in the proceedings which might prejudice the defendant—certainly not after verdict rendered.

The judgment of the district court is therefore affirmed.

KOVOLOFF v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1912.

Rehearing Denied October 29, 1912.)

No. 1,845.

1. INDICTMENT AND INFORMATION (§ 71*)—CERTAINTY OF ALLEGATIONS.

The rule that the facts material to be charged in an indictment must be stated clearly and explicitly, and not left to intendment or reached by way of inference or argument, governs the requisites of an indictment for perjury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 193, 194; Dec. Dig. § 71.*]

2. BANKRUPTCY (§ 494*)—FALSE OATH—INDICTMENT—REQUISITES.

Under Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720), providing that no indictment shall be deemed insufficient for any defect in matter of form not prejudicing defendant, an indictment for perjury in violation of Bankruptcy Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), punishing the making of a false oath in any bankruptcy proceeding, which charges that defendant committed perjury when he swore that his books were burned on April 21, 1907; that instead of being burned on such date they were in existence, and in his possession up to November 7th following; and that he knew he was making a false oath when he swore they were burned in April, 1907—sufficiently traverses the sworn statement that the books were burned in April and the indictment is good.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. § 494.*]

3. BANKRUPTCY (§ 495*)—FALSE OATH—EVIDENCE—SUFFICIENCY.

Where accused testified in bankruptcy proceedings that his account books were burned on April 27, 1907, while it conclusively appeared that the books were not destroyed by fire in April, but were in his possession and control as late as a week and a half afterwards, and that during such week and a half his bookkeeper worked on them and delivered to accused statements therefrom, a conviction of accused for perjury in violation of Bankruptcy Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), punishing the making of a false oath in bankruptcy proceedings, was justified.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912; Dec. Dig. § 495.*]

4. BANKRUPTCY (§ 494*)—FALSE OATH—INDICTMENT—ISSUES, PROOF, AND VARIANCE.

An indictment for perjury, which alleges that accused gave false testimony before the referee in bankruptcy, is sustained by evidence that the hearing at which accused testified was had in the referee's office, that the referee administered the oath to accused as a witness, and conducted personally a part of the examination, while a part was conducted by counsel, that all the testimony was taken by a stenographer, and that the referee was at all times in the same room, or in one of his suite of offices adjacent to the room, in the absence of anything to show that the referee was not within the hearing of the examination at all times, as against the objection that the perjury was not committed before the referee in person, based on the statement of the stenographer, deduced from signs in her notes, that the referee was out of the room part of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

time, but without any independent recollection on her part that such was the case.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. § 494.*]

Humphrey, District Judge, dissenting.

In Error to the District Court of the United States for the Northern District of Illinois; Kenesaw M. Landis, Judge.

Dan Kovoloff was convicted of perjury, and he brings error. Affirmed.

Plaintiff in error, hereinafter termed "defendant," was indicted on June 30, 1908, for violation of section 29b of the Bankruptcy Act of July 1, 1898, which reads in part as follows, viz.:

"A person shall be punished, by imprisonment for a period of not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or relation to, any proceeding in bankruptcy."

The indictment contained three counts, in the first of which defendant was charged with having made a false oath in relation to a proceeding in bankruptcy, in willfully omitting from the statement of his assets at the date of filing the petition the proceeds of certain fire insurance policies aggregating \$1,500. In the third count, he was charged with having concealed from his trustee \$1,500 and certain books, silverware, cut glass, and household articles. On trial had, he was found not guilty as to both of these counts. The second count charged him with "unlawfully, wrongfully, willfully, knowingly, fraudulently, falsely, corruptly, and contrary to his said oath" deposing and swearing in response to an examination by Frank L. Wean, referee, pursuant to the bankruptcy act, etc., that "all of the books (that is to say, books of account) of him, the said Dan Kovoloff, had been burned up in a certain fire, in a certain building, at, to wit, 313 West Twelfth street," on the 21st day of April, 1907, in the city of Chicago, Ill., that being the defendant's office; and that defendant, on October 16, 1907, and on November 7, 1907, had no books of account, whereas in truth he did on both those dates have "in his possession and under his control the books of account of him, said Dan Kovoloff, which contained a record of the business transactions of him, said Dan Kovoloff, while engaged in business at, to wit, the said office at 313 West Twelfth street, in the city of Chicago"; and that, while being so examined, he well knew that the matters contained in his said statements as above set forth were not true, and that he did not believe them to be true, and that he knew the said statements were willfully, etc., false and untrue.

At the conclusion of the government's evidence, and again at the conclusion of all the evidence, defendant moved the court to take the case from the jury, which was denied.

The jury found the defendant guilty as to said second count. Motions for new trial and in arrest were made and overruled, and defendant was sentenced to be confined and imprisoned in the house of correction of the city of Chicago for and during a period of one year.

On the hearing, it was satisfactorily shown by the testimony of defendant's bookkeeper and another employé that the defendant's books of account, consisting of a ledger, a record book, journal, cashbook, daily book, and order book, were in defendant's possession to their knowledge, subsequent to the fire of April 21, 1907. The bookkeeper worked on them for a week and a half after the fire, struck off statements therefrom, and left them at defendant's house. The evidence entirely fails to account for the books subsequent to the time fixed by the bookkeeper at about 1½ weeks after the fire. It further appears from the evidence that the oath was administered by the referee to defendant as a witness in the examination before him on November 7, 1907, that he then swore that he had kept books of account, and that they were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

all burned up in the said fire, and that the examination was made in part by the referee, and in his presence by counsel in the case.

Whether or not there is evidence to show that the referee was for a part of the time during said examination in another room in his suite of offices depends upon the weight to be given to the testimony of the stenographer, who, while she has no independent recollection upon the matter, infers from certain language in her report of the evidence that he was for some part of the time in such adjacent room, while the examination was carried on by counsel. It further appears that the examination was carried on in the office of the referee and was, for all that appears in the evidence, at all times within his hearing or control, and that no objection was made to such manner of procedure.

It further appears from the record that the defendant offered no evidence on the trial.

The errors assigned, in substance, are: (1) That said count two of the indictment does not state an offense against the statute; (2) that the evidence was insufficient to warrant a conviction.

Benjamin C. Bachrach and John F. Geeting, both of Chicago, Ill., for plaintiff in error.

James H. Wilkerson and Seward S. Shirer, both of Chicago, Ill., for the United States.

Before KOHLSAAT, and MACK, Circuit Judges, and HUMPHREY, District Judge.

KOHLAAT, Circuit Judge (after stating the facts as above). [1, 2] The second count of the indictment, in substance, charges that defendant committed perjury in that: (1) He falsely swore before the referee that his account books were burned in the fire of April 21, 1907; and (2) that he had no books of account on October 19, 1907, and November 7, 1907, and by way of negation of these two allegations sets out that he did have such books of account on October 16, 1907, and on November 7, 1907.

There is in the count no direct traverse of the alleged false statement that the books were destroyed by fire on April 21, 1907, unless the charge that defendant had the books on the two later dates may be deemed such a traverse, or that the allegation in the indictment that he—

“well knew that the matters and things by him made oath to as hereinabove in this count set forth were not true, and that the said Dan Kovoloff, at the time and place above mentioned in this count of this indictment, did not believe the said matters and things by him testified to under oath, as aforesaid, to be true; that the testimony so given as aforesaid and so falsely sworn to and made oath by the said Dan Kovoloff, was willfully, fraudulently, and corruptly false and untrue as he, the said Dan Kovoloff, at the time of so making oath and swearing as aforesaid well knew”

—constituted a sufficient negation of that allegation. From the evidence, it appears that Kovoloff's statement as to the destruction of the books by the fire of April 21, 1907, was false, and that when last seen, a week and a half after the fire, the books were in his possession and control. It is laid down in *Bartlett v. United States*, 106 Fed. 884, 46 C. C. A. 19, that:

“The facts material to be charged in an indictment must be stated clearly and explicitly and must not be left to intendment or reached by way of inference or argument.”

In *Rosenfeld v. United States*, 202 Fed. 469, handed down at this, April, session of the court, we have conceded the correctness of this rule of law with reference to an indictment charging perjury.

Does the present indictment state the material facts explicitly?

In *U. S. v. Freed* (C. C.) 179 Fed. 236, Judge Hand says:

"As to the failure to allege the actual facts and not merely that the defendants' testimony in the perjury indictments was false, and that they believed it to be false, there is doubtless authority for the rule which would make the indictments invalid. The practice in this district has been the other way, and on principle it is clear enough that the practice is right, for the requirement is of the allegation of evidence. If the practice is to be changed, the Circuit Court of Appeals [Second Circuit] must change it."

Section 1025 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 720) provides that:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding therein, be affected by reason of any defect or imperfection in the matter of form only, which shall not tend to the prejudice of the defendant."

In substance, the present presentment charges that defendant committed perjury when he swore that his books were burned on April 21, 1907; that instead of having been burned on said 21st day of April, 1907, they were in existence and in his possession up to November 7, 1907; and that he knew he was making a false oath when he swore they were burned in April, 1907.

The assignments of perjury, under the principle enunciated in *Commonwealth v. McLaughlin*, 122 Mass. 449, are in substance an explicit averment that defendant substantially testified that his books of account, which were sought for by his creditors, had been burned and were not in existence on April 21, 1907, whereas in truth and in fact they had not been consumed on that date, but had been in defendant's actual possession up to November 7, 1907. This constituted, we think, a direct traverse of the defendant's sworn statement that the books were destroyed by fire on April 21, 1907, and we hold the indictment in that behalf to be sufficient.

[3] From the record it conclusively appears that the account books were not destroyed in the fire of April, 1907; that they were in the possession and control of defendant as late as 1½ weeks after the fire; that, during the last-named period, defendant's bookkeeper worked upon them and took off and delivered to defendant statements therefrom; that the bookkeeper left them in defendant's possession. The question therefore is: Was this evidence sufficient to justify the jury in finding defendant guilty as to said first assignment of perjury? We are of the opinion that it was.

It thus becomes unnecessary to pass upon the second assignment of perjury.

[4] Defendant further contends that the hearing at which said acts of perjury were in the indictment charged to have been committed was not in fact had before the referee in person, but in his absence from the room. From the evidence it appears that the hearing was

had in the referee's office; that he swore the witness and personally conducted some of the examination; that the examination was in part conducted by counsel, and all the evidence taken down in shorthand by a stenographer and written out in full; that the referee was at all times in the same room, or in one of his suite of offices adjacent to said room; that no objection was at the time made to the course pursued by the referee; that defendant was not in any way prejudiced thereby; that there is nothing in the record to show that the referee was not within hearing of said examination at all times; and that the examination was in the nature of a civil proceeding. Moreover, the only evidence in the record upon which to base the claim that the referee was not at all times present during said examination is that of the stenographer, who deduced from certain language or signs in her notes that the referee was out of the room part of the time. She had no independent recollection that such was the case.

The evidence sustains the allegations of the indictment that the examination was made by the referee, and effectually controverts defendant's contention that there is a variance between the indictment and the evidence, with reference to that matter. *Schintz v. People*, 178 Ill. 320, 52 N. E. 903; *Nichols & Shepherd Co. v. Metzger*, 43 Mo. App. 607; *Murphy v. People*, 19 Ill. App. 131; *Ouidas v. State*, 78 Miss. 622, 29 South. 525; *Ermlick v. State* (Miss.) 28 South. 847; *Turbeville v. State*, 56 Miss. 793, 799; *State v. Smith*, 49 Conn. 377; *Pritchett v. State*, 92 Ga. 65, 18 S. E. 536; *Rowe v. People*, 26 Colo. 542, 59 Pac. 57.

Affirmed

HUMPHREY, District Judge (dissenting). The finding in the second count that defendant on October 16th and November 7th had in his possession certain books of account is not a sufficient traverse of the words charged as perjury that the books had been burned on April 21st.

The sixth amendment to the Constitution gives the requirement for an indictment.

The clear and distinct negating of the truth of a statement on which perjury is charged is a substantial and necessary part of an indictment. No indictment for perjury can be good without it.

Section 1025, Revised Statutes, cannot cure a defect which renders the indictment insufficient under the sixth amendment. As to this section, Justice Harlan, speaking for the Supreme Court in *Markham v. United States*, 160 U. S. 319, 326, 16 Sup. Ct. 288, 291 (40 L. Ed. 441), said:

"It is not to be interpreted as dispensing with the requirement in section 5396 [U. S. Comp. St. 1901, p. 3655] that an indictment for perjury must set forth the substance of the offense charged. An indictment for perjury that does not set forth the substance of the offense will not authorize judgment upon a verdict of guilty."

See, also, *Dunbar v. United States*, 156 U. S. 192, 15 Sup. Ct. 325, 39 L. Ed. 390; *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135;

United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; United States v. Pettus (C. C.) 84 Fed. 791; United States v. Cruikshank et al., 92 U. S. 557, 23 L. Ed. 588.

In re KNOWLTON & CO.

WATERS et al. v FIRST NAT. BANK OF GARDNER, MASS., et al.

(Circuit Court of Appeals, Third Circuit. January 24, 1913.)

No. 63.

BANKRUPTCY (§ 354*)—PARTNERSHIP—MARSHALING OF ASSETS.

Where the members of a bankrupt partnership were a natural person and another partnership, which is also insolvent, in the marshaling of assets, under Bankruptcy Act July 1, 1898, c. 541, § 5f, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), the constituent partnership is to be treated as an individual partner, and its assets applied first to the payment of its own creditors; the surplus only, if any, being distributable to the creditors of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555-564; Dec. Dig. § 354.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. B. McPherson, Judge.

In the matter of Knowlton & Co., a partnership, bankrupt. From an order of the District Court for distribution of assets to the First National Bank of Gardner, Mass., and others, William R. Waters and others, creditors, appeal. Affirmed.

For opinion below, see 196 Fed. 837.

Arthur G. Dickson, James McMullan, Horace Paul Dormon, and Henry P. Brown, all of Philadelphia, Pa., for appellants.

James A. Stiles, of Gardner, Mass., and Henry G. Hart, of Philadelphia, Pa., for appellees.

Before GRAY and BUFFINGTON, Circuit Judges, and RELLSTAB, District Judge.

GRAY, Circuit Judge. This is an appeal from an order and decree made and entered in the above-entitled cause by the court below, sitting in bankruptcy, modifying and in part reversing the order made by a referee in bankruptcy, in regard to the distribution of a fund in the hands of the trustees of the estate of Knowlton & Co., received by them from the assignees of the firm of A. & H. C. Knowlton, one of the partners of the said firm of Knowlton & Co. The case both before the referee and the court below was heard on an agreed statement of facts, briefly summarized as follows:

On June 18, 1910, the partnership of Knowlton & Co., formed November 28, 1908, doing business in Philadelphia, was adjudged a bankrupt; the bankrupt partnership consisted of the firm of A. & H. C. Knowlton, of Gardner, Mass., and John W. Maskell, of Camden, N. J. The partners of A. & H. C. Knowlton had their dom-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

icile, and the firm its principal place of business, in Gardner, Mass. This firm was formed July 2, 1895. Neither the firm of Knowlton & Co. nor John W. Maskell had any interest whatsoever in the said firm of A. & H. C. Knowlton, or its property, business or assets, except as herein stated. Knowlton & Co. and A. & H. C. Knowlton were "separate partnerships." The latter sold "chairs in the white" to the former, for which it was paid; and, except as to certain indorsements of notes of the former company to the latter company to secure deferred payments, there were no business transactions between the two, and each kept separate books of account. February 21, 1910, the Gardner partnership made an assignment for the benefit of creditors to Greenwood, Derby and Bryant. At that time, it owed about \$15,000, upon contracts and obligations with which neither the firm of Knowlton & Co. nor John W. Maskell were in any wise concerned and upon which neither was in any way liable. The Gardner partnership was then able to pay in full all its debts, excluding its liability as a partner in Knowlton & Co., and the liquidation of its assets resulted in a net sum of \$25,000—more than sufficient for that purpose. The bankrupt firm of Knowlton & Co. was indebted in an amount greater than its assets. The administration of the assets of the Gardner firm of A. & H. C. Knowlton was taken over by the court below, as being the assets of one of the partners of the bankrupt firm of Knowlton & Co., and the net proceeds thereof, amounting to about \$25,000, were paid over by the assignees of the Gardner firm to the trustees in bankruptcy of the Philadelphia firm. The assets of the firm of Knowlton & Co. have proved insufficient to pay its partnership debts. Debts primarily due from the Gardner firm of A. & H. C. Knowlton, or due from it by virtue of its indorsement of paper of Knowlton & Co. and John W. Maskell, have been proved in this cause against the said firm. Debts primarily due from the Philadelphia firm of Knowlton & Co. have likewise been proved against A. & H. C. Knowlton as a partner in Knowlton & Co., subject to an order of court which permitted such proof to be made, subject to the determination of the questions of law submitted to the court below upon the statement of facts. These questions were:

First.—Does the adjudication in bankruptcy of Knowlton & Co. and the administration of its affairs in this court draw to this court the administration of the assets of A. & H. C. Knowlton, as one of the partners in said firm of Knowlton & Co.?

Second.—Are the creditors of Knowlton & Co. entitled to prove against A. & H. C. Knowlton, as one of the members of the firm of Knowlton & Co., for the full amount of their respective claims, or, for whatever balance may remain due thereon after applying such sums as may have been or will be received from the estate of Knowlton & Co.?

Third.—Can the creditors of Knowlton & Co. share equally in the distribution of the assets of A. & H. C. Knowlton with the other creditors of A. & H. C. Knowlton?

The learned court below has decided the first question in the affirmative. Also, that the creditors of Knowlton & Co. are entitled

to prove against the firm of A. & H. C. Knowlton, as a partner of the bankrupt firm, for the full amount of their respective claims. No appeal has been taken from these decisions.

As to the third question, the court held that the partnership creditors of Knowlton & Co. can share in the distribution of the assets of A. & H. C. Knowlton only after the other creditors of A. & H. C. Knowlton have been paid in full. In this respect the judgment below is appealed from and the determination of the court on this question is assigned for error.

The well-known rule in equity, that has been so long applied to the marshaling of assets and liabilities between partnerships and the individual members thereof, has been embodied in section 5f of the present Bankrupt Law, as well as in those that have preceded it, as follows:

"The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

As it is well settled and not here denied that one partnership, "A," may be an individual partner of another partnership, "B," it would seem to be a logical conclusion that the assets of partnership "A," as an individual member of partnership "B," must be applied to the debts of partnership "A" before they can be called on to contribute to the debts of partnership "B." So, in turning to the case in hand, the Gardner partnership, as a legal entity, was a member of the Philadelphia partnership, and its debts, qua the Philadelphia partnership, were the individual debts of a partner of the Philadelphia firm, in the sense of section 5f of the statute, and the liability for such individual debts must have preference to the Gardner partnership's liability, as a member of the Philadelphia firm, for the debts of that firm. The confusion and fallacy in the contrary contention seems to arise from the fact that the debts of the constituent partnership are individual debts, qua the Philadelphia partnership, but they and the partnership debts of the Philadelphia firm are alike partnership liabilities of the constituent Gardner firm, though the former liability is primary and the latter is secondary.

This satisfies logically and equitably the exigence of the rule. We are relieved, however, from further consideration of this question by the clear and adequate discussion by the learned judge of the court below in the opinion accompanying its judgment, as found in *In re Knowlton & Co.* (D. C.) 196 Fed. 837.

The decree and order below are hereby affirmed.

AMERICAN BONDING CO. OF BALTIMORE v. ALCATRAZ CONST. CO.

(Circuit Court of Appeals, Second Circuit. January 13, 1913.)

No. 76.

1. PRINCIPAL AND SURETY (§ 175*)—RIGHT OF SURETY TO INDEMNITY—CONTRACT.

A principal is bound to indemnify his surety against loss, without any express agreement therefor; and a contracting company, which, on making application to a surety company to furnish the bonds it was required to give to secure performance of its contracts, delivered to the surety company an agreement to indemnify it against loss, cannot avoid liability thereon, because it did not definitely specify what bond it was intended to cover.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 505-509; Dec. Dig. § 175.*]

2. MUNICIPAL CORPORATIONS (§ 368*)—REPAIR OF STREET—DISSOLVED CORPORATION—NOTICE.

Where a paving company, which had given a guaranty to maintain streets in good condition for 10 years and make needed repairs on notice, was dissolved within the 10 years, notice mailed by registered letter to the corporation, and received by some one acting in its behalf, was sufficient to bind it and its surety.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 901; Dec. Dig. § 368.*]

3. PRINCIPAL AND SURETY (§ 175*)—CONTRACT TO INDEMNIFY SURETY—EVIDENCE OF LOSS.

A provision, in an indemnity agreement given by a paving contractor to the surety on its bond to keep the paving in repair for a term of years, that vouchers and other evidences of payments by the surety company should be conclusive between the parties, is reasonable and valid.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 505-509; Dec. Dig. § 175.*]

In Error to the District Court of the United States for the Southern District of New York; James P. Platt, Judge.

Action at law by the American Bonding Company of Baltimore against the Alcatraz Construction Company. Judgment for defendant, and plaintiff brings error. Reversed.

The action was brought by the plaintiff to recover \$18,135.65 alleged to have been paid by it as surety for the defendant upon bonds given by the latter to different municipalities to secure the performance of certain contracts containing provisions guaranteeing the condition of, and agreeing to keep in repair, streets. The complaint contained two causes of action. The first was for moneys paid to the city of Detroit, Mich., and the second, for moneys paid to the city of Ft. Wayne, Ind., in settlement of claims against the defendant based upon such contracts.

The trial court excluded the plaintiff's proof as to the first cause of action and directed a verdict for the defendant upon the second cause, and the plaintiff has brought this writ of error. Other material facts are stated in the opinion.

Wilder, Ewen & Patterson, of New York City (J. Ewen, of New York City, of counsel), for plaintiff in error.

Kellogg & Rose, of New York City, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NOYES, Circuit Judge (after stating the facts as above). [1] The trial court excluded the plaintiff's proof as to the first cause of action because it held that the indemnity agreement sued upon was so uncertain as to be invalid. The agreement was duly dated and executed and was attached to a bond application. The agreement itself is full and complete except that the amount of the premium to be paid is not filled in. It refers to the "bond herein applied for." The application form, however, contains many unfilled blanks and it cannot be said that any particular bond is described. But the application is for bonds. The subject matter of the contracts which they are to cover relates to "asphalt pavements and guaranteeing the same." The defendant's place of incorporation is shown and its officers authorized to sign contracts are designated. A statement of the defendant's assets and liabilities also appears and the experience of its management is stated. All the information necessary to enable the plaintiff to determine intelligently whether to act as surety appears except the amount of the bonds desired. It seems clear that the application was thus made, indefinite in amount, to cover any bonds which the plaintiff might thereafter write for the defendant. That it was so accepted by the plaintiff is apparent, for the bond in question was issued about three months after this application and it does not appear that any new one was made.

A principal is bound to indemnify his surety against loss without any express agreement and the indemnity agreement in this case adds little to the common law obligation, except in so far as relates to the establishment of liability. An agreement of this nature is one which a surety company would naturally expect to receive and which a contracting company would naturally expect to give. Such an agreement requires only general language. One might well be drawn to cover any bonds which a surety company should give for a contractor. We think that it was altogether too narrow a ruling to reject the agreement in question as void for uncertainty, and that there was error in excluding the proof offered as to the first cause of action.

[2] A verdict was directed for the defendant upon the second cause of action for the reason, as may be gathered from the contentions made in support of the rulings, that notice to make repairs under the Ft. Wayne contracts was not properly given to the defendant. But these contracts contained another provision than that expressly requiring notice. The defendant warranted that the streets should be in good condition at the end of ten years from the date of completion and it is argued that the plaintiff would be liable upon the bonds for breach of this warranty without any notice to repair. Assuming, however, for present purposes that the agreement to repair was not distinct from the warranty of condition and that notice was necessary, we think there was sufficient proof of such notice to send the case to the jury. That defendant corporation had been dissolved under the New York statute and there was some difficulty in giving notice. Due notice was, however, mailed

to the corporation itself and to its former representatives. The notice to the corporation was sent by registered mail and a receipt was returned by the post office. There is no denial by any officer or trustee that notice was actually received. Moreover one of the directors who became liquidating trustee was personally informed by the plaintiff concerning the notice. When a contracting company enters into long term contracts and then gets itself dissolved, it should not escape liability because it has made the service of notice upon it difficult. Here there was sufficient proof of service to make out a prima facie case, and plaintiff was entitled to go to the jury.

[3] As to another contention of the defendant: The provisions of the agreement to the effect that the vouchers and other evidences of loss should be conclusive upon the question of liability, were reasonable and valid. Such provisions in an indemnity agreement are obviously necessary to give a surety company the right which it should have under certain circumstances to make settlements, and are wholly unlike those executory agreements for arbitration which are some times rejected as ousting courts of their proper jurisdiction.

There was error in directing a verdict for the defendant upon the second cause of action.

The judgment of the District Court is reversed.

BOLAND v. GREAT NORTHERN RY. CO.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,169.

1. MASTER AND SERVANT (§ 270*)—NEGLIGENCE—RELEVANCY OF EVIDENCE.

Where, in an action for injuries to a railway employé by being struck by a steel chip from a cold chisel, plaintiff claimed that defendant was negligent in failing to furnish proper tools, to wit, the chisel, and testified that plaintiff's section foreman was the only man who furnished the tools, and hired and discharged men, and that no warning was given plaintiff as to the condition of the tool, evidence that tools were only furnished by defendant's store on requisition of the section foreman after proper inspection, that the foreman had no authority to purchase or obtain tools elsewhere, and that the chisel in question had not been so furnished, was relevant and material, as bearing on the foreman's authority in furnishing the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

2. APPEAL AND ERROR (§ 204*)—QUESTIONS NOT RAISED AT TRIAL—REVIEW.

An objection to evidence, not presented to the trial court, cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1258-1272, 1274-1278, 1280, 1569; Dec. Dig. § 204.*]

3. APPEAL AND ERROR (§ 263*)—ISSUES—SUBMISSION—WAIVER OF ERROR.

Plaintiff, by failing to except to an instruction submitting a question of the authority of his section foreman to furnish tools not provided by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant in accordance with its requisition rules, consented to the submission of the case to the jury in the manner in which the issues were stated in the charge, including the question whether the foreman was acting within the scope of his authority.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.*]

In Error to the District Court of the United States for the Western District of Washington; George Donworth, Judge.

Action by James Boland against the Great Northern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff in error was the plaintiff in the court below, and he alleged in his complaint in substance that, while working as a section laborer for the defendant, the latter negligently furnished him with a defective cold chisel to be used with a hammer; that, while using the same in a proper manner, a small chip flew from the head of the cold chisel and put out his eye. The defendant answered, admitting that the plaintiff was working for the defendant when the accident occurred, that he was using a hammer and a cold chisel, and that the defendant had furnished him the hammer; but it denied that it had furnished him with the chisel, and it denied that it was necessary or proper for the plaintiff to use the said chisel.

The assignments of error bring in question the rulings of the trial court in admitting certain evidence, the substance of which is as follows: John Craig, who had been section foreman for the defendant for 18 years, testified that in his experience with the defendant he had never known of their furnishing section men with chisels such as that which the plaintiff was using, and he said that the chisel referred to "is not a chisel. This is a stonemason's point, to cut holes in the rock to lift with the derrick." He testified that the section foreman had no authority to buy tools and charge to the company, and had no authority to obtain tools in any way, except from the supply train on requisition. P. H. McFadden, the defendant's division roadmaster, testified: That the tools were furnished by monthly supply cars. "The section foreman makes a requisition monthly, and that order is filled at the store department, and sent out in the supply car once a month, and in most cases it is accompanied by the assistant roadmaster. The tools that are furnished in that way pass inspection at the shops and the storehouses at each point they are furnished from, and also by the assistant roadmaster, and many times by myself, if I go up with the car and on the section. The regular shop inspections are made before they are shipped. The duty of the assistant roadmaster is to inspect the tools, and any defective tools shall be shipped in and new ones returned in their place. The rule is to make a trip of inspection and supply of that sort monthly." That Pat Boland had no authority in the month of August, 1909, to procure tools in any other way, and that, if no suitable tools were on hand, the matter could have been held in abeyance for several days or weeks, "and I might say months, until the proper tool was supplied, if it was necessary to have that tool." That section foremen make requisitions for tools, and in so doing they inspect them, and that a chisel such as was used by the plaintiff is not furnished to section men. Patrick Boland, the foreman, testified that he gave to the plaintiff the chisel which he was using, that he found it in a donkey engine on a scow, and that it was not one of defendant's chisels; that he had the regular standard rail chisel, and always carried them in his hand car.

The court instructed the jury that the master could delegate to another the duty which he owed to an employé to exercise ordinary care in providing reasonably safe tools; that there was in the case for their determination a question of fact whether the foreman, Pat Boland, was acting within the scope of his authority when he procured and furnished to the plaintiff the chisel with which he was working; that the question whether he was acting within the scope of his authority in procuring that chisel, and in furnishing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it to the plaintiff, was a matter for them to determine from the evidence; and said: "If he was acting within the scope of his authority, then his acts are binding upon the defendant; if he was acting outside the scope of his authority, then his acts are not binding upon the defendant." The plaintiff took no exception to any portion of the charge, and made no request for instructions. The case was submitted to the jury, and a verdict was returned for the defendant.

Heber McHugh and John T. Casey, both of Seattle, Wash., for plaintiff in error.

F. V. Brown and F. G. Dorety, both of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The testimony set forth in the foregoing statement of facts, which was admitted over the objection of the plaintiff, was offered in response to certain testimony of the plaintiff. The complaint had charged the defendant with negligence. It had not named any officer of the defendant, nor had it set forth that the duty of the master to furnish safe appliances had been delegated to any one. On the trial the plaintiff testified, however, that Pat Boland, the section foreman, furnished the tools to work with; that he hired and discharged the men, and there was nobody else that furnished tools and hired and discharged the men, other than the foreman; that no warning was given the plaintiff as to the condition of the tool; that the foreman came along, and brought him the chisel, and said, "Take that chisel and hammer and cut these two corners out;" that he did so, and, while doing it, he received the injury to his eye. It was to rebut this testimony that the evidence above alluded to was offered by the defendant. It was admitted on the theory that the defendant had the right to show, if it could, that Boland, in furnishing the plaintiff with the chisel, did so without authority of the defendant, and, in fact, did so contrary to the defendant's directions. The testimony so admitted does not tend to rebut the proof that the foreman had the authority to hire and discharge the men, or that he furnished the plaintiff with the cold chisel which he was using, or that he had authority to furnish the men with tools. But it does tend to show that his authority was limited, and was to be exercised only in a specified way, and that he had no authority to furnish tools other than those which were supplied him by the defendant, and which were to be obtained by him in a prescribed manner.

[2] The plaintiff contends that, the defendant having given authority to the foreman to hire and discharge the men and to furnish them tools, it follows that its whole duty to furnish such employes with safe tools was delegated to the foreman, and that it is bound by any act which he did in the discharge of that duty—citing *Hermanek v. Chicago & N. W. Ry. Co.*, 186 Fed. 142, 108 C. C. A. 254; *Telander v. Sunlin* (C. C.) 44 Fed. 564; *Port Blakely Mill Co. v. Garrett*, 97 Fed. 537, 38 C. C. A. 342, and other cases—and that therefore the testimony which was objected to should have been excluded. We need not ex-

press an opinion upon the question which is thus presented. It does not appear that this contention was ever brought to the attention of the court below. There was no motion to strike out the testimony on the ground suggested, nor was there any request for an instruction in accordance with the plaintiff's views.

[3] On the contrary, the plaintiff, by his failure to except to the instruction, consented to the submission of the case to the jury in the manner in which the issues were stated in the charge, including the question whether the foreman was acting within the scope of his authority, and instructing them that, if he was acting outside the scope of his authority, his acts were not binding upon the defendant. The plaintiff is in no position now to assign error to the admission of the testimony.

The judgment is affirmed.

REAGAN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,139.

1. CRIMINAL LAW (§ 635*)—BILL OF RIGHTS—RIGHT TO PUBLIC TRIAL—EXCLUSION OF SPECTATORS.

Defendant, in a prosecution for rape, was not deprived of a public trial by an order clearing the courtroom of spectators, but permitting all persons connected with the court, either as officers or members of the bar, and all persons in any manner connected with the case as witnesses, etc., to remain.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1452; Dec. Dig. § 635.*]

2. CRIMINAL LAW (§ 1169*)—APPEAL—EVIDENCE—PREJUDICE.

Where prosecutrix testified as to her own age, as did also her mother and the nurse who was present when she was born, and there was no credible evidence contradicting such proof, defendant was not prejudiced by the admission of an entry in a Bible of the date of her birth, alleged to have been made by prosecutrix's mother five weeks thereafter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3130, 3137-3143; Dec. Dig. § 1169.*]

In Error to the District Court of the United States for the Fourth Division of the District of Alaska.

William Reagan was convicted of an offense, and he brings error. Affirmed.

T. C. West, Fernand de Journal, and Joseph T. Curley, all of San Francisco, Cal., and James Wickersham and J. E. Coffey, both of Fairbanks, Ala., for plaintiff in error.

John L. McNab, U. S. Atty., of San Francisco, Cal.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The plaintiff in error was convicted in the United States District Court for the Fourth District of the Terri-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tory of Alaska under an indictment which charged him with the crime of rape upon the body of one Violet Myers, a female person under the age of 16 years.

[1] The assignment of error principally relied upon is that the court, at the beginning of the trial, directed that the spectators should leave the courtroom; whereupon the bailiffs cleared the courtroom of spectators, and counsel for the plaintiff in error noted an exception to the court's order. The court then said:

"Your exception is granted. I made that order for the reasons, first, that I believe many are here out of morbid curiosity; second, I feel that the jurors in the box can listen to the testimony better if not bothered by people in the courtroom; and, in the third place, I am not feeling good myself this morning, and I can listen to the testimony of the witnesses and objections of counsel better than if I am bothered with noise in the courtroom. Counsel: I only want to object upon the ground that the defendant is entitled to a public trial. Court: He is getting a public trial except for those reasons. The record may show that it is upon my own motion, without any request from either side."

There is no provision of the Code of Alaska guaranteeing to the accused in a criminal case the right to a public trial; but the right of the plaintiff in error to demand a public trial is found in the sixth amendment to the Constitution, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial.

The question presented by the assignment of error is one upon which the authorities differ. In some of the decisions it is held that the exclusion of spectators from the courtroom is a violation of the defendant's constitutional right to a public trial, and that prejudice will in all cases be presumed therefrom. *People v. Murray*, 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, 28 Am. St. Rep. 294; *People v. Yeager*, 113 Mich. 228, 71 N. W. 491; *Tilton v. State*, 5 Ga. App. 59, 62 S. E. 651; *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734, 9 Ann. Cas. 108; *People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108. In the case last cited, however, the order was more stringent than the order in the case at bar; for it excluded "all persons except the officers of the court and the defendant." Other decisions hold that if the courtroom is barely large enough for the officers of the court, the witnesses, and the jury-men, or if spectators become disorderly or boisterous with laughter, so as to interfere with the court and confuse the witnesses, they may be excluded without depriving the defendant of his constitutional right. *Kugadt v. State*, 38 Tex. Cr. R. 681, 44 S. W. 989; *State v. Callahan*, 100 Minn. 63, 110 N. W. 342; *Grimmett v. State*, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630; *Lide v. State*, 133 Ala. 63, 31 South. 953; *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849. If, for the reasons given in the cases last referred to, the court may exclude spectators, we see no ground for holding that the court may not exclude them in a case such as the case at bar; for if the defendant in a criminal trial has the constitutional right to the presence of spectators in the courtroom at all times during the trial, and the deprivation of that right shall be presumed prejudicial to him, he ought not to be

deprived of it under any circumstances, no matter what may be the conduct of the spectators, since he is not responsible for their conduct. We think the better doctrine is that it is not reversible error to exclude the spectators as was done by the order of the court in the case at bar, when there is no showing whatever that the defendant was prejudiced thereby, or deprived of the presence, aid, or counsel of any person whose presence might have been of advantage to him. The constitutional provision for a public trial should be construed in a reasonable sense, and in view of the object thereby intended to be subserved. The mere denial of the literal right should not be held ground for reversing a judgment, unless it can be perceived that the defendant has been deprived of some benefit or advantage thereby.

The only conceivable benefit the defendant might have been deprived of by the order of the court in this case was the presence in the courtroom of a crowd of idle, gaping loafers, whose morbid curiosity would lead them to attend such a trial, and the consequent embarrassment and annoyance their presence might cause to the unfortunate girl who was called upon to testify to the story of the defendant's crime and her shame. Of the deprivation of that benefit the defendant has no legal ground to complain. The trial was not, by the order of the court, rendered a secret trial. In a sense it was still a public trial. In addition to the court and jury, there were present in the courtroom the officers of the court, the witnesses for the government and for the defendant, and the counsel for the respective parties, and no members of the bar were excluded. These constituted a sufficient number of the public to see that the plaintiff in error was fairly dealt with and not unjustly condemned. In *State v. Nyhus*, 19 N. D. 326, 27 L. R. A. (N. S.) 487, 124 N. W. 71, the Supreme Court of North Dakota held that on a trial on the charge of rape the making and enforcing of an order excluding all persons from the courtroom, except all jurors, officers of the court, including attorneys, litigants, and their attorneys, witnesses for both parties, and any other person or persons whom the several parties to the action may request to remain, does not deprive the defendant of a public trial, within the statutory and constitutional provisions giving persons accused of crime the right to a speedy and public trial. Of those provisions the court said:

"They were enacted to make it forever impossible for public prosecutors or courts to continue the evils of secret trials as they formerly existed. * * * These provisions are held to be subject to a reasonable construction, and circumstances may arise where certain portions of the public may be excluded without impairing the defendant's rights under these provisions. For instance, it is conceded by text-writers and courts generally that persons of immature years may be excluded from the courtroom during the trial, where the evidence relates to scandalous, indecent, or immoral matters. Furthermore, the courtroom may be cleared to prevent interference with or obstruction of the due administration of justice."

In *Benedict v. People*, 23 Colo. 126, 46 Pac. 637, the court said:

"In a criminal case the trial must be public, not secret; but the public trial does not necessarily contemplate that every person whose morbid curiosity for indecent details draws him thither shall have that curiosity gratified by being permitted to be present in the courtroom to listen to the recital of disgusting facts."

[2] Error is assigned to the admission in evidence of an entry in a Bible, made by the mother of the prosecuting witness, stating the date of the latter's birth. The entry was made five weeks after the birth. It was objected to on the ground that the book was not a family Bible, and contained but a single entry. Aside from the evidence so admitted, there was ample proof of the age of the prosecuting witness. She testified as to her age, as also did her mother and the woman who, as a nurse, attended her mother at the time when the girl was born. There was no evidence worthy of consideration to contradict it. If there was error, therefore, in the admission of the entry in the Bible, it was harmless. *People v. Slater*, 119 Cal. 620, 51 Pac. 957.

There are other assignments of error, but we find in none of them ground for reversing the judgment.

The judgment is affirmed.

UNION NAVAL STORES CO. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1913.)

No. 2,415.

1. PUBLIC LANDS (§ 8*)—TRESPASS—UNPERFECTED HOMESTEAD ENTRY—TAKING TURPENTINE.

The boxing of trees on an unperfected homestead entry by a trespasser and the extracting of crude turpentine therefrom constitutes a willful trespass, especially where the trespasser was warned by the entryman of the condition of his title and the trespasser's probable liability to the government.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 8, 148; Dec. Dig. § 8.*]

Rights acquired by homestead settlements and entries, see note to *McCune v. Essig*, 59 C. C. A. 434.]

2. TROVER AND CONVERSION (§ 48*)—DAMAGES—PUBLIC LANDS—UNPERFECTED HOMESTEAD ENTRY—TRESPASS—TAKING TURPENTINE—BONA FIDE PURCHASER.

Defendant contracted to purchase turpentine from R. by an agreement stipulating that R. was not to box trees on uncompleted homesteads. R. nevertheless took turpentine from trees on land which he was warned was held by homestead entrymen under an unperfected entry, and sold the same to defendant, who purchased in good faith. *Held*, that defendant was a purchaser from a willful trespasser, and was liable to the United States for the value of the turpentine and resin made from the homestead as at the time of its purchase from R.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 48.*]

3. TROVER AND CONVERSION (§ 9*)—DEMAND—RESIN AND TURPENTINE TAKEN FROM PUBLIC LAND—SALE BY INNOCENT PURCHASER.

Where defendant innocently purchased resin and turpentine from a willful trespasser, who had obtained the same by boxing trees on an unperfected homestead entry, defendant's sale of the turpentine and resin, though no demand had been made on it by the United States, constituted a conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 58-83; Dec. Dig. § 9.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. ACCESSION (§ 1*)—MANUFACTURE OF ARTICLE—WRONGFULLY ACQUIRED.

The doctrine of accession has no application to the liability of a purchaser of manufactured turpentine and resin from a willful trespasser, who had taken the crude turpentine from trees located on an unperfected homestead entry.

[Ed. Note.—For other cases, see Accession, Cent. Dig. §§ 1-10; Dec. Dig. § 1.*]

5. CONFUSION OF GOODS (§ 7*)—WRONGFUL INTERMIXTURE—EFFECT.

Where a trespasser willfully took turpentine and resin from trees on an unpatented homestead entry, and willfully mixed the same with turpentine and resin unlawfully taken from other lands, and sold the mass to defendant, the United States would be entitled to recover the value of all the turpentine and resin so sold, unless the part derived from the homestead entry was determinable with reasonable certainty.

[Ed. Note.—For other cases, see Confusion of Goods, Cent. Dig. §§ 5-10; Dec. Dig. § 7.*]

6. TROVER AND CONVERSION (§ 53*)—DAMAGES—INTEREST—DEMAND.

Where defendant purchased resin and turpentine from a willful trespasser, who had taken a part thereof from an unpatented homestead entry, but no demand was made on defendant to account to the United States therefor until suit was brought for conversion, the United States was not entitled to interest, except from the time of suit brought.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 254; Dec. Dig. § 53.*]

In Error to the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge.

Action by the United States against the Union Naval Stores Company. Judgment for plaintiff, and defendant brings error. Modified and affirmed.

Harry T. Smith, of Mobile, Ala. (R. W. Stoutz, of Muskogee, Okl., on the brief), for plaintiff in error.

William H. Armbrrecht, Sp. Asst. Atty. Gen., of Mobile, Ala., for the United States.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This was an action by the defendant in error, the United States, against the plaintiff in error, defendant in the court below, for damages for the conversion of certain turpentine and resin, taken in crude form from pine trees on the homestead entry of Lewis Freeland by H. M. Rayford, and by him manufactured and sold to the plaintiff in error. There was a judgment in the court below for the market value of turpentine and resin at the time of its sale and delivery to the plaintiff in error, with interest from the date of purchase to the time of trial. There are 50 assignments of error. Upon examination we find none of sufficient merit to justify a reversal of the judgment.

[1] The jury found, and we think were authorized to find from evidence contained in the record, that Rayford was a willful trespasser, having boxed the pine trees from which the turpentine was taken with knowledge that Freeland, the homesteader, had not com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pleted his entry at the time the trees were boxed. Rayford's contract with the plaintiff in error contained a stipulation that he was not to box trees on uncompleted homesteads, and Freeland, the entryman, at the time Rayford attempted to acquire from him the right to box trees, warned him of the condition of his title and his probable liability to the government for so doing. In the case of *Parish et al. v. U. S.*, 184 Fed. 590, 106 C. C. A. 570, we held that:

"The boxing of trees by a settler on public land covered by an unperfected homestead entry and the extracting of crude turpentine therefrom constitutes in law a willful trespass, although the settler may have acted in good faith and without knowledge of the illegality of the act."

We adhered to this principle in the case of *McKenzie v. U. S.*, 184 Fed. 988, 106 C. C. A. 666, and see no reason to depart from it now.

[2] The plaintiff in error was, therefore, a purchaser from a willful trespasser, and, conceding its good faith, was liable for the value of the turpentine and resin at the time of its purchase from Rayford. In *Bolles Woodenware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, the measure of damages as to an innocent purchaser from a willful trespasser is thus stated:

"Where he is a purchaser without notice of wrong from a willful trespasser, the value at the time of such purchase."

In the case of *U. S. v. Perkins* (C. C.) 44 Fed. 670, we stated the rule as follows:

"In an action by the United States for the value of timber bought by defendant from a trespasser, who had knowingly cut it from public land, the measure of damage is the value of the timber at the time of the purchase."

[3] Conversion of the resin and turpentine by an innocent purchaser, if it is not made out, even in the absence of demand, by the taking and retaining possession from one whose possession was in itself wrongful (see *Stubbee v. Trustees Cincinnati Railway Co.*, 78 Ky. 481, 39 Am. Rep. 251), would be supported by a sale of it before the beginning of the suit, even though no demand had been made on him by the owner (38 Cyc. 2026, 2032-2036). The record contains evidence which justified the submission to the jury of the question as to whether the plaintiff in error had sold the resin and turpentine before the government's suit was instituted.

[4, 5] The doctrine of accession has no just application to the facts in this case. The record shows that evidence was submitted to the jury from which they could have determined with reasonable certainty the amount of turpentine and resin that came from the Freeland entry, as distinguished from the mass delivered by Rayford to plaintiff in error. If it were indeterminable, the result contended for by plaintiff in error would not have followed. The confusion was the act of Rayford, who was a willful wrongdoer, and the result of confusion in such a case, if separation were impossible, would be that the title to the whole mass which Rayford delivered to the plaintiff in error would have been vested in the government. The plaintiff in error, in being charged only with what the jury found to have been taken from the Freeland entry, has no cause of complaint.

[6] Interest was assessed, as part of the damages, from the time of the purchase by plaintiff in error till the time of the trial. No demand is shown to have been made by the government upon the plaintiff in error prior to the bringing of the suit. The plaintiff in error was an innocent purchaser, though from a willful trespasser. Under the circumstances, we think interest should only begin to run from the date of demand, which in this case was the commencement of the government's suit. In the case of *U. S. v. Perkins et al.* (C. C.) 44 Fed. 670-676, we held in a similar case that interest should be computed only from the date of judicial demand.

We direct that a remittitur be entered upon the judgment in the amount of that part of the interest included in it, computed from the time of the purchase of the turpentine and resin by the plaintiff in error up to the date of the filing of the suit, and that the judgment be thereupon affirmed, with costs.

CAMPBELL et al. v. BALDWIN LOCOMOTIVE WORKS.

(Circuit Court of Appeals, Third Circuit. February 4, 1913.)

No. 1,639.

1. MASTER AND SERVANT (§ 103*)—INJURIES TO SERVANT—SAFE APPLIANCES—DUTY TO FURNISH.

A master is under an absolute nondelegable duty to furnish a servant with reasonably safe appliances with which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

2. MASTER AND SERVANT (§ 285*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—PROXIMATE CAUSE—QUESTION FOR JURY.

In an action for injuries to a servant by a chip of steel striking him in the eye, whether defendant's negligence in requiring the servant to operate a defective facing cutter, which it was necessary to hammer at short intervals in order that the slot therein would hold the cutter wedge, was the proximate cause of plaintiff's injury, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. § 285.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Action by John Campbell and another against the Baldwin Locomotive Works. Judgment for plaintiffs, and defendant brings error. Affirmed.

James Wilson Bayard, Frank P. Prichard, and John G. Johnson, all of Philadelphia, Pa., for plaintiff in error.

E. J. Pershing and W. B. Linn, both of Philadelphia, Pa., for defendants in error.

Before GRAY and BUFFINGTON, Circuit Judges, and RELL-STAB, District Judge.

BUFFINGTON, Circuit Judge. In the court below, John F. Campbell, a minor citizen of New Jersey, by his father and next

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

friend, brought suit against the Baldwin Locomotive Works, a corporation of Pennsylvania, to recover damages sustained in the loss of his eye through defendant's alleged negligence while he was in its employ. On his recovery of a verdict and judgment thereon, defendant sued out this writ. No complaint is made of the court's rulings or charge; the sole question involved being the refusal of defendant's request for binding instructions.

The case was confined to the proofs adduced by plaintiff. These tended to show that he was employed to operate a facing cutter, an appliance used on a boring machine or lathe. The steel to be cut was clamped on the machine. A hole was then drilled in it, which hole was then reamed, and the piece was finally faced. Such facing was done by a revolving cutter bar, in a slot in which was securely seated the wedge-shaped facing cutter. The slot in the bar the plaintiff used had become so enlarged that the facing cutter wobbled and would not cut true. The plaintiff complained a number of times to his foreman of such defect, and was told new bars were being made, and directed to meanwhile go ahead and make the best use he could of the old cutter, keeping it wedged in place by striking it with a hammer. He followed these directions, but while striking the revolving wedge a piece of steel flew off and injured his eye. The proofs showed no person was working near him, nor was there any other possible way of the accident being caused save by the hammer. Under these proofs, did the court err in allowing the jury to infer that defendant's lack of care caused the plaintiff to lose his eye?

[1, 2] Without entering on the over-discussed question of the law of proximate and remote cause, it suffices to say that confusion on that subject lies, not in the uncertainty of the law, but in its application to the facts of individual cases. On its individual facts each case must be a law unto itself. In the present one, for example, the absolute duty of the employer—a duty that cannot be delegated—to furnish the employé with reasonably safe appliances with which to work is clear. It is equally clear that the proper tool was a revolving bar, the slots in which would hold the cutter bar rigidly fixed in place, and in the operation of which the plaintiff, in the risks of his occupation, would be subjected to no danger such as caused the present injury. The defective character of this machine the defendant recognized, was engaged in remedying, and requested the plaintiff to use the old one. To enable the employé to do it, it suggested and imposed on plaintiff the additional auxiliary operation of constant hammering. In doing this directed duty the plaintiff was injured.

These conditions raise questions of fact, which call for the exercise of those experiences, observations, and inferences which different men draw from the affairs of life. For example, when a revolving steel wedge is repeatedly struck, is the chipping of steel particles an event that ought to have been, by reasonable forecast, anticipated? If it was, was the chipping of such steel caused by the original negligence in failing to supply the regular tool? Was the

use of the hammer itself an unconnected, intermediate, and efficient cause of the injury, or was its directed use a connected and designed step in the line of prescribed duty which made flying steel chips a not unlikely result? Obviously, these are all questions of fact and inferences to which the law itself affords no answer, and which in the nature of things could be answered in different ways by different men. Upon this evidence the court, in a charge to which no objection is made, left it to the jury in substance to determine whether the chipping of the steel was, on the one hand, the natural, ordinary, and probable consequence of the failure to furnish proper working appliances, or, on the other, an extraordinary, unlooked-for, and not reasonably to be expected event. The jury found the former was the case, and we think that conclusion was not, under the proofs, so unwarranted as to require the court to refuse to sustain its verdict. For the court to have itself decided that question would have trenched on the province of the jury.

The judgment below is therefore affirmed.

SHAFFER v. AMERICAN CAR & FOUNDRY CO.

(Circuit Court of Appeals, Third Circuit. December 23, 1912.)

No. 1,666.

MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where defendant replaced a saw, which had been used to cut grooves in blocks of wood intended for freight car roof brackets, with a dado-head, without installing a guarding device, required by Act Pa. May 2, 1905 (P. L. 352), and plaintiff, though experienced in working the saw, was inexperienced in using the new appliance, and was injured while doing so, without knowledge of a safety appliance that should have been used, plaintiff was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action at law by Henry Shaffer against the American Car & Foundry Company. Judgment for plaintiff (196 Fed. 513), and defendant brings error. Affirmed.

Fred Ikeler, of Bloomsburg, Pa., and G. A. Orth, for plaintiff in error.

Morgan S. Kaufman and C. B. Little, both of Scranton, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Henry Shaffer, the plaintiff, a citizen of Pennsylvania, recovered a verdict against

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the American Car & Foundry Company, a citizen of New Jersey, for personal injuries suffered by him while in its employ, through its alleged negligence. The defendant then moved for judgment notwithstanding the verdict. On denial of this motion and entry of judgment for plaintiff, defendant sued out this writ. The question here involved is whether there should have been binding instructions for defendant.

The proofs tended to show plaintiff worked at a saw table in defendant's car factory. His duty was to rabbet or saw grooves on the under edge of blocks of wood used for freight car roof brackets. To the top of Shaffer's table was attached a raised wooden hump, or "camelback," shaped like an obtuse, inverted V. Through the apex of this hump the teeth of a circular revolving saw protruded about an inch and a half, and as the blocks were correspondingly indented to seat themselves on the hump an even-depth groove was cut on the block edge from end to end. A few days before the accident this saw was replaced by a groove-cutting revolving device called a "dado-head," which consisted of four protruding blades or cutting gouges, equally spaced peripherally from each other. When dado-heads were used, there was some tendency of the blocks to kick away. The plaintiff, under directions of his foreman, helped install the new device, and worked upon the same in all for about two days, when a block held over the dado-head split and allowed his hand to drop thereon. While Shaffer was experienced with the saw, he had never worked on a dado-head. When the latter device was installed, there was at the rear side of the cutter from where he worked a raised strip, which served as a guide to keep the block in line while subjected to grooving. The blocks worked being of uniform width, the proofs tended to show that, instead of using this single low guide strip on one side, it was possible to attach guard strips of greater height, one on each side of the dado-head, thus affording a channel in which the block could be worked and which would guard the operator's hands. The proofs likewise tended to show that such guards were in ordinary use with dado-heads, that they could be readily affixed, and in fact were affixed after the accident. The Pennsylvania statute of May 2, 1905 (P. L. 352), provides that "all vats, pans, saws, planers, cogs, gearing, belting, shafting, setscrews, grindstones, emery wheels, flywheels and machinery of every description shall be properly guarded," and the omission of the defendant to in any manner guard this dado-head, which is a species of saw, was charged as negligence.

The court below submitted to the jury the question "whether this machine was not properly guarded, or as it might have been guarded or protected under the circumstances," and instructed that, if it was so found, "then there is evidence before you of such negligence on the part of the defendant as would convict it of liability for the injury suffered, provided you find the plaintiff free from contributory negligence." On the subject of contributory negligence it further charged:

"Did the plaintiff do anything, fail or omit to do anything, or act contributory to his injury, which a careful, prudent man of ordinary intelligence would or not have done under the circumstances? Is he to blame in this matter? Could he himself have protected himself by the use of ordinary care and the exercise of ordinary reason? Did he know of the means to be em-

ployed by the use of this extra guard or protection that he now insists the defendant should have supplied? If so, and he failed to protect himself by using or affixing it to his machine, if within his power, he is guilty of contributory negligence, and cannot recover."

It will thus be seen that in effect the jury were instructed that, if they found the defendant neglected a mandatory statutory obligation of safeguarding a machine, nevertheless, if the plaintiff knew how it could be guarded, but worked on the machine for two days without doing it himself, he was guilty of contributory negligence. Whether this instruction did justice to plaintiff is a question not before us, for this case rests on a verdict which establishes in plaintiff's favor the facts of a possible safeguarding, of defendant's omission to so guard, and of the plaintiff's ignorance of such method. With sufficient evidence before it on those facts to warrant submission to the jury, the court below properly refused defendant's request to itself hold the plaintiff guilty of contributory negligence.

The judgment below is therefore affirmed.

DESERET WATER, OIL & IRRIGATION CO. v. STATE OF CALIFORNIA.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,129.

1. COURTS (§ 325*)—IMMUNITY FROM SUIT—WAIVER.

Immunity against suit, conferred on a state by the federal Constitution, eleventh amendment, providing that the judicial power of the United States shall not extend to any suit at law or in equity commenced or prosecuted against one of the United States by citizens of another state, may be waived in a case within the court's jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 884; Dec. Dig. § 325.*]

2. COURTS (§ 307*)—FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—STATES—"CITIZEN."

A state is not a "citizen" within the law conferring federal jurisdiction in certain cases where diversity of citizenship exists.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 850-854; Dec. Dig. § 307.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1164-1174; vol. 8, pp. 7602, 7603.

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.]

3. COURTS (§ 325*)—RIGHT TO SUE STATE—STATUTES—CONDITIONS.

Code Civ. Proc. Cal. § 1240, authorizes condemnation of state lands to public use when not devoted to other public uses; and section 1243 provides that all proceedings therefor shall be brought in the superior courts of the counties in which the property is situated. Held that, since the state was authorized to attach the condition that suits brought against the state with its consent shall be brought in one of its own courts, the appearance of the Attorney General in a suit to condemn

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

land of the state in a federal court did not confer jurisdiction on such court over the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 884; Dec. Dig. § 325.*

Federal jurisdiction in suit against state, see note to *Tindall v. Wesley*, 13 C. C. A. 165.]

Appeal from and Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. W. Morrow, Judge.

Action by the Deseret Water, Oil & Irrigation Company against the State of California to condemn certain land belonging to the State. From a judgment of dismissal, plaintiff brings error. Affirmed.

A. H. Ricketts, of San Francisco, for appellant and plaintiff in error.

U. S. Webb, Atty. Gen., and John T. Nourse, Deputy Atty. Gen., for the State of California.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The plaintiff in error, a corporation organized under the laws of Nevada, engaged in doing business in the state of California, brought an action to condemn to public use certain land belonging to the state of California. The state was made a party defendant, and John Doe, Richard Roe, and Peter Pink were also made parties defendant as claiming an interest in the land. These defendants were alleged to be citizens and residents of the state of California, although their true names were unknown. The Attorney General of the state of California caused his appearance to be entered on behalf of the state, and thereafter filed a demurrer in the name of the state, on the ground that the complaint did not allege facts sufficient to constitute a cause of action against the state. The demurrer was sustained without leave to amend, and the action was dismissed for want of jurisdiction. The question now presented to this court is whether the Circuit Court had jurisdiction of the case. By making an appearance in the case, if the Attorney General was authorized so to do, and filing a general demurrer to the complaint for want of facts to constitute a cause of action, and raising no objection to the jurisdiction, the defendant in error waived, so far as it was possible for it, by the unauthorized act of its Attorney General, to waive the question of the jurisdiction. The question remains whether the court could, with such consent of the defendant in error so expressed by the action of its Attorney General, entertain jurisdiction of the cause.

[1, 2] By the eleventh amendment it is provided that the judicial power of the United States shall not extend to "any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state." The immunity against suit thus conferred by the Constitution may be waived in a case within the jurisdiction of the court. But the case before us is not such a case. There is involved in it no question of the Constitution or a law of the United States; nor is there jurisdiction over the defendant in error on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ground of the diversity of citizenship of the parties. It is true that three defendants are joined by fictitious names, who are alleged to claim an interest in the land, which is said to belong to the state; and they are alleged to be citizens of the state of California. It may be doubted whether any court would accept as a jurisdictional averment such an allegation of the citizenship of defendants, of whom the pleader had so little knowledge as to be unable to state their names. But, however that may be, the state is not a citizen, and it is a party, and the principal party, here to an action in which the court had no jurisdiction of it on the ground of diversity of citizenship. The present case is not like that of *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780, in which it was held that the state might waive its constitutional privilege and, in order to assert its claim to funds in the hands of the court, become a party to a suit of which the court already had jurisdiction. In that case the court said:

"That in a suit otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction. * * * In the present case the state of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination."

[3] Again, the effect of the appearance in the case of the Attorney General on behalf of the state must be limited by the terms of the statute of the state whereby it consented to be sued. Section 1240 of the Code of Civil Procedure of California authorizes the condemnation of state lands to a public use when not devoted to other public uses; and section 1243 provides that "all proceedings under this title must be brought in the superior courts of the counties in which the property is situated." This is a consent to be sued only in a court of the state, and in that respect the case is similar to that which was before this court in *Smith v. Rackliffe*, 87 Fed. 964, 31 C. C. A. 328, affirmed in *Smith v. Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140, in which it was held that it was competent for the state to couple with its consent to be sued the condition that the suit be brought in one of its own courts.

There was no error in dismissing the cause for want of jurisdiction. The judgment is affirmed.

WHITE et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1913.)

No. 2,347.

1. PUBLIC LANDS (§ 13*)—TRESPASS—CUTTING TIMBER—DAMAGES.

Where 13 years expired after the conversion of certain timber from public land before suit was brought therefor by the United States, plaintiff's damages were limited to the market value at the time of the conversion, and it could not recover the highest market value up to the time of the trial.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 16-18; Dec. Dig. § 13.*]

2. DAMAGES (§ 69*)—INTEREST—TORTS.

Interest is not allowed in actions of tort in a federal court as a matter of right, but its allowance as a part of plaintiff's damages is discretionary with the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 137-140; Dec. Dig. § 69.*]

3. DAMAGES (§ 69*)—INTEREST—TORTS.

Where the United States delayed 13 years before suing for conversion of lumber, manufactured into timber, taken from the public domain, it was not a proper exercise of discretion to allow interest on the damages recovered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 137-140; Dec. Dig. § 69.*]

4. APPEAL AND ERROR (§ 719*)—ASSIGNMENTS OF ERROR—NECESSITY.

A plain error may be noticed on appeal, without assignment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.*]

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Action by the United States against W. M. White and others, as executors of J. J. White, deceased. Judgment for the United States, and defendants bring error. Affirmed on condition.

J. I. Ford, of Pascagoula, Miss., and J. S. Sexton, of Hazelhurst, Miss. (W. A. White, of Gulfport, Miss., on the brief), for plaintiffs in error.

R. C. Lee, U. S. Atty., of Jackson, Miss. (William H. Armbrrecht, Sp. Asst. Atty. Gen., of Mobile, Ala., on the brief), for the United States.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This was an action by the United States, as plaintiff in the court below, defendant in error in this court, against the intestate of the plaintiffs in error and others, for damages for cutting and converting timber from the lands of the United States. The principal question in controversy in the court below was as to which of the various defendants sued cut the timber, the cutting of which was complained of by the plaintiff. So

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

far as the errors assigned relate to the question of the liability of the intestate of the plaintiffs in error, we find them to be without sufficient merit to justify the reversal of the judgment.

[1] The plaintiff recovered a judgment based on a value for the timber converted, in excess of its manufactured value at the time of the conversion, based upon a charge of the court, excepted to by the defendant, which permitted the jury to assess the highest market value of the manufactured lumber as shown by the evidence at any time up to the trial of the cause in the court below. The trial occurred some 13 years after the conversion. The rule invoked by the plaintiff that justified this measure of damages, when applicable otherwise, is limited to cases in which suit is instituted within a reasonable time after the conversion. *Galigher v. Jones*, 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658. We do not think that the rule should be applied to a case in which the plaintiff delayed so unreasonably, as in this case, to institute its suit. We think the jury were authorized to find that the intestate of the plaintiffs in error was a willful trespasser and liable for the manufactured value of the lumber at the time of its conversion, which was shown to be \$10 a thousand feet, but for no greater measure of damages. *Bolles Woodenware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230.

[2] The verdict and judgment show, and the parties concede, that interest was allowed by the jury from the date of conversion to the date of trial—a period of 13 years—aggregating \$2,152.80, almost one-half of the entire judgment. The oral charge of the court is set out in the bill of exceptions in its entirety, and contains no reference to the question of interest. Interest in actions of tort in the federal courts is not allowable as a matter of right; but its allowance, as part of plaintiff's damages, is discretionary with the jury. *Eddy v. Lafayette*, 163 U. S. 458-467, 16 Sup. Ct. 1082, 41 L. Ed. 225.

[3] The jury were not instructed by the court below that they possessed any such discretion, and probably included interest in their verdict upon the idea that the plaintiff was entitled to it as a matter of right, and not of discretion.

[4] It is true the plaintiffs in error do not assign error because of this omission of the court, but a plain error may be noticed by us, in the absence of any assignment. In view of the long and unexplained delay on the part of the government in instituting the suit, we feel that a proper exercise of discretion by the jury would have denied the plaintiff interest.

In view of these conclusions, the recovery of the plaintiff, in the court below, should have been limited to the value of the lumber manufactured from the timber converted, at \$10 per thousand feet, without interest, which, as appears from the judgment entry, would amount to the sum of \$2,300. The order of the court is that, unless the defendant in error enter upon the record of the court below, within — days from the date of this judgment, a remittitur of that part of the judgment in excess of the amount mentioned, the judgment of the court below be reversed, and the cause remanded for further proceedings; but, if the remittitur is entered by the defendant in error, as herein required, the cause stand affirmed, with costs.

UNION TANK LINE CO. v. AMERICAN CAR & FOUNDRY CO.

(District Court, S. D. New York. January 28, 1913.)

1. PATENTS (§ 234*)—"INFRINGEMENT"—USE OF PARTS OF DEVICE.

To constitute "infringement," it is unnecessary to use the entire device; but if parts thereof are used in substantially the same way, and in a similar contrivance, it is infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 370, 381; Dec. Dig. § 234.*

For other definitions, see Words and Phrases, vol. 4, pp. 3590-3594.]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—TANK CAR.

The Van Dyke patent, No. 768,888, for a railroad tank car, in which the tank is secured to the underframe in the middle only, to allow for free expansion longitudinally, was not anticipated and discloses invention; also *held* infringing.

In Equity. Suit by the Union Tank Line Company against the American Car & Foundry Company. On final hearing. Decree for complainant.

Gifford & Bull, of New York City (Livingston Gifford and George E. Cruse, both of New York City, of counsel), for complainant.

Frederick P. Fish, Frederick H. Gibbs, and Charles J. Hardy, all of New York City, for defendant.

HAZEL, District Judge. The bill alleges infringement of claims 14 to 17, inclusive, of letters patent No. 768,888, granted August 30, 1904, to John W. Van Dyke, for improvements in railroad cars. The invention more particularly relates to tank cars of sheet metal construction for carrying oil or other liquids, having the tank riveted at the center to the underframe, which serves to receive and transmit the stresses and shocks incident to the movements of the car. Such tank cars, according to the evidence, were designated as "center anchor" cars at a meeting of the Master Car Builders' Association where they were under discussion, and such designation will for brevity be adopted herein.

In recognition of the prior state of the art, the inventor in his specification says:

"Heretofore two general sorts of tank-attaching means have been devised—one in which the tank seated on the underframe between longitudinally and laterally retaining devices is prevented by straps from being thrown from its seat, and the other in which the tank is secured by rivets or the like. In accordance with the present invention the middle of the tank is secured to the underframe by rivets, and the ends are held down between laterally retaining devices by means which allow the tank to expand longitudinally. Devices at the ends of the tank are unnecessary, since the riveting of the tank to the underframe at the middle prevents such motion."

That the prior tank cars were not wholly free from objectionable features is sufficiently established, and, while not entirely superseded by the Van Dyke patent, many of them having given excellent service, and, being still in active use, yet they have frequently become prematurely impaired by inertia shocks and stresses developed in trans-

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portation, in spite of the introduction of such substances as oakum or india rubber between the ends of the tanks and the head blocks, to impart elasticity and minimize the dangers of pounding. There was another objectionable feature of the prior tank cars, which the patentee herein designed to overcome, namely, the destructive strains caused by longitudinal expansion of the tank on account of the heated condition of the oil or other liquids, or on account of the steam introduced into the interior for cleaning. To make allowance for such expansion, he rested the ends of the tank on curved plates and passed over them straps or bands, which were anchored to the sills on each side thereof; and to effect the reduction of the strain caused by inertia, and to hold the tank against endwise motion, and from separating from the underframe in a vertical direction, he rigidly riveted the tank to the underframe at the center, and at no other point.

The involved claims read as follows:

"14. A railroad car, composed of an underframe, and a tank secured by rivets at the middle to said underframe, and held at the ends by means which allow the tank to expand longitudinally, substantially as described.

"15. A railroad car, composed of an underframe, and a car body secured by rivets at the middle to said underframe, and held at the ends by means which allow the car body to expand, substantially as described.

"16. A railroad car, composed of an underframe, and a tank secured by rivets at one place to said underframe, and held at other places by means which allow the tank to expand, substantially as described.

"17. The combination of longitudinal sills, plates secured to the said sills at the middle, curved plates or saddles secured to said sills near the ends, a tank riveted at the middle to said first-mentioned plates and resting at the ends on said curved plates or saddles, and straps passing over said tank at the ends and anchored at the ends, substantially as described."

Each claim has four elements: (a) The underframe; (b) the tank; (c) the center anchor; and (d) the straps or end fastenings. Claims 14, 15, and 16 are broad, while claim 17, which includes curved plates or saddles, specifically describes the invention. The defendant denies infringement, avers anticipation, and contends for a narrow construction of the aforesaid claims.

The principal contention is that a proper interpretation of the claims requires the determination that the patentee's evident purpose was to have the center anchor integrally hold the underframe to the tank with such rigidity as to resist strains of all kinds, and, indeed, that his central idea in riveting the plates in the middle was to prevent the tank from sagging or parting from the underframe in a vertical direction, and, if possible, from leaking; that as the defendant's tank is not actually riveted to the underframe, but is capable of being separated therefrom in a vertical direction, the claims should be construed to cover merely the specific construction by which the rigidity of the tank and underframe is secured. But such a narrow construction is not justified by the proofs. The skilled mechanic or draftsman had not at the date of the patent in suit reached perfection in the art of designing car tanks, and there was still room for improvement. Much, of course, had been accomplished to make the transportation of oil or other liquids in tank cars reasonably safe; but, as said, there was a liability to danger from destructive strains and stresses, which it

was important to remove or decrease. Means had been previously devised to minimize such shocks and stresses; but no one before Van Dyke had succeeded in appreciably lessening their harmful effects. The credit accorded to tank cars constructed in accordance with the specification and claims in suit, as evidenced by the appreciation thereof expressed in the proceedings of the Master Car Builders' Association and by their general adoption, is a proper point for consideration in determining patentability.

The defendant relies upon patents granted to Murray & Lamason, Frick, Hughes, Brown, Vanderbilt, and Stucki to invalidate or narrow the claims in suit. The Murray & Lamason patent, granted in 1873, belongs to the type of tank cars using head blocks to protect the ends from blows, as well as straps located close to each end and at other points along the tank. Subsequently other means were adopted for fastening the tank to the underframe, such as dome grapples, or straps fastened to the underframe and extending around the tank to the dome anchorage. Such tank cars, though still in use, are of the class the patentee designed to improve.

The Frick patent, No. 243,881, is asserted by the defendant to positively disclose the patentee's method of riveting the tank to the frame at the center and at no other point to allow for expansion, and shows a loop or strap at one end attached to the sills. It is argued that such structure contains every element of the claims in controversy, and that the specification demonstrates that the patentee merely applied an old method to an analogous subject, without making any change that rises to the dignity of invention; but an examination of the drawings and specification indicates that the boiler of the Frick patent, assuming it to be analogous to a car tank, is not riveted to the underframe at any point, but is connected by a bracket on each side of the boiler. It is impossible to believe that the patent in suit was anticipated by the Frick structure, and to me it only shows that the devising of means allowing for the free expansion of the tanks, which, according to the testimony of the witness Smith, often contain heated oil directly loaded out of the still at a temperature of from 300 to 400 degrees Fahrenheit, was a problem yet to be solved.

The Hughes patent, No. 512,297, describes a car tank attached by rivets to the underframe at four separate points, at two points near the center and at two points near the ends of the tank; but such riveting to the sills near the center does not, in my opinion, correspond to center anchoring. The patent in suit emphasizes that the plates be riveted to the sills at the middle of the tank by separate sets of rivets, and the desideratum of the patentee was to firmly clutch and to rigidly hold the tank to the underframe at the center, and at no other point, to prevent its movement against shocks and strains. There is no such riveting in the Hughes patent as that specified in claims 14 and 15 of the patent in suit. On the contrary, the riveting to the underframe occurs at various places along the underside of the car tank, and not solely in the mid-

dle, to secure a rigid hold at that particular point, nor are the ends of the tank left free to permit expansion, but are instead riveted to the cradles or body bolsters. Such a construction does not correspond to the claims in suit, and therefore the Hughes patent does not anticipate them.

The Brown patent, No. 588,742, describes a tank car having wrought iron ears riveted to the central lower sides of the tank, thus connecting it to the underframe by rivets and plates, so as to prevent it from moving endwise and turning on its axis. The ends are held by diagonal tie rods, which at one end are fastened to a crossbar and at the opposite upper end to the top of the tank by nuts. The object of this method of fastening, together with the use of head blocks and of various straps by which the tank was held to the underframe, was to strengthen and hold firmly in place the upper part of the tank. Clamps are used to engage the "chime of the tank," and it is claimed that if such clamps were omitted the construction would correspond to that of the claims in suit, but that the removal thereof for the purpose of modifying the structure would not involve invention. It is perhaps true that to merely remove the chime clip might not amount to invention, and that the skilled in the art might readily perceive the advantages of its omission; but it is thought unnecessary to consider this question at length, as it is clear that in the Brown patent there is strictly no center anchorage—the principal element of the Van Dyke patent—and that the wrought iron ears at the lower central sides of the tank, to which the underframe in the Brown structure was connected, were incapable of imparting the rigidity of the claims in suit or of permitting the free expansion of the tank.

It is unnecessary to enumerate the other prior structures to which attention was directed at the hearing as none of them, either those using merely head blocks or those using both rods and head blocks, were free from the liability to rupture the ends of the tanks or to leak around the rivets or seams. Corroboration of the testimony of complainant's witnesses Van Dyke and Smith as to the defects encountered in prior tank cars is found in the specifications of several prior patents in evidence and in the proceedings of the Master Car Builders' Association, wherein attention was called to the improved method (center anchorage) of preventing end movements of the tanks, and to the prior unsatisfactory method of fastening tanks between head blocks. By the patentee's method of riveting the plates at the middle, and at no other point, of the tank, which is ordinarily 36 feet long and 72 inches in diameter, and by his adaptation of curved plates upon which the ends of the tank rest, together with his method of anchoring straps at the ends, according to the evidence, a greater power of resistance was secured, and the difficulties from destructive strains and expansion were appreciably diminished.

In opposition to this view the defendant claims that Van Dyke did not progress the art, questions the asserted benefits derived from the improvement, and argues, *inter alia*, that as the patent

does not show how the end straps could afford free expansion, no such function is performed by them. It is, perhaps, a mooted question whether the tank straps are expanded with the tank; but the expert witness Thomas expressed the opinion that the straps expanded longitudinally and were moved with the tank. Such testimony being undisputed, there is insufficient reason for rejecting it. Defendant also claims that in recent years draft gears have been used to absorb the blows of the larger tank cars, and that by their use center anchors have been largely relieved from strains and shocks, and, while the importance of the patent is, perhaps, somewhat depreciated by such evidence, I am nevertheless of the opinion that credit is due the invention in suit for appreciably reducing the effect of the objectionable strains. Other subjects, relating to bolster rivet troubles, expansion tests, etc., were argued at the bar to negative the novelty of the patent, and, while the testimony relating thereto has been considered, I am disinclined to modify the views herein expressed as to the character of the patent, its achievement, or the scope of the claims.

My conclusion that Van Dyke was the first to devise successful means for riveting the tank to the underframe at the center and to afford means for free longitudinal expansion, removing or reducing the effect of strains and stresses, makes it reasonable to suppose that the claims in suit are entitled to a construction broad enough to include a tank car which appropriates the invention, notwithstanding that such structure by the use of additional features may also perform another function. A reasonable construction of the claims will not permit restricting them merely to a tank body or plates riveted permanently to the underframe.

[1] The defendant's car body in shape is practically the same as complainant's, and the underframe has sills extending the length of the car, to which the tank is rigidly secured in the center on the under side thereof by rivets. On either side of the middle between the walls of the sills there is a recess or pocket, and the tank on its under side has riveted thereto a hollow casing of boxlike appearance, which is inserted into and closely fits the recess or pocket in the underframe. Concededly such construction is the center anchor, and concededly its principal function, as in complainant's structure, is to clutch and firmly hold the tank to the underframe, to assist in preventing longitudinal movement. It is true that defendant's car tank may be lifted from the underframe for the purpose of repairing, and in this respect may have an advantage over complainant's structure; but such change or alteration of the parts does not deprive the patentee of his right to have his invention protected. It is a fundamental rule that, to constitute infringement, it is unnecessary to use the entire device, and that, if parts thereof are used in substantially the same way and in a similar contrivance, it is infringement. *Foss v. Herbert*, 2 Fish. Pat. Cas. 31, Fed. Cas. No. 4,957.

[2] The defendant has appropriated Van Dyke's method of center anchoring by riveting the casing to the shell, using according

to the exhibit model about 50 rivets, which perform the identical function of the plates riveted to the shell with the 58 rivets of the exhibit model of the Van Dyke patent in suit. True, the defendant has riveted the casing to the sills in a different way than has complainant; but such differences are negligible, in view of the fact that the same result is achieved. The defendant also uses straps around the car tank, one at each end, and two other straps at points along the tank body, to assist in holding it rigidly to the underframe. The tank body is not riveted at the ends to the underframe, but simply rests on wooden strips placed on curved sills riveted to the underframe, while the straps are anchored on each side thereof. The result of such adaptation is not only to cause the tank and underframe to support each other to prevent endwise motion, as in complainant's patent, but by omitting to rivet or fasten the tank at the ends to the underframe in connection with the adaptation of straps, defendant's tank car, as heretofore pointed out, is allowed free longitudinal expansion, and thus attains the precise result described in the claims in controversy. That in the Brown patent the straps at the ends are fastened to the underframe has not been overlooked, but neither in the Brown structure nor in any structures of the prior art are the ends of the tank free from riveting to the underframe or from some other method of direct attachment thereto.

My conclusion is that claims 14, 15, 16, and 17 are valid and infringed by the defendant. A decree may be entered as demanded in the bill, with costs.

AMERICAN THERMOS BOTTLE CO. v. AMERICAN EVER-READY CO.

(Circuit Court, S. D. New York. July 6, 1910.)

No. 40.

PATENTS (§ 328*)—INVENTION—DOUBLE-WALLED VESSELS.

The Burger patent, No. 872,795, for double-walled vessels, construed, and held void for lack of invention, as embodying only a change in a prior device from one material to another, which was also old in the art.

In Equity. Suit by the American Thermos Bottle Company against the American Ever-Ready Company, for infringement of letters patent No. 872,795, for improvement in double-walled vessels, granted December 3, 1907, to Reinhold Burger. On final hearing. Decree for defendant.

James C. Chapin, of New York City, for complainant.

H. D. Williams, of New York City, for defendant.

HAND, District Judge. The first question is of infringement. Literally the defendant's device infringes each of claims 1 and 3. It is a vessel comprising, in combination, first, double walls of glass united with each other only at the mouth of each other; second, inclosing between them a rarified space; third, an "unevenness" [and] a "pro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

jection" on the surface of one of said walls within said space; fourth, a stiffening body (a) disposed between said walls, and (b) engaging, and (c) kept in position by said "unevenness" [and] "projection."

It makes not the least difference whether the pad is necessary or not, or whether Recd's patent without a pad will be operative. If the pad be unnecessary, let the defendant omit its use, and this patent will not be pertinent. Nor does it matter that they put in the pad for a different purpose, as to guide the indenting tool. This they may do with a piece of paper afterwards removed. The difficulty is that, whatever the purpose, the function of the pad is to act as a "stiffening" body, because it alone keeps the two bottles apart and prevents any play between them. Without doubt the play might be little; but, while it is there, it acts precisely as the complainant's pads, though to a less degree. Moreover, it is "disposed" between the walls: it engages with and is kept in position by both "projection" and "unevenness." The defendant's purpose is immaterial, when it uses the actual device in that way.

The most plausible argument for the defendant is this:

"The complainant's pad is not kept in place merely by friction, for in each form of the patent the 'projection' or 'unevenness' is so set that the pad cannot slip without suffering some compression of its own form. It is not surface friction with the walls that holds it, but the proper rigidity of the body itself. In our pad, however, there is no need of compressing any part of the body, if it is to escape between the 'projection' and the wall, because it is held in place strictly by the surface friction between the two walls, which incidentally have at that point a peculiar conformation designed to increase their frictional resistance."

The answer is that the defendant's pad is of some elastic substance, and the "projection," which at the point of contact has a smaller circumference than the pad, is pressed firmly against it at approximately its center. This action upon an elastic substance necessarily compresses somewhat that portion of the pad directly between the point of the "projection" and the adjacent wall. Therefore, for it to slip out, there must be overcome the proper rigidity of so much of the pad as lies between the edge of the "projection" and the supposititious point in the circumference of the pad at which it is to escape. The pad is therefore held in the infringing device by precisely the same function as in the patent in suit. It is quite obvious that, were frictional engagement all that held the pad, it would be disastrous to reduce the area of the outer wall, as is done at the point of the "projection."

The argument in the Patent Office of the learned counsel for the complainant was in no sense an estoppel. As to its merits, I leave it as I find it, addressed to the authorities who have that issue in charge, and in no respect suggesting whether it be valid or not under the circumstances in which it appears.

I must therefore determine whether the patent is valid. It is clearly limited by Burger & Aschenbrenner, No. 820,347, strictly to the combination of "projections" and "unevennesses" in a glass vacuum bottle. However, mere projections from the sides of such vessel, such as Heylandt (French No. 343,818), Nicholson (544,791), or Arnold

(481,544), do not indicate in the least the problem, or its solution, and I disregard these. Also I disregard those which indicate spacing pads or stiffening bodies held in place by friction merely, as Kloejewski (200,065), or Ostergren (644,259), although these are much more suggestive than the former.

The real question is whether any one has in such a vessel, or one nearly akin to it, kept spacing pads in place by "projections" or "unevennesses" in the walls of the vessel. To determine this the quickest means by analysis is to look for estoppels in the file wrapper. We there find that claims 5 and 6 of April 23, 1907, were rejected upon Place (707,634), and were afterwards amended without appeal. By the usual rule the patentee is therefore limited in patentability to the change from Place to his new claims. Claim 5 of April 23, 1907, is most like claim 2 of the patent in suit, and claim 5 like claim 3. In order fully to understand their differences I now give claim 2 of the patent in suit, underscoring the new matter and adding in brackets that omitted from claim 5 of April 23, 1907. In the same way I set forth claim 3 of the patent in suit.

2. "A vessel, comprising in combination double walls of *glass* united with each other only at the mouth of said vessel and inclosing between them a rarified space, unevennesses *provided* on the adjacent in surfaces of said walls *at about the same height*, within said space and [resilient] stiffening bodies [arranged] *disposed* between said walls and *engaging the unevennesses referred to* and kept in position *thereby* [by said unevennesses] substantially as set forth."

3. "A vessel, comprising in combination double walls of *glass* united with each other only at the mouth of said vessel and inclosing between them a rarified space, a projection on *the* [an adjacent] surface of one of said walls within said space, and a stiffening body disposed between said walls, and *engaging and* kept in position by said projection, substantially as set forth."

It will be seen at a glance that, since Place used cork for his pads, the only change of the least consequence was in the material of the vessel, which was limited to glass in the claims finally allowed. Claim 1 of the patent in suit is the equivalent in the singular of claim 2, and certainly has no patentable difference from it; and the same may be said of claim 4, compared with claim 1. We may therefore start with the admission of the patentee by estoppel that his invention consisted in applying to the third Place patent the idea of a glass vessel, and the question becomes, shortly, whether it was invention to put such "projections" and "unevennesses" into a glass bottle as were indicated in the third Place patent.

It is no doubt usually the rule that a mere change in material is not patentable, but it is not universally nor necessarily the rule. I should certainly hold that, in view of the well-known Dewar vacuum bottle, it was no invention merely to put a Place holder into glass form. Indeed, to do so would be simply to turn back to the old art in its earliest development. The question here, however, is not simply of a Dewar bottle, but of such a bottle with stiffeners, and those stiffeners held by "projections." Was it invention to take the old Dewar bottle, and add the form of stiffener shown in Place, held fast as there indicated? The pads perform precisely the same function in either case, and the invention must therefore be limited to the glass projections and un-

evennesses. Of course, there might be patentability in the particular method of making the "projections" in question, but that the patentee has not claimed. Doubtless it was well-known and easy in the glass blower's art.

It is quite true that no one appears to have put "projections" of this sort into a glass bottle before, nor do I regard Wolf (415,428), or Haines (679,696), as near enough to be anticipations. In Wolf the outer bottle was not of glass, and in Haines the "projection" was from a metal container. Neither adds anything to Place, certainly so far as regards the "projections."

Nevertheless, with two vacuum bottles before one—first, the Dewar flask in glass; and, second, the Place vessel—admittedly exemplifying everything but the material, I cannot think that it was invention merely to combine the two. The idea of combination, both being vacuum bottles used for the same purpose, at once suggests itself. The precise form of "projections"—that is, by pushing in the wall of the bottle—might be new; but that, as I have said, is not claimed, for any "projection" from the wall would do, even a "projection" of another material, were that practicable. The invention is simply what is claimed, and the claims are its measure. *Nat. Enameling Co. v. New England E. Co.*, 151 Fed. 19, 29, 80 C. C. A. 485. The claims here are for the combination per se, and that combination is, after all is said and done, nothing but a change from one material to another old one in the art. Making every reasonable allowance, I cannot think the patent is good.

This is not a case of an immediate acceptance and use of the discovery, and I am not embarrassed by that usual evidence of novelty. So far as appears, the complainant has never made or sold his bottles, and it is only when the defendant put out what he plausibly claims to be an improvement that the sales began. It does not appear that without such improvement any problem has been solved which has long vexed inventors, or that alone the patented invention met a long unanswered want. Nor does it appear that the Dewar flask was before the Patent Office when the patent was granted.

I cannot, therefore, think that claim 3 is valid, which provides for the "projections." I think that I should have come to an opposite conclusion as to claim one, were it not that, by amending his claims, the patentee seems to have drawn no distinction between the "unevennesses" and the "projections," and by that election he must be bound.

Bill dismissed, with costs.

HITCHMAN COAL & COKE CO. v. MITCHELL et al.

(District Court, N. D. of West Virginia. December 23, 1912.)

1. TRADE UNIONS (§ 1*)—STATUS UNDER COMMON LAW.

Under the common law which governs in West Virginia, labor union combinations must be considered in their threefold relation: (a) To their own members; (b) to those who may employ such members; and (c) to the public interests.

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. MONOPOLIES (§ 12*)—STATUS AND POWERS UNDER COMMON LAW—RELATIONS TO MEMBERS.

In their relation to their respective members, labor unions cannot undertake to require, by oath, obligation, constitution, by-law, or rule, a surrender by such members of their individual freedom of action, and, when they seek to do so, they become illegal combinations in restraint of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

3. MONOPOLIES (§ 12*)—STATUS UNDER COMMON LAW—LEGALITY.

The question of the legality of a labor union combination is to be determined from an examination of the union's constitution, by-laws, or rules, as they may be called, and, where some of such rules are lawful, yet, if others unlawful in character are of such weight and importance as to dominate the course of the union's action, or if the lawful and unlawful ones are so interdependent or intermingled as to render their separation impracticable, the organization becomes wholly illegal as in restraint of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

4. MASTER AND SERVANT (§§ 338, 339*)—INTERFERENCE BY THIRD PERSONS.

Labor unions in their relations to employers of their members, while they may use all peaceful efforts to advance the interests of their members in the way of aiding them to secure better wages, shorter hours of labor, and better conditions in which to work, may not accomplish these ends by violence, coercion, or intimidation on their part or at their instance. They may not induce their members to break existing contracts with their employers, nor interfere by intimidation or coercion with the inherent right of the employer to control his property and conduct his business in any lawful manner he may choose, and while they have the lawful right to advise their members to strike, where not in violation of contracts, and by reasoning or persuasion endeavor to prevent others from taking their places, neither they nor their members have any right by intimidation or coercion to prevent other laborers or any of the members of the union from taking employment with such employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1283; Dec. Dig. §§ 338, 339.*]

5. MONOPOLIES (§ 12*)—ILLEGAL COMBINATIONS—LABOR UNIONS.

Neither a labor union nor its members may, under the law, use any means of coercion or intimidation to compel others to join the union, or to prevent a member from leaving the union if he desires or otherwise to interfere with the inherent right of the individual, whether a member or not, to dispose of his own labor or capital according to his

own will; and in their relations to the general public as consumers of the products of labor and capital such unions are governed by the same rules of law as to combinations in restraint of trade as are combinations of capital.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

6. MONOPOLIES (§ 12*)—CONSPIRACY (§ 8*)—ILLEGAL COMBINATIONS—UNITED MINE WORKERS OF AMERICA.

The United Mine Workers of America is an unlawful organization because of its principles as set forth in its constitutions, obligations of its members, and rules which (1) require its members to surrender their individual freedom of action; (2) seek to require in practical effect all mine workers to become members, whether desirous of doing so or not; (3) to control and restrict, if not to destroy, the right of the mineowner to contract with his employes independent of the organization; (4) to exclude his right to employ nonunion labor if he desires; (5) to limit his right to discharge, in the absence of contract, whom he pleases, when he pleases, and for any cause or reason that to him seems proper; and (6) assume the right through its officers to control the mineowner's business by shutting down his mine, and calling out his men upon indefinite strike in obedience to their obligation to the union, whether the men desire to quit work or not, whenever such officers deem it to the best interests of the union and regardless of his rights or interests, or the loss, direct and indirect, which he may sustain. It is also unlawful because of its procedure and practices, in that (1) it seeks to create a monopoly of mine labor such as to enable it as an organization to control the coal mining business of the country; and (2) has by express contract joined in a combination and conspiracy with a body of rival operators, resident in other states, to control, restrain, and to an extent at least destroy the coal trade of West Virginia, and by the admission of its officers has spent 14 years time and hundreds of thousands of dollars in effort to accomplish such purpose.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12;* Conspiracy, Cent. Dig. §§ 7-11; Dec. Dig. § 8.*]

7. MONOPOLIES (§ 12*)—COMBINATIONS—INTERFERENCE WITH INTERSTATE COMMERCE.

Complainant company commenced the operation of a coal mine in West Virginia with nonunion miners. It was shortly notified by officers of the United Mine Workers of America that, unless it unionized its mine, a union mine in Ohio in which some of its stockholders were interested would be shut down, and it yielded; its workmen forming a union. A strike was ordered the next day, which was settled. In the next three years three strikes were ordered, and complainant was subjected to a loss thereby of \$48,000. At the time of the last, which was a general strike, it offered to comply with the terms demanded, and its employes desired to continue work, but were not permitted. They became dissatisfied, withdrew from the union, and made individual contracts with complainant by which it was agreed that the mine should remain nonunion. Defendants, who were officers of the union, undertook to organize another local union at the mine, and threatened to shut it down unless it should be again unionized. Some time previously they had entered into an agreement with operators in other states who were competitors of the West Virginia mines by which they undertook to unionize the latter, so that they could control conditions and lessen competition. *Held*, that such agreement was unlawful, as in restraint of interstate commerce, and that complainant was entitled to relief by injunction.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

8. EVIDENCE (§ 253*)—SUIT TO RESTRAIN UNLAWFUL COMBINATION—EVIDENCE—DECLARATIONS.

On the question whether a combination is lawful or not, declarations of those engaged in it, explanatory of acts done in furtherance of its objects, are competent evidence after the combination has been proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994-1002; Dec. Dig. § 253.*]

In Equity. Suit by the Hitchman Coal & Coke Company against John Mitchell and others. On final hearing. Decree for complainant. For prior opinion, see 172 Fed. 963.

George R. E. Gilchrist, of Wheeling, W. Va., for plaintiff.
Charles E. Hogg, of Morgantown, W. Va., for defendants.

DAYTON, District Judge. On September 21, 1909, I filed a written opinion in this cause, reported in (C. C.) 172 Fed. 963. I there stated the purposes and objects of the bill and the proceedings had thereon and in the cause to that date. I do not, because of the necessary length of this opinion made necessary by the gravity and importance of the questions involved, deem it expedient to reiterate the statement of the case there made, but refer to this prior opinion therefor. Suffice it to say that to my order refusing to modify and in part dissolve the injunction based upon the reasons set forth in that opinion an appeal was taken by the served defendants to the Circuit Court of Appeals for this circuit. That court, on March 11, 1910, dismissed such appeal for want of jurisdiction. 100 C. C. A. 137, 176 Fed. 549. The parties then proceeded to mature the cause for final hearing. The evidence was taken in open court before me. This evidence and the record in bulk is now estimated to be equivalent to between 7,000 and 8,000 pages. Briefs of counsel filed are equivalent to near 800 more such pages, and the learning, research, and legal ability displayed by counsel on both sides in these briefs are such as to command not only the court's gratitude, but its highest admiration. The sincere purpose to aid, in every possible way, the true and right determination of the cause on the part of these counsel, deserves special commendation.

I have given several months' consideration and study to the questions involved. Because of their importance, I have, upon this final hearing, deemed it proper to review, as briefly as possible, the origin of labor unions in England, and the legislation and judicial decisions touching their rights, privileges, and obligations in that country, as well as under our federal and local state laws and judicial decisions.

Without tracing the distinction recognized in England between guilds and combinations of common laborers from which spring substantially the labor unions of to-day, it is sufficient to say that the emancipation of the serfs in the time of Edward III increased largely the number of laborers and the competition in the labor market, but in the middle of the fourteenth century, when the plague carried off 2,000,000 souls, near half the population of the realm, conditions became reversed—labor became very scarce, food rose in price, and higher wages were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

demand by labor. In consequence the Statutes of Laborers were passed in 1349 and 1350, fixing wages absolutely for the summer months, and authorizing the justices of the peace to fix them for the winter ones. These acts further designed to accomplish the other purpose of tying down the liberated serfs who had become laborers to the soil. A laborer was required under pain of imprisonment to remain in his parish, and it was made an offense to refuse to work or to receive or offer higher wages than those fixed by the statutes. These statutes were passed clearly in aid of the agricultural interests of a kingdom with limited resources in that regard, seeking to supply food products for its people. They looked especially to the interest of the consuming public, and not to those of the laborer. In the reign of Henry VIII the monasteries were suppressed, and, in consequence, a large number of unemployed persons were turned out to wander over the country. Thereupon the Statute of Apprentices was enacted "in great hope, that being duly executed, it shall banish idleness, advance husbandry and yield unto the hired, both in the time of scarcity and in the time of plenty, a convenient proportion of wages." This act confirmed the former ones regulating work and wages, and, in addition, fixed the hours of labor, and required the laborer to secure from the master a certificate that he had completed his work for him before seeking work in a new district. These acts fell into desuetude by the beginning of the last century, and state regulation of wages became superseded by contractual relationships between master and servant. The result was that labor, which had before that time opposed state regulation of wages, changed front, and began petitioning Parliament for such regulation and the enforcement of the Apprentice Act. Human nature is the same substantially yesterday, to-day, and forever. It was very natural that laboring men, seeking to better their condition in life, should a century ago clamor for the legislative regulation when work was dull and the laborers many, which they had opposed the preceding century when harvests were plenty and laborers few. It is just as natural to-day that from the vast army of laborers engaged in the coal mining industry constantly depressed by over production demands should come for legislative enactment of wage scales minimum at least, and, in the absence of such legislation, efforts on their part should be made by combination to achieve the same result. The question always recurs whether either method can best supersede the natural law of supply and demand. The English courts at the time manifestly thought not, for when organized trade societies, about 1800, instituted actions and sent petitions to Parliament to enforce the Apprentice Act (fixing wages), they held that the act only applied to industries existing at the time of its passage in 1563, thereby rendering it practically ineffective, and, in 1813, Parliament formally repealed it. During these two and a third centuries the Apprentice Act, fixing wages, necessarily forbade labor combinations having for their purpose the securing of wages beyond the limit fixed by the law.

In addition, the common-law doctrine "of restraint of trade" rendered such combinations illegal. In 1797 an act, reaffirmed in 1800,

known as the Combination Act, was passed, making unlawful every combination seeking to secure advance of wages, to change or decrease the hours of work, to prevent any employer from hiring any one he chose, to prevent workmen hiring themselves, to induce workmen to leave their work to attend any meeting called to advance any of these objects, or to spend any money for these purposes.

It is important to pause here, and bear in mind that the three charters granted to Virginia in 1606, 1609, 1611-12, all expressly provided that the laws and ordinances enacted by it should conform to those existing and in force in England; that under its six state Constitutions (1776, 1830, 1850, 1864, 1870, and 1902) the fact has always been recognized that the common law of England in force prior to the Revolution was the basic law of the state, save and except so far as repealed or modified by either constitutional or legislative enactment; that in the first Constitution of West Virginia (1861-63) it is enacted:

"Such parts of the common law and of the laws of the state of Virginia as are in force within the boundaries of the state of West Virginia when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of the state until altered or repealed by the Legislature." Article 11, § 8.

The same provision was incorporated in the Constitution of 1872.

This being true, it is all-important to the correct determination of the questions here involved to determine (a) just what the common law was at the time prior to the birth of Virginia as regards these labor organizations; and (b) how far that law has been repealed or modified by legislative enactment in Virginia and West Virginia. While there have been very many conflicting decisions in the different states of the Union, it seems to me that the questions are essentially local in character, and must be determined by local law. It is certainly an inherent power of each state to determine for itself how law and order shall be maintained and crime punished. This power necessarily carries with it the right to determine what assemblies meeting within its limits are lawful or unlawful, for what lawful purposes organization may be had, and for what purposes it may be unlawful to organize and operate within its limits. This inherent power in the state can only be superseded by the very limited power of the national government to interfere provided for by the federal Constitution. For this reason, it seems clear to me that I must determine what constitutes a lawful organization in West Virginia by its laws, and not by either statutes or judicial decisions of other states. What may be lawful in one may be unlawful in another, what may be criminal in one may be permissible in another. In this view of the matter, the subsequent legislation and decisions in England become immaterial, except so far as they may aid us in defining the true principles of the common law existing prior to 1776, and still existing in this state. It will be sufficient to say that the Combination Act of 1800 was, in 1825, repealed by the English Parliament, and conspiracy alone became the combination liable to prosecution. For common-law conspiracy a number of the members of trades unions were prosecuted for combining to raise

wages and for other of their declared purposes, and convictions were had. In 1856 Crompton declared:

"That all combinations tending directly to impede and interfere with the free course of trade were not only illegal but criminal."

In 1859 Parliament passed an act more closely defining the offense of "molestation and obstruction" used in the act of 1825. It rendered peaceful persuasion to induce workmen to abstain from working, in order to raise their wages, lawful. Was this act necessary because prior to it such persuasion for such purpose under the common law was unlawful? If so, has that common-law rule been abrogated in West Virginia by subsequent legislation? These questions must be considered later. Under this act of 1859, it was held by the Queen's Bench (1867) by Cockburn, C. J.:

"I am very far from saying that the members of a trade union, constituted for the purpose not to work, except under certain conditions, and to support one another in the event of being thrown out of employment, in carrying out the views of the majority would bring themselves within the criminal law, but the rules of the society would certainly operate in restraint of trade, and therefore in that sense be unlawful."

The labor unions thereupon secured the passage of the act of 1871, providing that:

"The purposes of any trade union shall not, by reason merely that they are in restraint of trade be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

Was this act secured to repeal another common-law rule existing prior? If so, has such common-law rule been abrogated in West Virginia? If not, could Congress, by virtue of its power to regulate interstate trade, traffic, or commerce, interfere with or prevent this state's enforcement of it as regards intrastate trade? This act of 1871 was the result of the long agitation preceding, which had resulted in the appointment of a royal commission by Queen Victoria in 1867, and which commission had made 10 preliminary reports, and its final one on March 9, 1869. As a result the government introduced a bill to legalize trade unions so far as they, being combinations, were in restraint of trade, and, in addition, the bill included certain clauses which made criminal certain acts of theirs. Objection was made by the unions to these criminal provisions. The result of the long agitation that followed was that the bill was cut in two, one being St. 34, 35 Vict. c. 31, known as the Trade Union Act of 1871, above referred to, the other the Criminal Law Act 1871 (St. 34, 35 Vict. c. 32). By four years of agitation the unions secured the appointment of another royal commission which reported in 1875. Following this report Parliament repealed the Criminal Law Amendment Act, 1871 (St. 34, 35 Vict. c. 32), and passed the Criminal Conspiracy and Protection of Property Act, 1875 (St. 38, 39 Vict. c. 86), and in 1876 amended the Trade Union Act, 1871, by an act known as the Trade Union Act (1871) Amendment Act, 1876, and the two together, it was provided, were to be cited as the "Trade Union Acts, 1871 and 1876." The "Conspiracy and Protection of Property Act, 1875," was amended by an

act known as "The Trades Disputes Act, 1906," and it was provided that it and the "Trade Union Acts 1871 and 1876," together might be cited as the "Trades Union Acts 1871 to 1906." These embrace the existing statutory law of England touching labor unions.

The Trade Union Act of 1871 provides:

"2. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

"3. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.

"4. Nothing in this act shall enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely,

"(1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed;

"(2) Any agreement for the payment by any person of any subscription or penalty to a trade union;

"(3) Any agreement for the application of the funds of a trade union,—

"(a) To provide benefits to members; or,

"(b) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or

"(c) To discharge any fine imposed upon any person by sentence of a court of justice; or,

"(4) Any agreement made between one trade union and another; or

"(5) Any bond to secure the performance of any of the above-mentioned agreements.

"But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful.

"5. The following acts, that is to say,

"(1) The Friendly Societies Acts, 1855 and 1858, and the acts amending the same;

"(2) The Industrial and Provident Societies Act, 1867, and any act amending the same; and

"(3) The Companies Acts, 1862 and 1867, shall not apply to any trade union, and the registration of any trade union under any of the said acts shall be void, and the deposit of the rules of any trade union made under the Friendly Societies Acts, 1855 and 1858, and the acts amending the same, before the passing of this act, shall cease to be of any effect."

Section 6 then provides that any seven or more members of a trade union may register such trade union, "provided that if any one of the purposes of such trade union be unlawful such registration shall be void." Section 7 authorizes a registered union or any branch of it under the act to purchase and lease land not exceeding one acre in the name of trustees to sell, exchange, and mortgage the same. Section 8 vests all land and personal property of the union or of its branches in the trustees selected therefor and their successors. Section 9 authorizes such trustees to sue and be sued touching the property rights of the union. Section 10 limits personal liability of such trustees to funds actually received by them as such. Section 11 requires the treasurer of the union to render to the trustees accounts of moneys, bonds, or securities received by him at such times as the union rules may prescribe, and, if required, to turn over to the trustees

balances in his hands and all books, papers, and property of the union. Section 12 provides for legal enforcement and criminal punishment of any officer, member, or other person fraudulently obtaining possession of, withholding, or misappropriating funds or property of the union so registered. Section 13 provides the rules of registration to be: (1) By an application with printed copies of the union's rules, and a list of the titles and the names of its officers sent to the registrar who (2) shall become satisfied that the union has complied with the requirements of the act. (3) That no union shall register under a name identical or so nearly the same as to deceive with that of another existing registered union. (4) Where the union has been in operation for more than a year before application made for registration, a general statement of the receipts, funds, effects, and expenditures of such union to be delivered to the registrar. (5) The certificate of registry unless proved to have been withdrawn or canceled to be conclusive that the requirements of the act have been complied with. (6) One of the Secretaries of State to have power to make regulations from time to time touching details of registration, the forms to be used, the inspection of documents kept by the registrar and the fees to be paid for registration. Section 14 provides (1) that the rules of the union shall contain provisions in respect to the several matters mentioned in the first schedule of the act; and (2) that a copy thereof shall be delivered to any person by the union on payment of a sum not exceeding one shilling. Section 15 provides that every registered union shall have a registered office. Section 16 provides that a general statement of the receipts, funds, effects, and expenditures of the union be on the 1st of June of each year transmitted to the registrar, together with any alterations in rules or changes in officers of the union. Section 17: Registrars to report annually to Parliament. Section 18 makes it a misdemeanor to circulate with intent to defraud other than the existing rules of a union. Sections 19, 20, 21, 22, and 23 relate to legal proceedings for the enforcement of the fines and penalties provided for in the act and of definitions of terms used and "the First Schedule" defines six matters to be provided for by the union's rules: (1) The name and place of meeting for business; (2) the whole of the union's objects, and the purposes for which its funds shall be applicable, the conditions under which a member may become entitled to benefits, and the fines and forfeitures that may be imposed; (3) the manner of making, altering, amending, or rescinding the rules; (4) a provision for the appointment and removal of a general committee of management, of trustees, treasurers, and other officers; (5) a provision for the investment of the funds, and an annual audit of accounts; (6) inspection of the books and roll of membership by every person having an interest in the union's funds. The amendments provided by the act of 1876 do not change these provisions, but enlarge them by (1) allowing unions to pay money on the death of a child under 10 years of age; (2) providing for transfer of union's funds from the estate of a bankrupt trustee to a new trustee; (3) requiring registration by registered unions in all countries where the unions operate; (4) regulating the withdrawal and cancellation of registration certi-

cates; (5) allowing one under 21, but over 16 years, of age to become member of a registered union, and providing how funds due him may be paid by the union; (6) providing how a registered union may change its name; (7) that two or more unions may amalgamate and the proceedings necessary thereto; (8) and how a union may dissolve.

The Conspiracy and Protection of Property Act, 1875, provides:

"An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

"An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.

"Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any act of Parliament.

"Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offense against the state or the sovereign."

It makes it criminal for (1) an employé of a municipality, alone or in combination with others, to break his contract of employment if he has reasonable cause to believe his doing so will deprive the inhabitants of the place wholly or to a great extent of gas or water; (2) to break a contract of hiring when there is reasonable cause to believe the doing so will endanger life, cause serious bodily injury, or expose valuable property, real or personal, to destruction or serious injury, for a master legally bound to furnish his servant with food and clothing to fail to do so where such failure is likely to impair seriously the health of the servant. It then provides:

"Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,—

"(1) Uses violence to or intimidates such other person or his wife or children, or injures his property; or,

"(2) Persistently follows such other person about from place to place; or,

"(3) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,

"(4) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or,

"(5) Follows such other person with two or more other persons in a disorderly manner in or through any street or road, shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

"Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section." Repealed by section 2, Trade Disputes Act, 1906.

The remainder of its provisions relate to the legal proceedings to be pursued in its enforcement, to definitions of its terms and to its application to Scotland and Ireland.

The Trade Disputes Act, 1906, provides:

"1.—The following paragraph shall be added as a new paragraph after the first paragraph of section three of the Conspiracy and Protection of Property Act, 1875:

" 'An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.'

"2.—(1) It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

"(2) Section seven of the Conspiracy and Protection of Property Act, 1875, is hereby repealed from 'attending at or near' to the end of the section.

"3.—An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills.

"4.—(1) An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court.

"(2) Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trades Union Act, 1871, section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute."

In giving this very limited review of the origin and progress of English legislation touching trade unions, I have not stopped to cite authorities. It will be sufficient for me to say that by aid of counsel I have had before me and have consulted the English works, Greenwood on the Law Relating to Trade Unions, Chalmers-Hunt on Trade Unions, Davis' Labour Laws, Wright's Criminal Conspiracies, Webb's History of Trade Unionism, Schlosser and Smith Clark's Legal Position of Trade Unions, Webb's Industrial Democracy, 14 Enc. Laws of England, Eleventh and Final Report of the Royal Commissioners (First Commission Appointed) 1869, and Second and Final Report of the Commissioners (Second Appointed) 1875.

It is somewhat difficult to define the exact status of these unions under the involved and confusing legislation existing to-day in England. Their position in the body politic is certainly anomalous. Discussing the Trade Union Act of 1871, Farwell, L. J., in the Taff Vale Case (1901) 1 K. B. 170, says:

"A trade union is neither a corporation, nor an individual, nor a partnership between individuals. It is an association of men which almost invariably owes its legal validity to the Trade Union Acts 1871-76, * * * and the Legislature in giving a trade union the capacity to act by agents, has without incorporating it, given it two of the essential qualities of a corporation."

Provisions are made for registered unions, but the acceptance of such provisions is purely voluntary. These registered unions obtain few privileges that are not enjoyed by those unregistered. It is very

doubtful whether class legislation of this character could be enacted and enforced in the United States by reason of constitutional limitations, both federal and state. It is to be always borne in mind that the power to legislate is supreme and unrestricted in the English Parliament, while always limited here by the written federal and state Constitutions. However, we are not called upon to pass upon the constitutionality of such legislation for none such exists under federal statute, or by laws of West Virginia as we shall presently show. However, some limitations in England still exist, under this legislation, upon the acts and proceedings of union organizations, that tend clearly to establish common-law principles existing in this state by which we must be bound. Some of these it seems important to indicate.

First. At least, prior to the last act (1906), which provided by its section 3 that "an act done by a person in *contemplation or furtherance of a trade dispute* shall not be actionable on the ground only that it induces some other person to break a contract," it was clearly unlawful for these unions by their trustees and officers to induce or procure men to break contracts with their employers. This was distinctly held by the House of Lords in 1901 in the case of *Quinn v. Leatham* A. C. 495, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 269, 17 Times L. R. 749, and in *South Wales Miners' Federation v. Glamorgan Coal Co.* (1905) A. C. 239, 74 L. J. K. B. N. S. 525, 53 Week. Rep. 593, 92 L. T. N. S. 710, 21 Times L. R. 441. This latter case, as reported in 1 British Ruling Cases, 1, will be found to involve closely a similar condition of fact existing here. The coal company and 73 other plaintiffs brought action against the Miners' Federation, its trustees, officers, and certain members of its executive council for wrongfully and maliciously procuring and inducing its workmen in the mines to break their contracts of service with the plaintiffs. It appeared that the Federation (a registered trade union) fearing that the action of merchants and middlemen would reduce the price of coal, and consequently the rate of wages, ordered a "stop day," obeyed by over 100,000 men who took a holiday, and thereby broke their contracts of service. Subsequently four additional "stop days" were ordered, and the men ceased work in violation of their contracts. It was found this advice to the men on the part of the Federation's council was given without malice. Bigham, J., dismissed the action. The Court of Appeal reversed the judgment, and awarded damages to the plaintiffs. (1903) 2 K. B. 545, 72 L. J. K. B. N. S. 893, 89 L. T. N. S. 393, 19 Times L. R. 708. Upon appeal to the House of Lords, the Court of Appeal was affirmed and the Federation's appeal dismissed; the Earl of Halsbury, L. C., Lord Macaghten, Lord James, and Lord Lindley delivering concurring opinions. Good faith was there held to be no justification; "that to combine to procure a number of persons to break contracts is manifestly unlawful." This ruling is in full accord with our American decisions which sustain the right to an injunction against the officers of a labor union to restrain them from inducing members of such organization to strike in violation of their contracts of employment, or which hold them liable in damages therefor. *Holder v. Cannon Mfg. Co.* (1904) 135 N. C. 392, 47 S. E. 481; *Tubular*

Rivet & Stud Co. v. Exeter Boot & Shoe Co. (1908) 86 C. C. A. 648, 159 Fed. 824; A. R. Barnes & Co. v. Berry (1907) (C. C.) 156 Fed. 72; Old Dominion S. S. Co. v. McKenna (1887) (C. C.) 30 Fed. 48; Thomas v. Cincinnati, N. O. & T. P. R. Co. (1894) 4 Interst. Com. R. 788, 62 Fed. 816; Thacker Coal & Coke Co. v. Burke (1906) 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Ann. Cas. 885. Attached to the report of this last case in 5 L. R. A. (N. S.) 1091, will be found a very valuable note citing many additional authorities. It would seem clear that section 3 of the English Act 1906, above referred to, can only effect the enforcement of this principle in England when a trade dispute is on between the same particular employer and his employés, and therefore that no sanction for the claim for the so-called sympathetic strike can be found in it where the breaking of contracts is involved.

Second. The Conspiracy Act 1875, it will be observed, expressly makes criminal all violence and intimidation against any person to prevent him from exercising his legal rights, or against his wife or children, or injury to his property, from persistently following him from place to place, from hiding his tools, clothes, or other property, or from depriving or hindering in the use thereof, from watching or besetting his house or place of business or the approach thereto, or from following such other person with two or more others in a disorderly manner through any street or road. In detail specification of forbidden acts this English statute possibly has gone farther than many of our American court decisions have gone as regards what shall be considered as intimidation and violence, nevertheless the general principle is the same, and is fully recognized in this country, as also the right to resort to injunction to stay such violence and intimidation. It is needless to cite the vast number of cases establishing this principle in this country beyond peradventure.

Third. It will be noted what stress is laid by this English legislation upon the rules that may be adopted by the unions. In order for them to have the benefit of registration, these rules must be filed with the registrar. All changes therein must be reported, and they are to be printed and copies furnished on demand of any one upon payment of a nominal fee. The clear purpose of this publicity is that it may be apparent to the public just how far the union is lawful in its organization and designs, and that the courts, when appealed to, may determine the character of the union by an examination of its rules. As a result, since these acts were passed, the English courts have been called upon to determine by such examination whether several of these organizations were lawful or not. From these decisions can be ascertained some very valuable information as to what penalties and obligations can be enforced by these unions against (a) its own members; (b) against the interests of its members' employers; and (c) against the interests of the public.

In *Chamberlain's Wharf Limited v. Smith* (1900) 2 Ch. Div. 605: "The rules of an association, called the Tea Clearing House, the members of which were dock companies and tea warehouse keepers carrying on the business of warehousing tea in bond, provided (rule 11) that every member should charge on teas the respective rates and adhere to the terms and con-

ditions specified in a schedule to the rules, and should not be at liberty to depart from them in any way, except that a discount not exceeding 10 per cent. might be allowed on the said rates. No other discount, no money gratuities, and no advantages, direct or indirect, should be offered or allowed by any member to any merchant, broker, or other person in connection with any matter or thing in any wise relating to the Tea Clearing House agreement. By rule 14 no subscriber should be entitled to warehouse or deposit tea with, or employ in connection with tea, any dock company or tea warehouse keeper who was not a member of the Clearing House, or to purchase or sample any tea from the warehouse of any nonmember. By rule 15 any member breaking or failing to observe any of the rules was to be liable to expulsion by resolution of the committee. The committee passed a resolution expelling the plaintiffs for an alleged breach of the rules, and they brought an action against the members of the committee to restrain them from acting on the resolution, on the ground (*inter alia*) that the plaintiffs had not had an opportunity of being heard in their defense. Kekewich, J., granted an interlocutory injunction. Held, on appeal, that the association was a 'trade union' within the meaning of section 16 of the Trade Union Act Amendment Act, 1876; that its objects were illegal independently of the Trade Union Act, 1871; and that section 4 of that act prevented the court from directly enforcing the agreement between the members: Held, also, that by granting the injunction the court would be directly enforcing the agreement. The injunction was accordingly dissolved."

In *Cullen v. Elwin* (1903) 88 L. T. 686:

"Under the rules of the Amalgamated Society of Tailors, it was provided by rule 34, 'Trade Regulations,' that during slack seasons a fair equitable division of trade shall be compulsory in all shops. That a fair equitable division of trade shall be understood to mean that each man shall get trade to the same value as his fellowman or as near it as possible. In no shop shall the dual system of piece work and day wage be allowed to exist. No member of this society shall in future be allowed to leave a workshop for the purpose of working outdoors or at home, except by the express permission of his branch committee, such permission only to be granted in case of physical inability to remain in the workshop, and to be in all cases indorsed by a general meeting of the members of the branch. Any member breaking the rules and allowing himself to run out of society and still work for a society shop, the branch shall have full power to deal with the matter as they deem best subject to rules 32 and 33. That a working week shall not exceed fifty-four hours, each district or town to regulate its own time of starting in the morning and leaving off in the evening and that no overtime be worked except in cases of necessity. Time lost on one day cannot be made up on the following or any subsequent day. Members infringing this rule shall be dealt with as the branch directs, subject to rules 32 and 33. By rule 32, if a member acted contrary to the interests of the society or its rules, he was to be fined or expelled. Held, that the society was illegal."

This case was heard in King's Bench before Lord Alverstone, C. J., Wills and Channell, JJ., all concurring. It was appealed and affirmed by the Court of Appeal in 1904, *Cullen v. Elwin*, 90 L. T. 840, all three of the judges concurring. In his opinion in this case Collins, M. R., says:

"It is possible for societies to frame rules which contain an element of illegality in them without at the same time vitiating the whole system. It is possible. It is also possible for them to make rules which are apparently and ostensibly innocuous, and yet may vitiate the whole system, because, rightly understood and considered as a whole, their innocent parts are merely ancillary to that part which is not in point of law deemed to be legal. The question on which side of the line the particular rules of a particular society fall is a question of fact in each case."

Again he says:

"At common law agreements in restraint of trade are bad, and combinations in restraint of trade are illegal. But the Trade Union Acts have to a certain extent, and for certain limited purposes, modified the rigour of the common law."

The case of *Gozney v. Bristol, etc., Trade & Provident Society* (1909) 1 K. B. 901, was an appeal from the county court to King's Bench Division, and from there to the Court of Appeal. The defendant was held to be practically an indemnity company undertaking to pay sick, funeral, and death benefits, and also benefits to members when on strike. The action was brought to recover such benefits not paid. The county court held the society illegal, and the action in consequence not maintainable. This action was reversed by the King's Bench and the reversal approved by the Court of Appeal upon the ground expressed by one of the judges that "this society is just inside the limits of legality," for the reason, as expressed by another of them, that "provisions to encourage or procure a strike may be illegal. Provisions for the assistance of the victims of a strike may be perfectly legal. In these rules I can find no provisions addressed to the procurement or even sanction of a strike." Channell, J., of the King's Bench, in his judgment in this case, says:

"It seems to me that the grounds for suggesting illegality are two: First, there may be illegality in the character of the influence which is exerted, which may amount to unlawful coercion; * * * secondly, that with which I think we have to do in this case, namely, the doctrine as to restraint of trade. Speaking generally, and without pretending to give an exhaustive definition, that doctrine is that it is unlawful to fetter by agreement the freedom of action of any one engaged in trade, as a trader or an employer or a workman, except so far as such fetter is reasonably necessary for the protection of the person seeking to impose such fetter upon others."

Again he says:

"What I think has to be found in order to make the association illegal is that the members agree to submit their own action to the decision of others, and to strike or not as directed. That would certainly make the society unlawful, and probably also it would be unlawful if the object is to combine for the purpose of putting pressure on employers, and thereby to fetter their freedom of action."

In his opinion in the case, *Fletcher Moulton, L. J.*, says:

"To answer this question (of legality of the association) it is necessary to examine the purposes for which the defendant society is formed, and the means whereby it proposes to effect those purposes. If either of these be illegal, it may be necessary to examine more closely into the nature of that illegality to see whether it is of such a kind as to taint the whole constitution of the society and make it an illegal society. * * * It follows, therefore, * * * that the question must be decided entirely by an examination of the contents of the printed book of rules of the society. These rules define its constitution and objects, and set forth the detailed rules adopted by it for carrying out those objects."

The case of *Russell v. Amalgamated Society of Carpenters & Joiners* seems to have been a test one having been appealed to the Court of

'Appeal, and from there to the House of Lords (1910) 1 K. B. 506, and 81 L. J. K. B. 619. In this case it was held:

"Where the rules of a society combined provisions for the militant purposes of a trade union and provisions for the provident purposes of a friendly society, and it was provided by one of the rules that members of the society might be expelled, with the result that they would forfeit all future benefit from the funds of the society, for noncompliance with the decisions of committees directing the militant operations of the society or for violating the recognized trade rules of the district, held, that the main object of the society was illegal at common law, as being in restraint of trade, and that the rules relating to its provident purposes were so inseparably connected with that object as to be affected by its illegality, and therefore unenforceable; and consequently that an action for moneys alleged to have become payable to a member under those rules was not maintainable."

Vaughan, L. J., of the Court of Appeal, in his opinion says:

"It is not every restraint of trade which will render the provisions of an agreement unlawful, in the sense that it cannot be enforced by action at common law. To have that effect, a restraint of trade must be such as in some way to prejudice the interests of the community. It may do that in a case where the freedom of contract of an individual is restricted to an unreasonable extent by an agreement which he has entered into, or in a case where the area from which employers, not parties to the agreement, can seek to obtain workmen is unreasonably restricted. It may be observed, in passing, that it cannot be said in the latter case, as it can in the former, that the restraint of freedom of trade arises in consequence of the voluntary action of the party whose freedom is restrained; for, in a case where, for instance, the rules of a trade union prohibit their members from working with nonunion men, there is a restraint of trade to the prejudice of employers and workmen other than members of the trade union, quite independently of any action of their own."

And again:

"With regard to clause 3, which provides that, where one of the committees of the union therein mentioned considers it to be the best interest of the members of the union that they should refuse to work with nonunion men, they shall be entitled to trade privileges, it appears to me that this clause does involve a restraint of trade inconsistent with the public interest. The same observation seems to me to apply to clause 6, the important words of which are those providing that any members who may be withdrawn from their employment on the instruction of one of the committees of the union therein mentioned shall be entitled to trade privileges. The effect of the rules seems to me to be that the members in question must leave work when they are so withdrawn by the instructions of the committee. Then, again, rule 48, cl. 1, appears to me most material for the purpose of showing that the rules contemplate such a restraint of trade as to render them generally unenforceable in law. (The Lord Justice here read the clause.) In my opinion that clause, in substance, from beginning to end amounts to such a restraint of trade as necessarily to render its provisions unlawful. It trespasses against the principle of freedom of contract. The workman is not to be allowed to take a subcontract or do piecework, or to work in fixing, using, or finishing work which has been made under conditions which the union may consider unfair, and, if he does so, he is liable to be expelled from the union. From every point of view this clause is, in my opinion, of such a character that it must of necessity tend seriously to hamper and restrain trade."

Kennedy, L. J., in his opinion in the case, says:

"The only question before us now is, therefore, as I have said, whether this society is an illegal society at common law. In dealing with that ques-

tion I will not refer to the rules of the defendant society in detail, as they have been already fully dealt with by the other members of the court. Speaking generally, what seems to me to be the vice of these rules is that they provide for a restraint of trade, not shown to be reasonable, in that they involve a surrender by the members of the union of their individual freedom of action; for they provide that a member may be expelled from the society, under rule 48, cl. 1, with the result that he will forfeit all future benefits, unless he renders passive, or, if required, active, obedience to the decrees of certain bodies constituted within the union under the rules."

In his opinion in the House of Lords, Lord Macnaghten, in this case, says:

"The only question, therefore, seems to be this: Is this trade union, apart from the act of 1871, a lawful association? The answer must depend on a consideration of its purposes as manifested in its rules. It is not every restraint of trade that is unlawful. But I cannot doubt that restraint of trade which is unreasonable, oppressive, and destructive of individual liberty is unlawful. And I cannot help agreeing with the learned judges of the Court of Appeal that such is the character of some of the rules of this society; and, further, that, having regard to the constitution of the society, the powers vested in its executive officers, and the blending of its funds for all purposes, it is impossible to separate what is legal from what is not legal."

And in discussing the effect of this Trade Union Act, 1871, as supplemented by the Act of 1876, Lord Robson says:

"It is to be observed that the act did not go the length of abrogating or altering the general law against restraint of trade. It grafted an exception on it in favor of certain classes of persons, but by section 4 it maintained the principle of the old law even against those persons, to the extent of refusing the assistance of the courts in the direct enforcement of contracts between members of a trade union, when the purposes of the union were in restraint of trade. Had it gone further, and altogether excluded the application of the common-law doctrine in this connection, the courts would have been compelled to give full effect by decree, or injunction, to contracts whereby workmen had bound themselves not to undertake certain legitimate kinds of work, and to refrain, under certain circumstances, from working at their trade at all, except by leave of their union, no matter what their immediate necessities might be. Such contracts would then be as legal as any other by which a man limits his freedom of action for a definite time or purpose, and the prospect of the burden which would thus be cast upon the executive, of actively enforcing great numbers of such contracts in periods of industrial hardship or disturbance, was one from which Parliament might well shrink. But the operation of section 4 of the Act of 1871 is not confined merely to contracts in restraint of trade. It enacts also that 'nothing in this act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of' (inter alia) '(3) any agreement for the application of the funds of a trade union,—(a) To provide benefits to members.' Prima facie the agreements thus excluded from the benefits of the act are legal and meritorious, and their exclusion can only be due to the fact that they rest, in some degree, upon a consideration involving a restraint of trade which the law tolerates, but will not directly assist."

See, also, *Mudd v. General Union of Operative Carpenters & Joiners* (1910) 103 L. T. 45, and *Thomas v. Portsmouth "A" Branch of the Ship Constructive, etc., Association*, reported in the *Times Law Reports* May 3, 1912, which are to the same tenor and effect.

I have made this review of the English legislation and decisions in regard thereto to make clear the demonstration of these propositions:

[1] First. That these union combinations under the law must be considered in their threefold relation: (a) To their own members; (b) to those who may employ such members; and (c) to the public interests.

[2] Second. That in their relations to their respective members they cannot, even under the advanced legislation of England, undertake to require, by oath, obligation, constitution, by-law, or rule, a surrender by such members of their individual freedom of action; that, when they seek to do so, they become illegal, and, while tolerated in England under her Trade Union Acts, nevertheless there, by reason of their illegality, neither can the unions enforce such contracts with their members or members with the unions.

[3] Third. That the question of legality is to be determined from an examination of the union's constitutions, by-laws, or rules as they may be called, and, while some such rules may be lawful, yet, if others unlawful in character are of such weight and importance as to dominate the course of the union's action, or, if the lawful and unlawful ones are so interdependent or intermingled as to render separation one from the other impracticable, then the organization becomes wholly illegal.

[4] Fourth. That in their relations to the employers of their members, while they may use all peaceful efforts to advance their members' interests, in the way of aiding them to secure better wages, shorter hours of labor, and better conditions in which to work, they cannot accomplish these ends by any acts of violence, coercion, or intimidation on their part or at their instance. They may not by common law, and in the absence of permissive legislation such as that of the English Act of 1906, interfere with the contracts which their members have entered into, and which are existing between an employer and his employés, nor by any means induce such employés to break such contract or contracts. To break a legal contract is unlawful. Therefore to persuade or induce one to do this unlawful thing is itself unlawful. Further, these unions have no right by intimidation or coercion to destroy the inherent right vested in the employer to control his property, and conduct his business in any lawful manner he may choose. Such employer may fix the terms and conditions upon which he will give employment, may employ whom he desires, refuse to employ whom it pleases him to deny employment, may discharge (in absence of contract) whom he pleases, and refuse to discharge whom he pleases. It is entirely within the right of the union to advise its members in the absence of contract on their part with the employer to quit their labor for him, to strike, in other words, and insist upon other and different terms of employment before they return to labor, but neither the union nor its striking members have any right by intimidation or coercion to prevent other laborers or any of the members of the union itself from assuming the employment under the employer's terms if they so desire. They may by reasoning and persuasion under such conditions induce its own members and others not to assume the employment where the breaking of no contract is involved, but this is as far as they can go.

[5] Fifth. The relation of these unions to the public must be considered in dual aspect: (a) As to the nonunion laboring class seeking competitive work with the union's members; and (b) as to the public generally considered as consumer of the labor's product. As regards the first class, it is to be remembered that, while the membership of organized labor is large, the number of nonunion laborers in this country and especially in this state is many times greater, and it is the law's function and duty to fully, without fear, favor, or partiality, protect the rights of the latter as well as those of the former. These rights guarantee to the laborer the absolute right to join the unions or not as he sees fit. The unions cannot, under the law, use any means of intimidation or coercion to compel him to do so. The limit of their right in this direction is persuasion. If he joins, they cannot compel his continuance in membership. He may withdraw when he desires. The union members as individuals may voluntarily determine not to work with nonunion labor if they so desire, they can cease working themselves on that account, but they can do nothing in the way of intimidation or coercion to compel either other union men or the nonunion men to cease working on the one hand or to prevent the employer from filling their places with other union or nonunion men on the other. The inherent right of the individual laborer to sell his labor, which is his property, in any lawful manner or pursuit, and upon such terms and conditions as he may himself determine to be for his personal best interests, must be upheld by the law just as fully and freely, regardless of these union organizations as it is upheld in all the other relations of our civic life. As said by Sir William Erle in his "Memorandum on the Law Relating to Trade Unions," filed with the Eleventh and Final Report of the Royal Commissioners 1869:

"As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms, which one person may exercise and declare singly, many after consultation may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms; but they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination. Any arrangement for that purpose, whatever may be its purport or form, does not bind as an agreement, but is illegal, though not unlawful, on account of restraint of trade, and therefore void. Every party to it, who chooses to put an end to it, is thenceforward as free to claim his own terms for his own labour as if such arrangement had never been made: and any attempt to enforce, by unlawful coercion, performance of any such supposed agreement, against a party who chooses to break from it and labour or contract for labour upon different terms, is an attempt to obstruct him in the lawful exercise of his right to freedom to trade; and is thus a private wrong. It is also a violation of a duty towards the public—that is to say, of the duty to abstain from obstructing the exercise of the right to the free course of trade. A person can neither alienate for a time his freedom to dispose of his own labour or his own capital according to his own will (see *Hilton v. Eckersley*, 6 Ell. & Bl. 47), nor alienate such freedom generally and make himself a slave (see the argument of Hargrave in the *Negro Somerset's Case*, 20 State Trials, 23). It follows that he cannot transfer it to the governing body of a union."

As regards the second aspect, the relation of these organizations to the general public as consumers of the products of capital and labor it must be admitted that, in the absence of special legislation such as that of England (of doubtful constitutionality at least in this country under the written Constitutions, federal and state, thereof), it is just as unlawful for labor to combine to form a trust or monopoly as it is for capital to do so. The same rule of common law governs the one as the other, and the act of Congress, known as the Sherman Anti-Trust Law, I conceive to be simply declaratory of this principle. The latest construction of this act by the Supreme Court set forth in *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, and *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, is that "it prohibits all contracts *and combination* which amount to an unreasonable or undue restraint of trade in interstate commerce." By the English authorities I have hereinbefore cited, it will be perceived that the same doctrine of "unreasonable" restraint of trade has been applied there as against these labor organizations.

Turning our attention to our own country, while it might be interesting to trace the history of these labor combinations in the United States and the decisions of the several states touching their status and rights, it is clearly impracticable to do so within the limits of this opinion. As regards the historical outline, too, it has already been well written in an article on "Trade Unions" in 27 *Encyclopædia Britannica* (11th Ed. 1911) pp. 150-153. As regards the court decisions of the several states, it is to be always borne in mind that some of the states have enacted legislation touching these organizations differing in character and extent from each other, and that their decisions, based upon and influenced by such legislation, may be found conflicting and confusing as regards each other. For example, New York has passed laws excepting trade unions from restrictions on combinations and conspiracies imposed by other statutes or by the common law; and states like Michigan, Wisconsin, Nebraska, Montana, and North Carolina have laws excepting them especially from the operation of their anti-trust laws. The Texas statute, having a like effect, has been by its Supreme Court declared unconstitutional. See *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689.

On June 1, 1898, an act of Congress was approved (chapter 370, 30 Stat. 424 [U. S. Comp. St. 1901, p. 3205]), providing for arbitration of controversies between common carriers in interstate commerce and their employes. The act was permissive, and not mandatory in character, as to whether such arbitration should be submitted to by the parties concerned. Its tenth section, however, provided:

"That any employer subject to the provisions of this act and any officer, agent, or receiver of such employer who shall require any employé, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employé with loss of employment, or shall unjustly discriminate against any employé because of his membership in such a labor corporation, association,

or organization; or who shall require any employé or any person seeking employment, as a condition of such employment to enter into a contract whereby such employé or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employé, attempt or conspire to prevent such employé from obtaining employment, or who shall, after the quitting of an employé, attempt or conspire to prevent such employé from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

This section was held unconstitutional and void in *United States v. Scott* (D. C.) 148 Fed. 431, *Order of R. R. Telegraphers v. Louisville & N. R. Co.* (C. C.) 148 Fed. 437, and in *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764. In this latter case the Supreme Court holds such a provision "to be an invasion of personal liberty, as well as of the right of property, guaranteed by the fifth amendment to the Constitution of the United States." This leaves the Act June 20, 1886, c. 567, 24 Stat. 86 (U. S. Comp. St. 1901, p. 3204), 7 Fed. Stat. Ann. 334, entitled "An act to legalize the incorporation of national trade unions," as our only federal law in amendment or modification of the common law upon the subject of trade unions. This statute has been construed by Jenkins, Circuit Judge, in *Farmers' Loan & Trust Co. v. Northern Pacific R. Co.* (C. C.) 60 Fed. 803. At page 816 he says:

"It was asserted at the argument with great confidence that the act of Congress entitled 'An act to legalize incorporation of national trades unions' (24 Stat. c. 567) had entirely changed the common law. I think the confidence of counsel in the assertion of the proposition was born of zeal, not of judgment. The statute provides for the formation of national trades unions, with power to establish constitution, rules, and by-laws to carry out its lawful objects, and defines the term 'national trade union' to be 'an association of working people having two or more branches in the states or territories of the United States for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages, and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of the sick, disabled or unemployed members, or the families of deceased members, or for such other object or objects for which workmen may lawfully combine, having in view their mutual protection or benefit.' The most that can be claimed for this statute is that it removes the common-law disability of combination to raise the price of labor, and to establish the conditions of labor. It contains no suggestion of any right to combine or conspire with a view to injure or oppress or interfere with the rights of others. The organization of labor for the purpose specified in the statute is lawful and commendable, but the statute does not sanction the use of a lawful organization for an unlawful purpose. Nor does it permit such organization to invade the rights of others. Under this act, labor may organize to regulate wages, the hours of labor, and the conditions of labor, and for the protection of individual rights in the prosecution of labor; but such lawful organization cannot be employed to injure property, or for the oppression of others, or to harm the public welfare. There is nothing in the statute which sanctions that which the law, as above declared, condemns."

It was also construed in *Arthur v. Oakes* (C. C. A. 7th Cir.) 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414, where Mr. Justice Harlan says:

"Some reference was made in argument to the act of Congress of June 29, 1886, legalizing the incorporation of national trades unions. 24 Stat. 86, c. 567. It is not perceived that this reference is at all pertinent to the present discussion. That act does not in any degree sanction illegal combinations. It recognizes the legal character of any association of working people having two or more branches in the states or territories of the United States, and established 'for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of the sick, disabled, or unemployed members or the families of deceased members, or for such other object or objects for which working people may lawfully combine, having in view their mutual protection or benefit.' Associations of that character are authorized to make and establish such constitutions, rules, and by-laws as they deem proper to carry out their lawful objects. Those objects, as defined by Congress, are most praiseworthy, and should be sustained by the courts whenever their power to that end is properly invoked. What we have said about illegal combinations has no reference to such associations, but only to combinations formed with the intent to employ force, intimidation, threats, or other wrongful methods whereby the public will be injured, or whereby will be impaired the absolute right of individuals, whether belonging to such combinations or not, to dispose of their labor or property upon such terms as to them seem best."

The only statute of West Virginia relating to these trade unions that could be held to be in amendment or modification of the common law in force in the state is Act Leg. 1907 (Reg. Sess.) c. 78, § 19 (Code Supp. 1909, § 413a1), which re-enacted the latter clause of section 413, Code 1906. Code 1899, p. 1053, § 14. This statute has been construed by the Supreme Court of Appeals in *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Ann. Cas. 885, wherein Brannon, J., speaking for the court, says:

"The defendants rely on Code 1899, p. 1053, section 14 reading as follows: 'Nor shall any person or persons or combination of persons by force, threats, menace or intimidation of any kind, prevent or attempt to prevent from working in or about any mine, any person or persons who have the lawful right to work in or about the same, and who desire so to work; but this provision shall not be so construed as to prevent any two or more persons from associating themselves together under the name of Knights of Labor, or any other name they may desire, for any lawful purpose, or from using moral suasion or lawful argument, to induce any one not to work on and about any mine.' This statute is a penal, criminal statute; for it makes the acts in it specified unlawful, and by section 17 imposes a punishment. This is a criminal act. It does not pretend to create rights between individuals. It prohibits certain acts, and the proviso simply curtails the scope of the enactment by saying that the enacting clause shall not be construed to impair any right already existing, if existing, to join the organizations therein specified or use moral suasion. It is only a curb upon the enactment. It does not affirmatively grant, create, or originate those rights. It does not make them lawful, if before unlawful. And could the Legislature authorize any person to violate a contract?"

In *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863, the Supreme Court of Appeals of West Virginia says:

"The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights or does the same thing by restricting the privileges of certain classes of citizens and not of others, when there is no public necessity for such discrimination, is unconstitutional and void."

And in *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, Mr. Justice Lamar, speaking for the court, says:

"Society itself is an organization, and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right powerful labor unions have been organized. But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution, or by standing on such rights, and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one."

Further citation of authority would seem to be unnecessary to establish the proposition that under federal legislation and that of West Virginia the common law is in full force, and that the several propositions I have set forth are the principles of law to govern in the determination of this case. Before applying these principles to this particular organization and case, I cannot, in view of the extended quotations from labor leaders and advocates contained in the brief of counsel for defendants, but disclaim the sentiment expressed by such leaders, to the effect that either the legislative bodies or the courts of this country, federal or state, have been or are unfriendly to labor organizations. The contrary is true. The statute books are full of laws for the benefit of labor to better their conditions, to insure their health, safety, and their lives. Organized labor is entitled to all praise for the effective work done in aid of securing these laws. And the courts of the country have been prompt in fully and effectively enforcing such laws.

[6] All labor unions organized for lawful purposes, and striving to achieve those purposes by lawful means and procedure, are entitled to the protection of the law to the fullest extent, but, on the other hand, any and all combinations, labor or otherwise, organized for unlawful purposes, or being lawful in purpose which are prostituted to unlawful proceeding and to the accomplishment of unlawful ends, should be required either to reform their unlawful purposes, cease from their unlawful procedure, or cease to exist. And no part of the body politic is or can be more vitally interested in the suppression of labor organizations unlawful in purpose or proceeding unlawfully than the members of such organizations lawful in purpose and procedure. In determining the character of this International Mine Workers Union assailed in this case, as disclosed by the near 8,000 pages of evidence, for reasons that will more fully appear hereafter, I purpose to reverse

the order, and consider first its relation to the general public and especially to the citizenship of West Virginia. It appears clearly established that in 1898 this organization had a membership of over 30,000, the bulk of which resided in Western Pennsylvania, Ohio, Indiana, and Illinois; that in that year they sought and secured a joint conference with an organization of coal operators, the employers of its members, in these states. Such conference was had, and as a result a distinct agreement was entered into. From the stenographic report (admitted to be correct) of the "Proceedings of Joint Conference of Coal Operators and Coal Miners of Western Pennsylvania, Ohio and Indiana," subsequently held in Cincinnati, March 8-29, 1910, filed in this cause as "McKinley's Exhibit No. 4," the purport of this Chicago agreement is fully disclosed. In reply to certain propositions presented by the defendant here, Mr. Lewis, then president of the union, Mr. Maurer of Ohio read on behalf of the operators a statement from which I quote:

"The answer of the operators to the proposition of the miners, in order to be thoroughly understood, makes it necessary to recall the history of wage agreements, and trace with brevity the conditions under which we have from time to time met as operators and miners and effected such agreements, so as to show connectedly the factors which have controlled both parties up to the present time.

"In the years prior to any substantial agreement the conditions of the mining industry were very unsatisfactory in their influence upon both the operators of mines and the miners in the various competitive districts. A remedy for this state of chaos was earnestly sought by both parties, and resulted in the early '80's in agreements between the operators and miners of Western Pennsylvania, Ohio, Indiana, and Illinois. In 1886 the institution of contracts between miners and operators was effected. These contracts operated with varying degrees of success and failure for some years and until about the year 1894, when these relations were dissolved. The conditions again took on an aspect of demoralization, which continued with varying degrees of intensity, numerous strikes, lockouts, and consequent loss in wages and profits and sometimes injuries to property, until in the year 1898. During this period the conditions were such, both as to the price received for coal by operators and the price paid to the miners, that it became imperative for the interests of each to re-establish in some form the former agreements. At this time the basing price of the Hocking district was 56 cents per ton for screened lump coal. For a short time immediately preceding that year the mining rate was 51 cents. The working hours in the districts, parties to the early agreements, were from 9½ to 10 hours per day.

"The chief evil was the fact that districts which did not recognize the United Mine Workers and had no agreements with them produced coal much more cheaply than those districts which sustained contractual relations with that organization. Some of the more important factors influencing these conditions were different methods of producing coal, varying costs of mining, different hours of labor, different sized screens, not mentioning various other elements.

"In order to correct these most harmful conditions, a joint convention of operators and miners of Western Pennsylvania, Ohio, Indiana, and Illinois, at the solicitation of the miners' officials, was called to meet at Chicago in January, 1898. At this convention an interstate joint agreement was established. After a long session of deliberation and negotiation, continuing over a period of about three weeks, the basing price for mining in Ohio and Pennsylvania was increased from 56 to 66 cents per ton, an advance of practically 18 per cent., and both the existing price and method of screening and weighing of coal was made uniform throughout the entire territory covered by the terms of the contract. As a result of the Chicago convention,

a representative meeting was subsequently held at Columbus, at which a uniform day wage scale was established for inside labor. All of these concessions made by the operators were of substantial benefit to the miners.

"In addition to the advance in the price of mining and the other important concessions enumerated, the action of this convention had an effect of the most far-reaching and salutary character, not alone for the mine workers, but for the entire labor world, in the recognition of eight hours as constituting a day's labor; this being the first recognition of the eight-hour day by any large body of employers in the United States. *The granting of the eight-hour day by the operators, after making these numerous other important concessions, was with the distinct understanding and explicit promise of the miners to give to the operators of the four contracting states adequate protection against the competition of the unorganized fields. From year to year they have been called upon to fulfill that promise.* The operators, parties to that agreement, at the time of its execution, felt that it was absolutely necessary to the safety of their investments that they be protected from the encroachments upon them by their competitors of the unorganized fields. The tonnage of the nonunion fields entering into the competitive market, particularly of West Virginia and Kentucky, at that time was not so large, as it was aggressive and threatening, the total tonnage entering directly into competition from those fields being approximately 600,000 tons. Since, however, coal from this unorganized territory coming into direct competition with Ohio and Pennsylvania has so increased that a fair estimate places this competitive tonnage at 8,000,000 tons, which does not include the tonnage from nonunion fields adjacent to the Pittsburgh district. The markets in Western and Northern Ohio, Eastern Indiana, and Michigan, from year to year have been encroached upon by coal from the unorganized districts, until at the present time nearly 50 per cent. of the coal consumed in these markets is supplied from fields operated with nonunion labor. To find a market for the union tonnage displaced in the territory named, the mineowners of Ohio and Pennsylvania within the past five years have made heavy investments and built and equipped large coal docks to secure the markets at the upper lake ports; but these operators now find the nonunion coal rapidly commanding a heavy percentage of this market, when, at the time of the Chicago agreement, the nonunion fields had but a small fraction of this trade, and, unless these conditions are corrected, the markets so secured will soon be replaced by the tonnage from West Virginia and Kentucky. Though in the very heart of the consuming territory, on account of the wide difference between the price of labor in the organized fields of Ohio and Pennsylvania and the unorganized fields of West Virginia, Kentucky, and the fields adjacent to the Pittsburgh district, Ohio, and Western Pennsylvania are rapidly losing the markets at their very doors. It is evident to any candid observer that such unfair conditions should not be imposed upon the operators and miners of the unionized territory. That the interests of operators and miners are mutual in every respect does not admit of controversy. *Each is equally concerned in rescuing this business from its present peril.*

"Finally, we ask for the fulfillment of the pledge of 1898 upon which we made to the miners so many important and costly concessions. Though that promise has not been kept, we have continued for 12 years to make additional concessions by increasing the mining price from 66 cents agreed upon at that time to 90 cents, and in other respects conceding demands without any compensating concessions upon the part of the miners, until we now find ourselves at the limit of financial safety. The operators can make no further concessions. It is now, in our view, not only to the interest of the miners, but their duty as well, to do their share to meet these conditions."

The Chicago agreement and its purposes as set forth by Maurer were substantially admitted. In proof of this I quote from the remarks of Mr. Green, a defendant here, as follows:

"Our friend, Mr. Maurer, in the well-prepared statement he has submitted to this convention, referred to an obligation he claims was assumed by the

United Mine Workers of America in the meeting at Chicago in 1898. Mr. Chairman and gentlemen, we agreed that to a certain extent that was right; but I do not believe it was ever understood that one party to this contract was obligated exclusively to carry out that promise. I believe it was intended to be a mutual understanding, and that both sides would co-operate in trying to organize West Virginia and other nonunion districts in order to extend this businesslike basis of adjusting our differences to those fields.

"Let me point to the fact that the United Mine Workers of America have diligently and aggressively attempted to carry out the promise made in Chicago in 1898; that they have done everything in their power to redeem any promise they may have made to organize West Virginia. Since 1898 our organization has at various times spent hundreds of thousands of dollars trying to unionize West Virginia. We have also sacrificed human life in the attempt to redeem that promise. In view of the fact that we have spent hundreds of thousands of dollars and that our organizers, our members who have gone there as missionaries in an attempt to redeem that promise, have sacrificed their lives and their liberties, we should be given credit for what we have done. I want to ask the operators how much money they have spent, and what they have done to aid us to organize West Virginia.

"Is the fact that we have spent hundreds of thousands of dollars appropriated from the small earnings of our people in the central competitive field, and the fact that we have sacrificed the liberty of some of our members, any evidence that we have tried to redeem that promise? Does not that show that we have honestly, sincerely, and diligently attempted to redeem it? I believe, gentlemen, that if the operators had done one-half as much as the miners have done, if they had even co-operated with us in what we have done, West Virginia would be organized and the operators and miners of that state would be here to-day participating in this joint movement."

The "plea in the nature of confession and avoidance" contained in the last paragraph of Mr. Green's argument had been advanced by Mr. Lewis, and was urged by him in these words:

"We want to say, and we say it kindly but positively to the gentlemen on the other side of the house, 'Get together and organize, not only in Ohio and West Virginia'—and I know a lot of you have influence enough over there, if you do as much work as we do, to organize them."

But at the same time it is manifest that he recognized the danger of the public declaration of such purpose, for, prior in the discussion, he had said:

"If I have a proper conception of this movement it means the uplifting of the industry. If I have a proper conception of this movement, it does not mean that either operators or miners can publicly say, 'We will organize West Virginia in order that the miners of Ohio or Indiana can get more work.' That has done more to prevent the organization of West Virginia than anything I know of. Coupled with that is the attitude of Ohio and Western Pennsylvania, probably of Indiana, and I know of some Illinois operators who have gone to West Virginia, and have built human fences around their properties. I mean by that that they surround their properties with pickets, men who, even when the organizers of the United Mine Workers want to walk along a county or township road passing through the properties, is met at the property line and compelled to state what his business is before he can walk on the public highway. Men will say that that is not possible in a free country, but I say it is possible. It is possible in some mining districts in this country, and I believe they are in the United States, because they are in West Virginia, Kentucky, Tennessee, Alabama, and a few places in Pennsylvania."

I further quote from the remarks of Mr. Feehan of Pennsylvania, another member and representative of the union, as follows:

"We are unwilling that the nonunion operators and miners of West Virginia or of any other coal field shall set the standard of prices and the standard of living for the intelligent operators and miners engaged in the mining industry in the states that are represented here. I believe that is the honest opinion of all of the operators who are present. It is unnecessary for me to refer to the fact that many of the operators who are represented here in this joint conference have interests in West Virginia and in other nonunion coal fields whose products are going into the markets they are complaining of. It is true that they have contributed, with the other operators who are engaged in the industry in those states and districts, to keep the organization from obtaining a hold or becoming a factor in the industry in those fields of which they complain. If they will withdraw their objections to the establishment of the organization in those fields, I am sure they would not be confronted with those conditions, and we would be able to remove the evil in a very brief time. The practices resorted to by the nonunion operators of West Virginia are un-American."

Also from Mr. Maurer's reply:

"We have a condition confronting this convention as grave as confronted the convention that met in Chicago in 1898. We have this great tonnage from the unorganized fields of West Virginia and Kentucky that is absolutely taking away from us our markets, and taking away the employment which belongs to you. It is a condition that not one of us must meet, but that both of us must meet, not only for our protection, but for your protection as well. The cost of living is only incident to it, and the mine-run basis is only incident to it. Every man who swings the pick will agree with me that we can pay you no more for mining coal than we can get for the product of your labor. And I am going to put up to you, I am willing to concede to this convention that West Virginia is not organized, that for 10 or 12 long years the miners have done everything in their power to organize that field, and that they did it diligently and earnestly is admitted, nevertheless that field to-day is unorganized. Nobody is to blame. Neither the operator nor the miner is to blame for that condition; but it is a condition that we must meet, and each one bear his share of the burden. Eight million tons of the coal from that unorganized state is to-day taking away from you the product of your labor, and taking away from the operator every cent of profit he ever had in the business. You cannot correct that. *You may say to us, 'You must get together and agree upon prices. You must get the West Virginia operators in and agree upon a price.' Why, every man who stands here knows that, if the operators in the state of Ohio attempt it, they do so in violation of the Valentine Law, and that the penitentiary stares them in the face. Every miner here knows that, if in the states of Ohio and West Virginia the operators were to attempt anything of the kind, they would violate, not only the Valentine Law of Ohio, but they would violate the Sherman Anti-Trust Law.* It is easy to tell us what to do, but you should also tell us how to do it. Does any miner here believe that the operators of the state of Ohio have not tried to get the best price they can for their commodity? We have some interest in our business, we have our money invested in it, and I assure you that for two years the miners and the railroads have got every cent there was in it, and more too. However, we stayed in the market. We gave you employment. Now it is up to the miners of this state to meet those conditions, and bear their share of that burden. I want to tell you here that, if the miners of the state of Ohio insist on an increased price of their coal, they will lose every bit of business they have on the Great Lakes. You have already lost your commercial business. Who supplies Michigan to-day with commercial coal? Who supplies Detroit? Who supplies Toledo? Who supplies Marion? Who supplies Columbus, right in the heart of the Hocking district? Who supplies Eastern Indiana? Who supplies all of Western Ohio? Tell me, tell me you miners from the

Hocking Valley, who have seen your mines lay idle while West Virginia coal in train load lots has gone past your mines! Tell me you miners in Eastern Ohio, who have stood idly by, and watched Fairmont coal in train load lots taking your markets! Ninety per cent. of that market is supplied by West Virginia coal from the nonunion fields. I say to you the cost of living does not enter into this. I say to you these other elements did not enter into this. I say to you that the best price we can get for our coal under the competitive conditions will not admit of it.

"You miners who mine coal in the state of Ohio, and, if you please, in Western Pennsylvania, know that every bit of the trade I refer to was formerly supplied by Ohio and Pennsylvania, even down to the gas business, but it is now supplied by West Virginia."

And from Mr. Lewis' rejoinder:

"Now the argument is made that we ought to turn our attention to West Virginia, and stop the competition from that state. I admit that argument is good; but, in order for that argument to have strength, it is necessary for the operators at home to stop the kind of guerilla warfare they have among themselves. Mr. Maurer has very well said—and I am glad he has brought the subject up—that we say to the operators, 'Get a better price for your coal in order that you can pay us a better price for our labor.' Then he supplements that statement, and very properly, by the statement that, if they were to organize to get a better price for their coal, they would be haled into court under the provisions of the Valentine Law of Ohio and possibly sent to the penitentiary. Probably we would, too. He supplements that statement by asking us to tell them how to get a better price for their coal. I am going to tell you. First, stop making war on the railroads. The poor fellows need help! And this proposition is going to be no joke. I recognize what the mining industry is. I recognize that it is more important than transportation. I recognize that the Valentine Law of the state of Ohio was put on the statute books by a lot of political demagogues who believed they were working in the interests of the dear people—and they did it once for the dear people and about 20 times for themselves! I recognize that this industry does not occupy the plane among the industries of the country that it ought to occupy, because we have met in joint conventions year after year and discussed our wage relations, instead of devoting some of our time to going out and telling certain people to keep their hands off our business. The railroad companies of this country say to the mine-owners, 'We want our fuel at a certain rate.' The mineowners, in order to get a part of the fuel trade of the railroads, put down the prices in some instances to cost, not because of competition, but because of your desire to get a part of that trade. Then, after securing a part of that trade, the official representatives of the railroads are in so close touch with the leaders of the manufacturing industries of our country that the steam trade, as we call it, buys fuel almost at as cheap a price as the railroad company. Then, in order to make ends meet, somebody must pay a better price, and it is usually the domestic consumers, the masses of the people. And that is where the political demagogues get their work in, because they are the people who have votes, and that is why they have anti-conspiracy laws placed on the statute books."

Mr. Chapman of Ohio, an operator, contributed to the discussion some figures as follows:

"It is an admitted fact that there is a difference to-day of between 40 and 50 cents per ton in the cost of production of coal in the union fields of Ohio and the nonunion fields of the trade east and south of us in West Virginia, Kentucky, Tennessee, and Alabama, and three of those states, gentlemen, are competitors in the markets of Ohio coal—West Virginia, Kentucky, and Tennessee. The production of West Virginia for 1907 was 40,043,311 gross tons; 44,091,000 being net tons. In 1908 the production was 44,091,000 net tons. In 1909 the production was 44,495,000 net tons. Ohio's pro-

duction for 1907 was 32,365,949 net tons; in 1908, 26,287,800 net tons; and in 1909, 27,756,172 net tons. There are some more interesting statistics connected with this proposition. The following are the numbers of days the miners worked in West Virginia during the years from 1904 to 1909: 1904, 209; 1905, 213; 1906, 237; 1907, 234; 1908, 211; 1909, 192; making an average of 216 days of 10 hours per day, or a total of 2,160 hours worked each year. Reduced to eight hours per day would be an average of 270 days each year. Ohio worked in 1904, 164 days; 1905, 171; 1906, 175; 1907, 204; 1908, 157; 1909, 165 days, an average for the six years of 173 days, or 97 days less than the average work in West Virginia on the eight-hour basis,"

—and then said:

"Now, gentlemen, it is useless, after the discussions that have taken place here by the gentlemen who preceded me, to discuss at any great length the market that the nonunion fields have taken from Ohio in the past. It has been well said that they are putting coal into Columbus, into Michigan, into Detroit, taking the markets that heretofore have been enjoyed by Ohio coal. In the city of Athens, Ohio, which is within three miles of several of the large producing Hocking Valley mines, West Virginia coal is being sold. The gentlemen who are familiar with the situation have informed me that over 2,000 tons of West Virginia coal was sold there between the 1st of September and a short time ago. Even in the town of Logan, one of the points where Hocking Valley gathers its trains to start its coal out to the markets they have, West Virginia coal is taking that market. The gentlemen who were in the Toledo convention and returned on the Hocking Valley train, if they had their eyes open, would have seen full solid trains of Norfolk and Western coal passing up over that road to Toledo. There was not a single car of Hocking Valley coal in the trains. At the town of Bowling Green, 20 miles south of Toledo, when I came through a few weeks ago, I saw every car of coal standing on the side tracks were loaded with West Virginia coal.

"Think of the proposition, gentlemen! Toledo, the central point at which several Ohio coal roads bring everything, and 60 per cent. or more of the coal being consumed there is from West Virginia! The Pennsylvania people have a road coming in there, the Wheeling & Lake Erie have a road coming in there, the Toledo & Ohio Central goes in there, the Hocking Valley goes in there, and the D. T. & I. goes in there on a direct line. Now just consider that proposition for a minute, and is it any wonder that Ohio coal operators and interests are in the condition they are to-day with that state of affairs? It was well said by Mr. Lewis and Mr. Penna that people buy their fuel where they can buy it cheapest. I am not through with this proposition. I want to bring you to the city we are now holding this convention in and give you a few figures. In 1897 Pittsburg shipped by river 1,401,000 tons of coal to the city of Cincinnati. The Kanawha region shipped by river 717,000 tons of coal. The Kanawha fields shipped by rail 704,000 tons. The other interests from West Virginia, Kentucky, and Tennessee shipped here 275,400 tons. Now we will come to the year 1908.

"Pittsburg district shipped 535,000 tons to the city of Cincinnati in 1908 as against 10,401,000 (manifestly a mistake—should be 1,401,000) in 1897. Kanawha shipped by river 867,000 tons in 1908 as against 717,000 tons in 1897, and Kanawha shipped by rail in 1908, 1,848,000 tons, as against 462,000 in 1897. The Pocahontas district, the Tennessee and Alabama fields shipped in 1908 by rail 1,512,000 tons to the city of Cincinnati as against 275,400 in 1907."

The reasons why West Virginia coals are able to supplant those of Ohio, Western Pennsylvania, Indiana, and Illinois operations in which both sides of this conference were so vitally interested are contributed by both operator and mine representative.

By Mr. Chapman, operator:

"It is not surprising that West Virginia is on a mine-run basis. Why? Because a large per cent. of all the fine coal that is produced in that state

is made into coke. They even crush the lump coal after they produce it to make coke, which is a much more valuable product to them and yields them more returns than the raw coal will. We haven't any of those coals in Ohio or Indiana and they have none of them in Western Pennsylvania outside of the coking coal as it is known there."

By Mr. Feehan, mine representative:

"There is one point I want to bring out that has not been made clear, and that is the disadvantage the operators of Eastern Ohio are put to in competing for the markets against the operators who have interests in West Virginia, and that is the character of the veins. In West Virginia it is not an uncommon thing to have them develop from six to ten feet of clean coal. There is no slate to remove. It is easily mined. It is a good grade of coal. It can find a market; and, when you take into consideration the cost of producing a ton of that coal compared with the little five-foot vein of coal in Eastern Ohio with its many impurities and its thick slate, and the Pittsburg district, with its weak roof, where in many cases it is difficult to operate a machine, as well as many other natural disadvantages the operators have, herein lies the cause of the competition more than in the cost of labor. The cost of labor is not the important factor that is crowding the Eastern Ohio operators out of the market on the Lakes or elsewhere. It is the natural disadvantages that is doing it. There is one advantage the operators in Eastern Ohio have, and that is their geographical situation. They are nearer the lake markets and other markets, and I believe they have an advantage of from 15 to 25 cents a ton in freight rates. I understand that, when the decision of the Interstate Commerce Commission goes into effect, they will have even greater advantages in freight rates. It is fortunate for them that they have these advantages. Were it not for their advantages in the matter of freight rates, I am positive that many of the veins of coal now being worked in Ohio and elsewhere would be abandoned, and they would wait until the big veins with the greater natural advantages in West Virginia were worked out before they would again operate there. These factors have not been seriously enough considered heretofore."

By Mr. Chapman:

"In 1907 and 1908 the miners earned more money in West Virginia at the prices they were paid there than were earned by Ohio. In fact, they earned from \$100 to \$150 more to the man. That tells the tale concerning that matter. * * * The coals of West Virginia are said to be mined at about one-half the cost of producing Ohio coals, and the West Virginia product has taken the Ohio markets to the full extent permitted by the difference in transportation expenses, leaving Ohio coals only such markets as may be near the mines, and, as the means of transportation increases by which West Virginia coals are put farther into Ohio markets, the prospect of the Ohio mines is not bright."

I quote further from the remarks of Mr. Savage, of Ohio, one of the defendants here, as follows:

"I was surprised a minute ago to hear that some of the operators were not in sympathy with the men in trying to get a readjustment of their freight rates in Ohio. I know as one miner we did all we possibly could in giving testimony before the commission in Columbus, and from what I heard then I believed, and I believe now, that the operators were absolutely right in asking for this readjustment. I believe I can assure you that we will help you in every manner that we can to get that readjustment. But we would ask you, on the other hand, if we are willing to help you—and by helping you we agree we are helping ourselves—if you operators from Ohio and Pennsylvania will lend us the same assistance in West Virginia in getting the mining price up so that competition will not prevail. When we ask that, what do we find? Operators have told me in years past that they were willing to have the miners organized in Ohio, but they were not willing that their

miners should be organized in West Virginia. We find as great opposition on the part of the operators from this state who have mines in West Virginia as we find from the operators resident there. If we are going to work along the line of mutual benefit, let us make West Virginia a union state. Go down there and practice what you preach in Ohio. Help us get the protection of the law in that state, and I think we can organize the miners. Instead of helping us, what have you done? You have done nothing but retard the progress of our organization in that state. The reason they have assigned to me for their attitude was that the caliber of the men employed in the mines of West Virginia was such that, if they were organized, it would be impossible to control them. I believe that a large percentage of those men are as intelligent as we are, and, once they understand the benefits of the organization and the benefits of the contract we enter into, they will observe those contracts as religiously as the miners in Ohio, Pennsylvania, Indiana, or any other state."

And finally from Mr. Zerbe, of Ohio, an operator:

"A very considerable amount of censure and criticism has been put upon some operators who are here because of the fact that they have gone to West Virginia and found investments. I will remind the other side of the house that the men who have gone into Virginia are business men. They are engaged in the coal industry, and they bring the commodity from one state or another to furnish fuel for such contracts as they take. They have found by experience that you as an organized body are not treating them fairly where they are circumscribed in the production of this commodity. They find that you are putting upon them burdens in the organized fields that do not exist in the unorganized fields. By reason of the fact that you cannot control in the production of this commodity, although we are willing to admit you have made an effort, their market is being taken from them or restricted or narrowed, and many of them in self-defense find it necessary, in order to carry out contracts and fulfill their obligations to those who take this commodity from them, to go to West Virginia and invest in properties there that they may continue a business for which they are obligated. * * * We might argue this up one side and down another for a year, and we would be no nearer a solution of this proposition. We are, when we get through, right up against the one proposition we cannot get through which has been created by the competition brought to bear against us by the operators and the miners of West Virginia in the unorganized field."

It is impossible to deny the conclusions to be drawn from all this. By reason of the natural advantages in the way of superior veins, roofs, and quality, West Virginia coals can be mined for something like 50 per cent. less than those of Ohio, Western Pennsylvania, Indiana, and Illinois, and then even her miners can make better wages. The officers and members of this union are almost wholly residents of Ohio, Western Pennsylvania, Indiana, and Illinois. In 1898 as an organization they entered into a direct contract with the operators of that field for and in consideration of an eight hour labor day and other concessions to organize the West Virginia miners, and, by reason of the control they would have under the unions' laws over such miners when so organized, "protect" these operators in Ohio, Western Pennsylvania, Indiana, and Illinois from the existing open competition even then threatening the markets of such operators especially in the West and the Lake regions. For the purpose of carrying out the agreement, this labor organization has, in the language of the defendant, Green, one of its officers, "at various times spent hundreds of thousands of dollars trying to unionize West Virginia," and "sacrificed

human life in the attempt to redeem that promise." Was this in the interest of and for the bettering of mine laborers in West Virginia? It is impossible to see how it could be, for in this conference between the operators and union representatives in March, 1910, as we have shown, direct statistics were given by Mr. Chapman and not controverted, showing that the West Virginia miners, unorganized, were getting more work and more wages than miners in this unionized field of Ohio, Western Pennsylvania, Indiana, and Illinois. In illustration of this, it seems to me that I may properly refer to conditions as they exist to-day, as disclosed by a public report made to the Governor of the state of West Virginia by a commission appointed by him to investigate and report upon such conditions. The members of this commission were Bishop P. J. Donahue of the Catholic Diocese of this state, Capt. S. L. Walker of the State Militia, and F. O. Blue, State Tax Commissioner, men of the highest character and integrity. From this report and current history it appears that the effort to unionize West Virginia still continues, and has more recently been directed to the Paint Creek and Cabin Creek fields in Kanawha county; that such efforts have led to such a condition of riot, bloodshed, and general lawlessness as to require the Governor of the state to twice put the district under martial law to save life and property. I quote from the report as to the condition of the miners:

"To this inquiry we have devoted special attention within the limits of the time and opportunity at our disposal and after careful personal investigation, supplemented by a great body of formal sworn testimony sifted, and tested by severe and exhaustive cross-examination, this commission has arrived at the unanimous conclusion that the general surroundings of the miners on Paint Creek and Cabin Creek, respectively, are very good when compared with those of the miners of the few unionized plants on the right bank of the Kanawha and with those of the miners throughout the state and the nation. We have gone into their houses and carefully examined them. They are above the average of miners' homes in most places."

And as to wages:

"A careful consideration of the evidence adduced leads us to the following conclusions: (1) The average annual wage of miners in West Virginia for the years 1905-1911, inclusive, is \$554.26. (2) The average annual wage of miners on Paint Creek and Cabin Creek is from \$600 to \$700. (3) The average wage on Paint Creek and Cabin Creek (nonunion) is fully equal to if not greater than that of the miners in the very limited number of unionized plants, in the state on the opposite bank of the Kanawha river. These figures may appear small and inadequate, but, slender as they are, they exceed the average wage obtained in Illinois, a unionized state, which is but \$510.86 a year. We have been unable to secure any official figures as to the average annual wage in the unionized states of Indiana, Western Pennsylvania, and Ohio. But we are informed by experts, and we believe, that the average wage in the two states first mentioned probably falls a little below that prevailing in Illinois; while the annual wage in Ohio, owing to local mining conditions, falls a little below those of Western Pennsylvania. This classification, in the order of the rewards of labor, puts West Virginia at the head of the list. If we inquire into these figures more closely, we find they are very substantially affected by several causes, among which comes first the unwillingness of a large number of the miners to work more than four days a week at the most. A minute examination of the pay rolls discloses the fact that 16 or 17 days in the month constitute a high average, and that many engaged in the mines decline to labor more than

12 or 14 days. This is particularly true of some of the native-born miners and many colored men, and results in the necessity of keeping 20 or 30 per cent. more miners in a given operation than would be required if steady application to work were the rule. At several of the mines in the districts under investigation were found men wholly illiterate, and without any special knowledge or skill other than that acquired by their daily experience, earning \$4 to \$5 and in some cases even \$6 a day of eight or nine hours, men with savings bank accounts of \$1,000 to \$2,000, and others who had purchased out of their savings small farms or other properties adjacent to the mines."

And as to the causes of the trouble:

"This arises, in our judgment, from the efforts of the United Mine Workers to organize the union in the whole chain of plants along said creeks. Their desire is to make the present strike region the place for the insertion of the thin edge of the wedge of unionism with the ultimate aim of organizing the whole state. The frank declaration on oath of Mr. Thos. Cairns, local president of district No. 17, would appear to put this intention beyond the region of doubt. The United Mine Workers Association contends that this is essential to the well-being of the 76,000 or more miners of West Virginia. That by this means and this alone can their lot be improved, their rights safeguarded, and the standard of living so raised as to bring it up to a level befitting a citizen, howsoever lowly, of this republic. All classes of people, recognizing the force of the adage 'In union there is strength,' do so organize. Even the operators themselves form associations. 'Why,' say the toilers, 'should we also not unite in lawful combinations?' The operators cannot and do not resist this right as a general proposition, but their claim is that the peculiar industrial conditions in West Virginia would render it ruinous and therefore impossible for them to recognize the union. The geographical position of this state is such, together with the small consumption within her own borders, that of her total coal output of over 60,000,000 of tons she markets barely 10 per cent. within her own borders and 90 per cent. or more must be hauled to the market through the competing territories of Pennsylvania, Ohio, Indiana, and Illinois known as the four competitive states; that the operators of said states have always on the floors of joint miners' and mineowners' conventions shown fierce and undisguised hostility to this state, endeavoring in every way to crowd her out of the market and going the length of stating by the mouth of one of Pennsylvania's leading operators that the opening of mines here at all was 'an economic blunder.' Resort has even been had to the Interstate Commerce Commission resulting in reduction of rates to the material advantage of the competitors of West Virginia operators in freight differentials. It has been claimed, too, and with some appearance of probability, that the operators of the said four competitive states are hand and glove with the United Mine Workers in their attempts to unionize West Virginia, so that the representatives of the coal interests of this state must go with their relatively small representation into conventions to regulate conditions and prices, and would come home having rates imposed upon them which, taking into consideration the heavy differentials in railroad hauls, would practically put them out of business and close every mine in the state. They decline, they say, to be wiped out in such fashion. They claim the right to settle their own affairs within the borders of their own state. Even if they come to terms with the district authorities of the United Mine Workers here in West Virginia, these terms may not be approved at the headquarters at Indianapolis, and all the labored attempts at amicable adjustment may fall through. Further, they claim that the few unionized mines in West Virginia do not and cannot obtain anything like an adequate return on the capital invested. And so, to probe this deplorable situation down to the bed-rock of facts, the geographical position of West Virginia is largely responsible for all this industrial strife. Our retarded manufacturing development is also a contributing cause. The consumption of coal within our borders, as elsewhere noted herein, particularly by manufactories, is almost neg-

ligible. No state in the nation has more inviting natural resources nor offers greater inducements to manufacturing enterprise than West Virginia—great areas of superior coal for steam and coke, splendid timber of many species, almost inexhaustible supply of natural gas, and unlimited water power awaiting to be utilized in the arts of industry. It is impossible not to recognize the merit of, and to sympathize with, many of the contentions on both sides of this unhappy quarrel. Most assuredly each party believes unreservedly in the justice of its claims. It is in the attempted enforcement of them that each has passed the limits of justice to say nothing of Christian charity and broad humanity. Two facts loom big over the smaller ones developed in this bulk of testimony—the desperate efforts and often unwarranted and unlawful acts of the United Miners to force the union into the disturbed districts, and the equally desperate, unwarranted, and unlawful acts of the operators and their agents to keep the union out. Thus, for months before the actual break, union agitators, many of them strangers, attempted to invade Paint Creek and Cabin Creek to persuade the miners to join the union. They called meetings of the workers, and described to them the hardships and injustice of their lot and the oppression under which they suffered. The wildest theories concerning the rights of property and the means of production were propounded and advocated, and doctrines closely verging upon anarchy were upheld with such effect that men, who before were living peaceably and in comparative prosperity, purchased Winchesters, revolvers, blackjacks, and other murderous weapons to shoot down the coal 'barons' and their myrmidons. Mild-eyed men, 75 per cent. of them with usually cool Anglo-Saxon blood in their veins, and with instincts leaning to law and order inherited down through the centuries, gradually saw red, and with minds bent on havoc and slaughter marched from union districts across the river like Hugheston, Cannelton, and Boomer, patrolled the woods overhanging the creek bed and the mining plants, finally massing on the ridges at the headwaters, and arranging a march to sweep down Cabin Creek and destroy everything before them to the junction. Meanwhile, the operators hurried in over a hundred guards heavily armed, purchased several deadly machine guns, and many thousands of rounds of ammunition. Several murders were perpetrated, and all who could got away. Men, women, and children fled in terror, and many hid in cellars and caves. If ever there was a case for some strong measure like martial law, the conditions prevailing on Monday, September 2, 1912, the eve of the proclamation, presented it. In fact, in the opinion of expert witnesses on the scene, martial law, and martial law alone, was the only measure to meet the desperate situation. We believe, partly on the evidence adduced, and in part from the personal knowledge of two members of the commission who were on the ground, one in active military service, that but for such proclamation taking effect on Tuesday, September 3d, at daylight, there would have been great destruction of property and loss of life in the strike zone. The enormous quantities of Winchesters, revolvers, and other weapons up to machine guns captured from both sides and brought to camp at Paint Creek Junction also bore mute, but eloquent, witness of the height to which the passions of the opposing forces had mounted.

"Now these propositions, trite and fundamental as they are, will assist us to apportion the blame for the strike and the subsequent disorders on Paint Creek and Cabin Creek and the close neighborhood:

"First. Every man has a right to quit his employment, and seek other work for any grievance he has or injustice which he may conceive to have been done to him.

"Second. But he has absolutely no right to obstruct, molest, threaten, or otherwise prevent another man from taking the position he has of his own accord abandoned. Organized society and natural law can never yield one jot or tittle on that head. To do so would be to acquiesce in the régime of brute force—a veritable reign of terror.

"Third. Labor has the right to organize for its benefit, protection, increase of wages, and better living conditions, and to have recognition of such organization.

"Fourth. But its organization has no right to coerce by threats or violence any one to become affiliated with it when he does not desire to do so, nor to assault or put in bodily fear one who desires to labor without belonging to it, nor to destroy property of the employer who does not desire to contract with it, nor to violate its contract with its employer without cause.

"There is abundant evidence before us that a reign of terror was attempted to be organized in the strike district and outside of it. It is true that the officers of the United Mine Workers professed to counsel moderation and a strict observance of law and order on various occasions, but there is testimony tending strongly to show that harangues delivered in public, and of which stenographic reports have been submitted as exhibits, incited the miners to violence and in some cases to murder. These harangues were in some instances delivered in the presence of officers of the United Mine Workers' Association, and from platforms upon which they stood and from which they, too, spoke; but the murderous and anarchistic utterances referred to were never disclaimed or disapproved by them either at the time or subsequent to their delivery. Furthermore, there is some evidence tending to show that officers stood by without interfering or protesting, while nonunion men were brutally beaten. Again, the warning to other miners from outside not to come into the strike region published for many weeks in their local organ and also filed as an exhibit and amounting in effect to a grave threat throws a strong light on the actual situation. We fear that the net result of the action and utterances of those acting and speaking under the apparent sanction and approval of the officers of the United Mine Workers was to foment bitter feeling and to incite to serious breaches of the peace. In all this, even granting that they were not acting against any express law set down in the statute books, yet they were acting against the fundamental principles of right and justice."

These commissioners also examined the mining conditions existing in the Fairmont and Norfolk and Western regions of the state. I cannot extend this opinion by quoting further from it but am justified in saying that they found and report such conditions to be in effect very superior to those obtaining elsewhere in unionized fields, conditions under which men have remained in continuous employment for 15 to 20 years, have saved money and purchased homes and farms, have furnished to them houses comfortable, with electric lights, some with shower baths, good sanitation and water supply, and with wages such as to enable the foreign-born miners in the 44 operations of the Consolidated Coal Company (Fairmont field) to send from \$125,000 to \$150,000 annually to their dependent relatives in Europe.

All the evidence in this record goes to show pretty conclusively that the 14 years' struggle of this labor organization since it entered into the compact with the operators of Ohio, Western Pennsylvania, Indiana, and Illinois in 1898 to unionize the operations in West Virginia has not been in the interest either of the betterment of mine labor in the state or of upholding that free commerce in coal between the states guaranteed by federal law, but to restrain and even destroy it in West Virginia for the benefit of these unionized competitive states. It may be unfortunate for those states that nature has favored West Virginia, Kentucky, and other Southern states by giving them better coal and less expensive mining conditions, but this does not warrant the operators and miners there to combine and confederate for the purpose of depriving the consuming public of the right to purchase the better coal at the lower cost, if desired. Such a combination is clearly a common-law conspiracy, too far reaching to be reasonable,

in restraint of trade, as well, in my judgment, a direct violation of the Sherman Anti-Trust Law. It is further in my judgment a combination or conspiracy against the rights of the many thousands of nonunion miners in West Virginia who are entitled to enjoy the advantages in their labor that nature has given them.

But the question at once arises, How could this union carry out this contract with the operators of Ohio, Western Pennsylvania, Indiana, and Illinois to substantially restrain or suppress coal mining in West Virginia, Kentucky, and other states by unionizing them? This brings us squarely to an examination of its constitution, manual, obligations, by-laws, and rules, by which, according to the English decisions, the legality or illegality of such combinations is to be determined. Turning to these, which are in evidence and not denied, we find that, when a miner is initiated into this organization, he is required to take an obligation for life as follows:

"I do sincerely promise, of my own free will, to abide by the laws of this union; to bear true allegiance to, and keep inviolate the principles of the United Mine Workers of America; never to discriminate against a fellow worker on account of creed, color or nationality; to defend freedom of thought, whether expressed by tongue or pen, to defend on all occasions and to the extent of my ability the members of our organization.

"That I will not reveal to any employer or boss the name of any one a member of our union. That I will assist all members of our organization to obtain the highest wages possible for their work; that I will not accept a brother's job who is idle for advancing the interests of the union or seeking better remuneration for his labor; and, as the mine workers of the entire country are competitors in the labor world, I promise to cease work at any time I am called upon by the organization to do so. And I further promise to help and assist all brothers in adversity, and to have all mine workers join our union that we may all be able to enjoy the fruits of our labor; that I will never knowingly wrong a brother or see him wronged if I can prevent it.

"To all this I pledge my honor to observe and keep as long as life remains, or until I am absolved by the United Mine Workers of America."

This obligation is required under assurance beforehand that it will require "nothing contrary to your civil or religious duties," yet it does, in fact, require him to alienate for life or until the union absolves him "his freedom to dispose of his own labor or his own capital according to his own will, * * * make himself a slave" contrary to all law, English, American and common, and in express violation of the Bill of Rights set forth in the Constitution of West Virginia. It binds him never to accept employment in place of a fellow member "idle for advancing the interests of the union or seeking better remuneration for his labor," no matter how anxious he may be to secure work, how well satisfied he might be with the wage offered, and how much he may need the work by reason of a starving family on his hands to support. It further binds him "to cease work at any time I am called upon by the organization to do so," regardless of the dire consequence that may result to him and those dependent upon him. It may well be said that such provisions under the law cannot be enforced. No, not legally, but practically it is different. His refusal to comply with this obligation subjects or may subject him to such social ostracism on the part of his fellow members as to compel

obedience. They may taunt him with being without honor or integrity, they may call him "black sheep," "scab," and other opprobrious epithets given new meanings in the English language because of just such conditions arising under the operations of these labor combinations, and they may and do drive him out of work and the community as shown by the facts set forth in many decisions of the courts of this country. But this is immaterial from a legal standpoint, for, as I have shown, the law distinctly bans such obligations as unlawful, and therefore the requiring them on the part of these labor organizations is unlawful. But to further show how complete control the union thus obtains and how complete the surrender to such control on the part of the member is, I quote further from the constitution of its national organization as follows:

"Article I.

"Sec. 3. This organization shall be composed of international, district, sub-district and local unions.

"Sec. 4. The international union shall have jurisdiction over all districts, subdistricts and local unions, which shall be governed by this constitution."

"Article II.

"Section 1. The officers of the union shall be one president, one vice president, one secretary-treasurer, and an executive board to be composed of one member from each district under the jurisdiction of the United Mine Workers, each district to elect its member of the international executive board, the president, vice president and secretary-treasurer to be members of the board by reason of their position."

"Article IV.

"Sec. 11. The funds of the organization shall be used for the purpose of assisting those who are in need from idleness or distress, when the payment of the same has been approved by the international executive board."

"Article VII.

"Cards.

"Section 1. Local unions shall provide each member with a due card, upon which the dues and assessments paid by the member shall be entered, which shall be his receipt for the same.

"Sec. 2. Due cards shall not admit any person to membership from one local to another, and to protect the membership of individuals who are unable to pay their dues because of no local existing where they reside, the international, district and subdistrict secretaries shall, upon the payment of dues and assessments by said member, issue the usual cards for the same; provided that this shall not apply to a member living in a locality where a local union is in existence.

"Sec. 3. No person a member of the organization, who holds a due or transfer card showing him to be a member in good standing, shall be debarred or hindered from obtaining work on account of race, creed or nationality. Cards properly filled out and signed by the officers of miners' unions in foreign countries shall be accepted in lieu of initiation fees.

"Sec. 4. Any member desiring to leave the mine where his local is located and work elsewhere shall immediately make application to the secretary of the local for a transfer card, and if he has paid all dues and assessments, the president and recording secretary shall issue a transfer card to him, which shall be attested by the financial secretary, providing the local union is in good standing with the international, district and subdistrict unions, which shall be accepted in any district, and in case such person cannot produce a transfer card he shall pay the regular initiation fee. All transfer cards shall be deposited as the laws of the district where work is secured may direct.

"Sec. 5. When a person who has not been a member of the organization three months or more secures a transfer card from a local union in a district where a dispensation has been granted said transfer card shall not be accepted by any local in a different district from the one in which the local issuing the same is located, unless said transfer card is accompanied by an amount equal to the difference between the initiation fee paid by said member and the initiation fee provided for in the district where the card is deposited.

"Sec. 6. No card shall be issued to any member when the local is three or more months in arrears to the international, district or subdistrict for dues or assessments. Officers of any local union issuing cards in violation of any section of article VII shall be fined \$10.00 for each card issued, the fine to be collected in the same manner as dues and assessments.

"Sec. 7. The transfer card must show that the member receiving it has paid all dues and assessments for the month in which it was issued, and must also show at what class of labor he was employed.

"Sec. 8. When a transfer card is issued to any member it must be deposited by him with some local union or with the international secretary-treasurer, within three months after the last day of the month in which it was issued to him, else the card will become void and he can only become a member again by initiation as a new member.

"Sec. 9. When a member presents a transfer card to a local union at any mine where he works or desires to work, the local union must accept the same and admit him to membership in that local, unless the local issuing the same is not in good standing, as shown by the monthly report of the secretary-treasurer, or the person to whom the card is issued has not been a member of the organization for three months as provided for in section 5 of this article, and shall collect from him all dues and assessments from the time between the last day of the month in which the card was issued and the date of depositing the same.

"Sec. 10. The subdistrict, district or international secretary-treasurer shall not accept a transfer card if the member is where he can deposit it with a local union.

"Sec. 11. The international secretary-treasurer shall prepare and send out monthly a statement of all locals three months or more in arrears for dues and assessments, and no local union shall refuse to accept a transfer card from any local unless it appears on said list as being in bad standing. Local unions on strike shall be exempt from the provisions of this section.

"Sec. 12. All transfer cards shall be made in book form, with two stubs attached. The books to be numbered, and each card in the book to be numbered and bear the number of the book. The stubs to be printed in conformity with the card itself. The card and one stub to be filled out by the recording secretary and certified to by the president and financial secretary of the local union granting the same; one stub to be retained by the local issuing the card for future reference, the other stub to accompany the card and must be immediately filled out by the secretary of the local where the card is deposited and returned by him to the secretary of the local that issued the card.

"Sec. 13. The president, financial and recording secretary of the local union shall keep a record of all transfer cards bought by, issued by, and deposited in their respective local unions. The auditing committee shall compare their records every three months, and in the presence of the local union destroy all transfer cards that have been deposited that there is no dispute about."

"Article XII.

"Sec. 2. Districts may adopt such laws for their government as they may deem necessary, provided they do not conflict with the international union."

"Article XIII.

"Sec. 2. Subdistricts may adopt such laws for their government as they may deem necessary, provided they do not conflict with international and district constitutions or agreements entered into.

"Sec. 3. All local unions within the territory of subdistricts already organized in any district shall contribute and become a part of the same and comply with its laws, before they are entitled to password or representation in either international or district organization."

"Article XIV.

"Section 1. Local unions shall be composed of miners, mine laborers and other workmen, skilled and unskilled, working in and about the mines, except mine manager, top boss and persons engaged in the sale of intoxicating liquors, and shall be given such numbers as the international secretary-treasurer may assign them.

"Sec. 2. All locals shall be under the jurisdiction of the international, district and subdistrict unions, and may make such laws for their government as they deem necessary, provided they do not conflict with the international, district and subdistrict constitutions or agreements entered into. Any local union or members thereof violating this section shall be subject to a fine of not less than \$5.00."

And to further show how this union undertakes to control the freedom of its members to work when and for whom they please, also its determination to destroy the right of the employer to conduct his own business as he pleases and to discharge and employ whom he pleases, I quote these sections of article 10 of this constitution:

"Section 1. When trouble of a local character arises between members of a local union and their employers, the officers of said local shall endeavor to effect an amicable adjustment, and failing in this they shall immediately notify the officers of the district to which the affected locals are attached, and said district officers, shall immediately investigate the cause of complaint; and failing to effect a peaceable settlement on a basis that would be fair and just to aggrieved members, finding that a strike would best serve the interests of the locality affected, they may order the inauguration of a strike, but no local strike shall be legalized or supported by a district unless its inauguration was approved by the officers of the district or by the international executive board, upon an appeal taken by the aggrieved members from the decision of the district officers; any local union striking in violation of the above provisions shall not be sustained or recognized by the international officers. * * *

"Sec. 3. When any member of the United Mine Workers is suspended or discharged, it shall be the duty of the mine committee to immediately investigate the case, and if the member discharged is not guilty of an offense justifying the same, the grievance shall immediately be reported to the subdistrict and district president in writing, under the seal of the local, and if, upon investigation, the report of the local committee is found correct, the subdistrict and district president shall immediately insist upon the reinstatement of the suspended or discharged member.

"Sec. 4. The international officers shall, at any time they deem it to be the best interests of mine workers in a district that is idle, for just and sufficient reasons, order a suspension in any other district or districts that would in any way impede the settlement of the district affected; provided, that such action would conserve to the best interests of the United Mine Workers of America."

I also quote the following from the constitution of district No. 6:

"Article I.

"Section 1. This organization shall be known as District No. 6, of the United Mine Workers of America.

"Sec. 2. One of the objects of this organization is to unite all employes in and around the coal mines of Ohio and the Pan Handle district of West Virginia."

"Article VIII.

"Section 1. In case of trouble arising in any local with the employer it shall be the duty of the local officers to try to effect a settlement; failing in this the grievance shall be presented to the subdistrict president in writing, who shall investigate the grievance or dispute and settle, if possible. Should he fail, he shall consult the district president, who shall settle the dispute either by suspending work or such other methods as they may deem best. In case of a direct violation of agreements the subdistrict president or local union affected are authorized to order a suspension of work.

"Sec. 2. When it becomes necessary for the district president to close a mine, or when a mine or mines from some other legitimate cause has been forced to close down, said officers may, if they deem it wise, close every other mine in district, or may distribute those idle men into any other mine or mines in the district in which said mine or mines so closed may be situated."

"Article IX.

"Section 1. The initiation fee in district 6 shall be \$10.00, and all persons applying for and securing work in the mines who are not practical workers shall pay \$10.00 initiation fee. Any person applying for work at any organized mine shall present a United Mine Workers' card. In case said person cannot present such a union card he shall pay the regular initiation fee. * * *

"Sec. 6. All persons employed as check-weighmen shall be members of the United Mine Workers for a period of six months before they are elected to such position. Notice shall be posted near the weigh sheet at least three days before the election of a check-weighman, and no persons are entitled to vote except those who are assessed to pay him his wages."

"Sec. 12. When a miner's son becomes old enough to work in mine he shall be given the preference over other applicants for work."

"Sec. 15. Any member of our organization working in or around the mine, working on idle days or extra time, in violation of our constitution or agreements, shall be fined \$2.50 for each offense. * * *

"Sec. 17. That a fine of \$10.00 in each individual case where it can be proven that a member of the union leaves his district for West Virginia, or any other unfair mines, and remains there one month or more without having deposited his transfer card and returns without giving a satisfactory account of why he has not deposited his transfer card; and the fine to be collected by the local union where he works."

And these from the constitution of subdistrict 5 of district 6:

"Article I.

"Section 1. This organization shall be known as subdistrict 5 of District 6, United Mine Workers of America.

"Sec. 2. The object of this organization is to unite the mine employes of Belmont, Jefferson, Tuscarawas, Harrison and Carroll counties in Ohio, and that part of Stark county south of Canton, other than the Massillon seam, and Hancock, Brooke, Ohio and Marshall counties of West Virginia, to ameliorate their conditions by methods of conciliation, arbitration or strike.

"Sec. 3. All men are eligible and must be members of the U. M. W. of A. who work in and around the mines."

"Article IX.

"Sec. 2. That a fine of \$10.00 in each case, where it can be proven that a member of our union leaves his district for West Virginia or any other unfair mine, and remains one month or more without depositing a transfer card, and returns without giving a satisfactory account of why he has not deposited his transfer card, and a fine to be collected by the local union where he is working.

"Sec. 3. Any member of our organization working in or around the mine, working on idle days or extra time, in violation of our constitution or agreements, shall be fined \$2.50 for each offense."

It very clearly appears from a study of these rules that (a) they undertake to require members of the organization to surrender their individual freedom of action; (b) to coerce nonunion miners to join the union, whether wishing to do so or not for they must be members "who work in and around the mines"; (c) to control or rather abrogate and destroy the right of the employer to contract with the men independent of the organization; (d) to exclude his right to employ nonunion labor if he desires; (e) to limit his right, in the absence of contract, to discharge whom he pleases, when he pleases, and for what reason he sees fit; and (f) to assume the right on the part of the organization, through its officers to control the employer's business, to shut down his mine by calling out the men in obedience to their obligation whenever it is deemed to the interests of the union, regardless of the employer's interests or the effect that such action may have upon him, as regards loss, damage, and necessary violations, on account thereof, of his existing contracts with others. To such extent in this direction does such assumption of power and control go that it is directly provided that such suspension of operations may be ordered, even though there be no dispute between the employer and the union, but solely because such dispute exists between the union and some one or more of his rival operators in business in the same district. In all these particulars these provisions violate the law, guaranteeing under our free government the rights of both the labor and capital involved, and, further, the rights of the public consuming the product of such labor and capital. But still further, and what manifestly is of far more vital importance, under the power so assumed by this close and compact organization, and by reason of these obligations and rules enforced by it upon its members, it is more than probable that, if allowed to unionize and control the mining operations in West Virginia, it will be entirely able to fulfill its express contract of 1898 with its co-conspirators, the operators of Ohio, Western Pennsylvania, Indiana, and Illinois, and "protect" them from the competition of West Virginia coals, restore to them their lost markets, and practically destroy the coal mining industry of this state to accomplish which the union has admittedly already spent hundreds of thousands of dollars and sacrificed human life as yet to no avail. It is not to be assumed that, because I have not discussed other of the rules and purposes of this organization, that I have ignored their meritorious and beneficent character; nor that I have not considered the very natural and human instinct inspiring the officers and members of this union, resident in other states and laboring under physical disadvantage in mining conditions, to regard their personal interests as paramount. Most of its officers have testified in open court before me, and have fully convinced me that they are men sincere in the conviction of the integrity of their action, perfectly frank and truthful in their testimony, self-educated, and who have by their own effort rightly acquired the leadership in their life work. So far as I am concerned, the law requires me to consider these rules of the organization, and ascertain whether any of them are unlawful in character. If so, whether the unlawful ones dominate the actions and purposes of the organization,

or whether the purposes contemplated by the unlawful ones are so intermingled with those designed by the lawful ones as to render separation impracticable. If such domination of the unlawful prevails, or such separation cannot be made, then, under the authorities I have cited, the organization becomes unlawful. In view of the undisputed testimony in this case, I am constrained to believe both unlawful conditions exist as to these rules. They go far beyond those held to be unlawful, dominating, and inseparable by the English cases which I have cited. They have permitted the officers of this organization to expend, by their own admission, hundreds of thousands of dollars of the funds derived from members bound by these rules in an unlawful conspiracy to restrain trade upon such a large scale as to involve the whole vast coal mining industry of West Virginia.

[7] The final question arises, How is this plaintiff, the Hitchman Coal Company, affected, and what right has it to complain and appeal for injunctive relief? The evidence establishes these facts: Plaintiff is an operating coal mining company in the West Virginia field. Its mines are situate in what is known as the Pan Handle just across the Ohio river from Ohio, and this union assumes jurisdiction over this territory incorporating it, with some five counties in Ohio, in sub-district 5 of district 6 of its organization. Plaintiff started operations in 1903 as a nonunion mine. At this time a company having some stockholders identical with those of plaintiff, and others not such stockholders of plaintiff, was operating a union mine at Mt. Pleasant, Ohio. The officials of the union notified the plaintiff that, if its mine were not unionized, the Mt. Pleasant mine would be shut down by it. On April, 1, 1903, the demand of the union was conceded by plaintiff, and it became a union mine. The next day a strike was called by the union, and plaintiff's men went out and remained out 21 days. This strike cost plaintiff \$7,242. Its occasion was a dispute as to the scale price for run of mine coal, and was compromised by the union accepting an advance of about $1\frac{1}{2}$ cents per ton for run of mine coal over what the company had been paying, and much less than had been demanded when the strike was called. The miners resumed work on May 23, 1903, and worked until April 20, 1904, when another strike was called about the run of mine coal; the union officials not being satisfied with the prior year's compromise, and insisting on what was called the average as distinguished from the tonnage basis. The plaintiff yielded, and the average basis was established. This strike lasted until June 15, 1904, 55 days, and cost plaintiff \$17,000. On April 1, 1905, the union demanded a return to the tonnage basis, as being more profitable to the miner than the average one. This demand was conceded by plaintiff, and the tonnage basis was resumed. A national strike was called for April 1, 1906. In anticipation of it, plaintiff sought to protect its fuel trade by arranging with the union officials for the men to continue work for that purpose, offering to pay the scale prices demanded by the union. This was at first agreed to upon condition that no commercial and only fuel engine coal should be mined. This permission was later withdrawn, and the men ordered to strike, which they did on April 16, 1906. The

men did not want to quit work, and tried to get permission from their union officials to continue loading engine coal, for the reason that, if they were not allowed to do so, the Baltimore & Ohio Railroad Company would haul in nonunion coal, and have it loaded into their engines from plaintiff's tipple and bins under the terms of plaintiff's contract with the railroad company. The union was notified, too, by plaintiff that, if the men were called out on strike, the mine would not be run union again. This availed nothing. The strike was called, coal was hauled from an Ohio union mine with which settlement had been made by the union by the railroad, and loaded on its engines over plaintiff's tipple. This strike continued until June 12, 1906, 56 days, and cost the plaintiff \$24,500. This national strike was finally settled in July, 1906, by the adoption of the 1903 scale, which plaintiff from the start had offered to pay. But in the meantime the Hitchman miners had been promised benefits by the union which were not paid, and they were incensed because the Ohio coal had been allowed to be hauled and loaded on its engines by the railroad over plaintiff's tipple, and because plaintiff's proposition to pay the 1903 scale had not been accepted. Thereupon a mutual agreement was entered into between plaintiff and these individual miners to the effect that the men should abandon the union, and the company should operate the mine nonunion. This was on June 12, 1906, and the agreement was evidenced by memorandum cards signed by the men, reading as follows:

"I am employed by and work for the Hitchman Coal & Coke Company with the express understanding that I am not a member of the United Mine Workers of America and will not become so while an employé of the Hitchman Coal & Coke Company, and that the Hitchman Coal & Coke Company is run nonunion and agrees with me that it will run nonunion while I am in its employ. If at any time while I am employed by the Hitchman Coal & Coke Company I want to become connected with the United Mine Workers of America, or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company I will not make any effort amongst its employés to bring about the unionizing of that mine against the company's wish. I have either read the above, or heard same read."

The men surrendered their charter to the union, and on June 25, 1906, secured a charter from this state as a corporation under the name of the Independent Mine Workers of West Virginia. Prior to April 1, 1903, when the mine ran nonunion, the company had no trouble whatever with its men, and since June 12, 1906, when it started nonunion again, it has run continually without trouble. During the three years and two months from April, 1903, to June, 1906, when unionized, it had three strikes called that suspended its operation for a total of 162 days at a total cost or loss of \$48,742. In March, 1907, the subdistrict convention of the union resolved "to take up the work of organizing every mine in the subdistrict as quickly as it can be done." In accord with this resolution, officials of the union, defendants here, called on the plaintiff's management, and expressed their desire to reunite the Hitchman mine. The company's officials declined the suggestion. The mine officials asked that the matter be referred to the company's board of directors. This was done, and the board of directors declined to have anything to do with the union, and

so notified its officials. Reports were put in circulation among plaintiff's men to the effect that the mine was going to be unionized, and that they had better join the union if they wanted to retain their jobs. Early in September, 1907, the defendant Hughes was sent by the union into the Pan Handle territory to organize the nonunion mines, and compel recognition by them of the union. As a result of his work he secured 22 men to join the union and quit work at a mine known as the Glendale, which was owned by the same stockholders and run by the same management as the Hitchman. He also succeeded in organizing the Richland mine in that territory, and, when its operator refused to recognize the union, shut it down. According to his statements, he succeeded in securing enough men at the Hitchman mine to agree to join the union to enable him to unionize it, and was about ready to and intended to shut it down if its management did not recognize the union. Thereupon the plaintiff company applied for and obtained the restraining order and temporary injunction in this cause. It is also established that Hughes and other officers of this union were beforehand fully informed of the contracts existing between plaintiff and its employes. These facts very clearly demonstrate such interest in this plaintiff in the premises as to warrant its appeal for aid from this court of equity. I conclude, therefore, that this organization, known as the United Mine Workers of America, is an unlawful one because (a) of its principles as set forth in its constitutions, obligation for membership, and rules which (1) require its members to surrender their individual freedom of action; (2) seeks to require, in practical effect, all mine workers to become members of it whether desirous of doing so or not; (3) seeks to control, and restrict, if not destroy, the right of the mineowner to contract with its employes independent of the organization; (4) to exclude his right to employ nonunion labor if he desires; (5) to limit his right to discharge, in the absence of contract, whom he pleases, when he pleases, and for any cause or reason that to him seems proper; (6) assumes the right on its part, by and through its officers, to control the mineowner's business by shutting down his mine, calling out his men upon indefinite strike in obedience to their obligation to the union, whether the men desire to quit work or not, whenever the union's officers deem it to be for the best interests of the union, regardless of the rights and interests of the mineowner, and regardless of his direct loss and damages and such indirect loss and damage as may be incurred by him by reason of the resultant violation of contracts by him with others. *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764. I further conclude that it is an unlawful organization because (b) of its procedure and practices, in that (1) it seeks to create a monopoly of mine labor such as to enable it, as an organization, to control the coal mining business of the country; and (2) has by express contract joined in a combination and conspiracy with a body of rival operators, resident in other states, to control, restrain, and, to an extent at least, destroy, the coal trade of the state of West Virginia. It has spent 14 years time and hundreds of thousands of dollars in effort to accomplish this unlawful purpose. The rules of law relating to the

responsibility of individual members concerned in such combination and conspiracy are plain and well defined. Great latitude in establishing conspiracy by the admission of circumstantial evidence is allowed, circumstances tending in slight degree to a determination of the truth are allowed to be proved. *Clune v. United States*, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269. The acts and declarations of co-conspirators in execution of a conspiracy are evidence against others of their number. *Id.* "Where two or more are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ*, in its execution, may be given in evidence against the others." *American Fur Co. v. United States*, 2 Pet. 358, 7 L. Ed. 450.

[8] On the question whether a combination is lawful or not, declarations of those engaged in it, explanatory of acts done in furtherance of its objects, are competent evidence after the combination has been proved. *Wiborg v. United States*, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; *Lincoln v. Claflin*, 7 Wall. 132, 19 L. Ed. 106. See, also, *Sprinkle v. United States*, 141 Fed. 811, 73 C. C. A. 285, decided by the Circuit Court of Appeals for this circuit and *Ellis v. Dempsey*, 4 W. Va. 126, where these principles are fully upheld. In the very recent cases (decided June 10, 1912) of *Hyde v. United States*, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, and *Brown v. Elliott*, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136, it is held:

"There may be a constructive presence in a state, distinct from personal presence, by which a crime committed in another state may be consummated, and render the person consummating it punishable at that place. Overt acts performed in one district by one of the parties who had conspired in another district * * * give jurisdiction to the court in the district where the overt acts are performed as to all the conspirators. Until a conspirator affirmatively withdraws from a continuing conspiracy, there is conscious offending that prevents the statute from running."

The law just as clearly lays down the rules to determine what is an unreasonable restraint of trade.

"From the principles which underlie all the cases the inference must be necessarily drawn that if there be any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint however partial on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it however partial must be regarded by the court as prejudicial to the public interest." *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 625, 46 Am. Rep. 527.

In deciding the case of *United States v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 158, 85 Fed. 271, 288, 46 L. R. A. 122, Judge Taft said that coal was an article of prime necessity. And in the case of *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 56 S. E. 264, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, 9 Ann. Cas. 667, it is held that coal is properly classified under the head of necessities. The case of *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, *supra*, also holds:

"A contract, combination, or trust among various producers and sellers of a commodity, the direct and necessary or natural effect of which is to

restrain competition and control the prices of such commodity, is in unreasonable restraint of trade, and void at common law, because contrary to public policy. In determining whether or not a contract or combination is in unreasonable restraint of trade, the subject-matter of the contract or combination, the situation of the parties, and all the circumstances attending the transaction should be considered. In determining whether or not a contract or combination is in unreasonable restraint of trade, it is immaterial whether or not the commodity which is the subject-matter of the contract or combination is of prime necessity, if the commodity is an article of legitimate trade or commerce. In determining whether or not a contract is in unreasonable restraint of trade, all the powers of the contract should be considered, and its character determined, not alone by what has been done under it, but by what may be done under it when all of its powers shall have been fully exercised. It is no defense to the illegality of a contract or combination which is in unreasonable restraint of trade to show that the prices of the commodity which constitutes its subject-matter have not been changed, or even that such prices have been lowered. Unreasonable restraint of trade, which is only partial, is illegal. In order that a combination or trust may be in unreasonable restraint of trade, it is not necessary that a complete monopoly be formed. The combination or trust is in unreasonable restraint of trade if it tends to monopoly and is to the injury of the public."

The Supreme Court of the United States has held to the same view of the common law so far as the common law was considered in deciding the case of *Standard Oil Co. of New Jersey et al. v. United States* (1911) 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, and the case of *United States of America v. American Tobacco Co. et al. and American Tobacco Co. et al. v. United States of America* (1911) 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. In *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, it was held that the Sherman Anti-Trust Act "prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business; and this includes restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of interstate trade except on conditions that the combination imposes," and that it "makes no distinction between classes. Organizations of farmers and laborers were not exempted from its operation, notwithstanding the efforts which the records of Congress show were made in that direction," and that "a combination of labor organizations and the members thereof, to compel a manufacturer whose goods are almost entirely sold in other states, to unionize his shops and on his refusal so to do to boycott his goods and prevent their sale in states other than his own until such time as the resulting damage forces him to comply with their demands," is a "combination in restraint of trade."

I further conclude that this union, in pursuit of its unlawful purposes to secure control and the monopoly of mine labor, and to restrain, suppress, if not destroy, the coal mining industry of West Virginia in the interest of their co-conspirators, rival operators and producers in Ohio, Western Pennsylvania, Illinois, and Indiana competitive fields, have sought and still seek to compel the plaintiff, the Hitchman Coal & Coke Company, to submit to contractual relations with it as an organization relating to the employment of labor and pro-

duction contrary to the will and wish of said company; that its officers, in pursuance of such unlawful effort to monopolize labor and restrain trade, and with knowledge of the express contracts existing between this plaintiff and its employes, have unlawfully sought to cause the breach of the said contracts on the part of its said employes. It is admitted in the testimony of Lewis, Sullivan, and Savage that, if this injunction is dissolved, such efforts will be repeated. I do not stop now to further consider the law declaring efforts to secure the breach of contracts unlawful. I have fully considered this question in my former opinion in this case to which I now refer.

It therefore necessarily follows that the plaintiff had by reason of the damage and loss it had already incurred and the damage and loss threatened and imminent to it in futuro just right to appeal to this court of equity for injunctive relief; that by reason of its unlawful organization, purposes, and practices as hereinbefore set forth, this organization, combination, or union, as now constituted, is unlawful, and under the law, therefore, has no right to seek plaintiff's employes to become members thereof or to become party to its unlawful purposes and practices.

The injunction will be made perpetual.

In re FARTHING.

(District Court, E. D. North Carolina. January 18, 1913.)

1. BANKRUPTCY (§ 81*)—INVOLUNTARY PROCEEDINGS—SUFFICIENCY OF PETITION.

The sufficiency of a petition in involuntary bankruptcy in respect to the description of the claim of a petitioner may fairly be tested by the rules governing a declaration or complaint in an action on such claim, and should distinctly, and not inferentially, allege all facts essential to state a cause of action thereon, and which might be put in issue by the answer in such an action. The existence of claims of sufficient number and amount should also be alleged with such particularity and definiteness as will enable the court to find from the petition the essential jurisdictional facts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113-118, 125; Dec. Dig. § 81.*]

2. BANKRUPTCY (§ 81*)—INVOLUNTARY PROCEEDINGS—SUFFICIENCY OF PETITION.

Such a petition alleging that petitioners own and hold negotiable notes executed by the alleged bankrupt, which are due and owing to them, giving the amount held by each, but without stating the dates of execution or maturity, to whom payable or whether executed by defendant as sole or joint maker, or as principal or surety or indorser, is insufficient as too vague and indefinite.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113-118, 125; Dec. Dig. § 81.*]

3. BANKRUPTCY (§ 81*)—INVOLUNTARY PROCEEDINGS—SUFFICIENCY OF PETITION.

Where the act of bankruptcy alleged in an involuntary petition is the making of a general assignment by the debtor, nearly four months prior

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the filing of the petition, and which appears on its face to have been very fair and reasonable, it is especially requisite that the petition should set out fully and particularly all facts with respect to the claims of petitioners, that it may appear whether they were creditors at the time of the assignment or became such afterwards by purchase from creditors who may have assented to the assignment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 50, 113–118, 125; Dec. Dig. § 81.*]

4. BANKRUPTCY (§ 60*)—“ACT OF BANKRUPTCY”—GENERAL ASSIGNMENT.

The making of a general assignment for the benefit of creditors constitutes an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1493), without regard to the solvency or insolvency of the debtor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

For other definitions, see Words and Phrases, vol. 1, p. 118; vol. 8, p. 7562.]

5. BANKRUPTCY (§ 84*)—INVOLUNTARY PETITION—VERIFICATION—AMENDMENT.

The verification of a petition in involuntary bankruptcy on knowledge, information, and belief is insufficient, but the defect is not jurisdictional, and may be cured by amendment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129; Dec. Dig. § 84.*]

6. BANKRUPTCY (§ 84*)—INVOLUNTARY PETITION—AMENDMENT—DISCRETION OF COURT.

An alleged bankrupt owned property valued at about \$300,000, consisting chiefly of real estate, and was indebted in nearly that amount, largely as surety for others. With the consent and by the advice of a large majority of his creditors who owned 97 per cent. in amount of the claims against him, he executed a deed of assignment conveying all of his property, except his residence, which was conveyed to his wife, to two trustees to be handled and disposed of in their discretion, and the proceeds applied on his debts pro rata. The trustees were competent, and their compensation was fixed by the deed so as to insure an economical administration of the property. The debtor's wife joined in the deed releasing her right of dower. Nearly four months after the deed, petitioners, representing less than 3 per cent. of the indebtedness, filed a petition in involuntary bankruptcy, alleging the making of the deed as the act of bankruptcy. The petition was fatally defective, but might be validated by amendment. It fairly appeared from the evidence submitted that the property, if administered by the trustees under the deed, would pay all indebtedness and probably leave a surplus of several thousand dollars, but that if administered in bankruptcy, subject to the wife's dower rights, it certainly would not pay the indebtedness. *Held*, that to permit an amendment of the petition would not be in furtherance of justice, nor in the interests of creditors, and that, in the exercise of its discretion, the court would refuse leave to amend, and dismiss the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129; Dec. Dig. § 84.*]

In the matter of G. C. Farthing, alleged bankrupt. On demurrer to petition and motion for leave to amend. Demurrer sustained, and petition dismissed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

L. L. Tilley and J. A. Giles, both of Durham, N. C., and Armistead Jones & Son, of Raleigh, N. C., for petitioners.

J. S. Manning and Victor S. Bryant, both of Durham, N. C., for respondent.

Winston & Biggs, of Raleigh, N. C., Percy Reade, Branman & Brawley, Guthrie & Guthrie, and W. L. Foushee, all of Durham, N. C., and B. S. Royster, of Oxford, N. C., for creditors.

CONNOR, District Judge. J. W. Smith and three others filed their petition in this court on December 12, 1912, containing the essential jurisdictional averments in regard to residence, amount of general indebtedness, on the part of the respondent, etc. They further allege that they are creditors of respondent "having provable claims against him which amount, in the aggregate, in excess of the amount of securities held by them, to five hundred (\$500) dollars," etc.

They further allege:

"That the nature and amount of your petitioners' claims and the securities held by them, if any, are as follows: Negotiable notes executed by said G. C. Farthing and held and owned by your petitioners, viz., A. N. Blalock, \$500; J. A. Walker, \$500; J. W. Smith, \$4,800; Raschad Tilley, \$225—all of which said negotiable notes are now due and owing to your petitioners by the said G. C. Farthing. That within four months next preceding the filing of this petition, viz., on the 23d day of August, 1912, the said G. C. Farthing, while insolvent, committed an act of bankruptcy, in that he did on the 23d day of August, 1912, transfer, assign, and convey all of his property, both real and personal, except certain property theretofore conveyed to his wife, to trustees for the benefit of his creditors, which said deed of transfer, assignment, and conveyance is attached hereto and asked to be taken and considered as a part of this petition."

The petitioners ask that the respondent be adjudged bankrupt, etc.

In the deed of assignment, a copy of which is attached to the petition, it is recited:

"That, whereas the said G. C. Farthing is indebted to various parties and desires to secure the payment of all his indebtedness of every kind by an equitable disposition of his property and effects among his creditors," etc.

The property conveyed is described as:

"All the real estate and interest in real estate owned by G. C. Farthing and situate in the city of Durham, or elsewhere, in Durham county, state of North Carolina (excepting residence lot below referred to) and reference is made as a part of this description, as fully as if incorporated herein, by metes and bounds, to the description found in the following deeds and conveyances to G. C. Farthing, recorded in the office of the Register of Deeds of Durham county in books and pages, as follows, to wit:"

Following this language is a list of deeds, etc.

The same description is given of the real estate owned by respondent in the counties of Orange and Wake:

"Also all other real estate and interest in real estate owned by G. C. Farthing wherever located, and whether specifically referred to herein or not," etc.

A number of shares of stock in incorporated companies and banks, choses in action, policies of insurance on the life of James E. Shepherd, "and all other personal property of all kinds, of whatever na-

ture or description, and wherever located," etc., is transferred to the trustees named in the deed of assignment. The residence of respondent is excepted. The trustees are directed to take immediate possession of the property conveyed and assigned, and to sell the same in the manner, at the time, and upon the terms set forth in the deed, and to apply the proceeds to the payment, without preference, to the creditors of the assignor. His wife joins in the execution of the deed for the purpose of releasing dower and homestead rights. The other provisions in the deed of assignment are not material to the question presented upon the pleadings. The petition is signed by each of the petitioners and verified in the following words:

"The petitioning creditors * * * do hereby severally make solemn oath that the statements of fact contained in the foregoing petition are true, according to the best of their knowledge, information, and belief."

Respondent demurred to the petition, assigning as grounds of demurrer: (1) That the nature and amount of the petitioners' claims do not appear, etc. (2) That the nature and amount of the claims of the petitioners is not alleged with sufficient definiteness and particularity as will enable respondent to answer the same, or to know the nature of the indebtedness, etc. (3) That the petition fails to show the nature, amount, and character of the securities, if any, held by the petitioners, etc. (4) It does not appear from the petition that the said G. C. Farthing has committed any act of bankruptcy within the meaning and purview of the Bankrupt Act of 1898, and the amendments thereto. (5) That said petition is not properly verified within the meaning of the law, etc.

The cause was argued upon the petition and demurrer; no motion for amendment being made before the hearing. The grounds of demurrer will be disposed of in the order in which they are assigned. The two first are directed to the same point and may be discussed together. Nothing is found in the Bankruptcy Act prescribing the form of the petition to be filed by creditors in involuntary bankruptcy, nor the degree of definiteness and particularity with which the alleged debts, or claims of the petitioning creditors shall be set out. Section 30 of the act provides that:

"All necessary rules, forms and orders as to procedure, and for carrying this act into effect shall be prescribed, and may be amended, from time to time, by the Supreme Court of the United States." Collier, Bankruptcy (9th Ed.) 571.

It is uniformly held by the federal courts:

"That the general orders promulgated by the Supreme Court, in accordance with this section, are binding on courts of bankruptcy." *Id.* 572; *In re Scott* (D. C.) 99 Fed. 404, 3 Am. Bankr. Rep. 625.

Of course, this is subject to the limitation that the rules and forms prescribed are in harmony with the language of the statute—if the two conflict, the court would be controlled by the statute. *Burke v. Guarantee Title & Trust Co.*, 134 Fed. 562, 67 C. C. A. 486. Referring to the power conferred upon the court by section 30 of the statute, Mr. Justice Peckham, in *Orcutt v. Green*, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390, says:

"There is nothing in that provision inconsistent with, or opposed to, anything in the bankruptcy law upon the subject, and we must therefore take the statute and the order and read them together, the order being simply somewhat of an amplification of the law with respect to procedure."

At the October term, 1898, the Supreme Court, pursuant to the power conferred by the act, promulgated "General Orders and Forms in Bankruptcy" (172 U. S. 666 [Appendix], 18 Sup. Ct. x), of which order—No. 38—is in the following language:

"The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case."

Pursuant to this order, "form No. 3" prescribes the essential averments of a creditor's petition in involuntary proceedings in bankruptcy. 172 U. S. 681, 18 Sup. Ct. xix. That portion of this form material to the question presented upon the petition and demurrer is:

"That the nature and amount of your petitioner's claims are as follows.
* * *

Mr. Loveland says that, to comply with this form—

"the petition must set forth and describe the claim or claims of the petitioning creditor or creditors sufficiently to show that they are provable claims and amount, in the aggregate, to \$500 or over. Ordinarily, where the debt is founded upon a written instrument, as a note, bond, contract, etc., the paper is annexed to the petition as an exhibit, and proper reference to it is made in that part of the petition which is designed to describe the debt or claim. Where several claims or debts are stated in the petition, each debt should be set forth in a separate paragraph with sufficient particularity to show that it is a provable claim." Loveland, *Bankruptcy* (4th Ed.) 414.

[1] The demurrer challenges the allegations of the petition in this respect, for that the "nature" of the petitioners' alleged debts is not set forth with sufficient particularity to enable the respondent to answer the same intelligently. It must be conceded that there is but little authority upon the question raised by the demurrer. The industry of counsel and my own investigation discover but few decided cases in which it is discussed. Resort must, therefore, be had to general principles of pleading and the "reason of the thing." In *Re White* (D. C.) 135 Fed. 199, there was a demurrer to the petition, for that it failed to set out particularly the nature of the debt. Judge Holland said:

"Thus far the petitioners have followed the form prescribed by general order 37 (38) of the Supreme Court prescribing the forms in bankruptcy; but in stating their claims, while the amount is given, the nature of the claim is not set forth, and, in that, it is defective, which, however, can be amended so as to meet the requirements of the act."

The reporter does not set out the language used in describing the nature of the claims, further than that they were "provable claims." In *Re Brett* (D. C.) 130 Fed. 981, the allegation is:

"That Whitehead is the owner and holder of a promissory note for \$100, dated January 15, 1904, made by the alleged bankrupt and payable in three months after its date to Whitehead's order at the Patterson National Bank."

This was held sufficient. There is a difference between the particularity required in filing proof of a debt for the purpose of sharing

in the distribution of the estate and filing a petition in involuntary bankruptcy. In the former the consideration must be set out. Bankr. Act, § 57b; Collier (9th Ed.) 712. Illustrating the principles by which the courts are controlled in the construction of the order of the Supreme Court in regard to the allegations required in petition of creditors in such cases, Lacombe, Circuit Judge, in *Re Rosenblatt*, 193 Fed. 638, 113 C. C. A. 506, after setting out the averments charging acts of bankruptcy, says:

"It is well settled that such averments, without any specification sufficient to apprise the alleged bankrupt of the charge against him so as to enable him to answer it, are too vague and general."

In the absence of more direct authority, it may aid us in arriving at a correct conclusion of the question raised by the demurrer to recur to the general rules of pleading. It would seem reasonable and just to apply to the petition in this respect the test by which the sufficiency of a declaration or complaint is measured in an action upon a negotiable instrument. The rule uniformly applied is that material facts should be distinctly, and not inferentially alleged. The court will not supply, by intendment, an averment which the pleader has failed to make. The facts constituting the cause of action should be set forth in the complaint with definiteness and certainty. The plaintiff, in his complaint, should apprise the defendant of the precise grounds upon which he relies. The facts may be alleged either upon plaintiff's own knowledge, or upon information and belief. So, it is said of the essential averments in a bill in equity:

"Facts essential to maintain the suit and obtain relief must be stated in the bill, otherwise the defect will be fatal, for no facts are in issue unless charged in the bill." 1 *Streets*, Federal Equity Practice, § 176.

"Every bill must contain in itself sufficient matters of fact per se to maintain the case of the plaintiff, so that the same may be put in issue by the answer and the proofs." *Id.* 177.

There are among others which occur to the mind several reasons in this case why a reasonable degree of particularity in setting forth the nature of the claim should be enforced. While it is true that Bankr. Act, § 19, does not, in express terms, secure to the respondent the right to demand a trial by jury in respect to the alleged indebtedness, it is manifest that the allegation of indebtedness is open to a denial by the alleged bankrupt and he may thereby raise an issue of fact which the judge for his own aid and guidance may submit to a jury. The existence of provable debts against the respondent, due to each of the petitioning creditors, or at least to the number required by the act, is jurisdictional. It follows, therefore, that the existence of such debts or claims and their nature should be alleged with such particularity and definiteness as will enable the court to find from the petition the essential jurisdictional fact. In a creditor's bill, to which a petition in involuntary bankruptcy may be assimilated, the indebtedness by the defendant to the plaintiff should be set forth with that degree of particularity of description which would entitle the plaintiff to judgment upon it in an action at law. Mr. Collier, discussing section 19 of the act, says that, while the statute limits the issues to be submitted:

"It is not thought that this precludes the jury from passing on any other pertinent question as * * * whether petitioning creditor has a provable debt, * * * provided the judge submits such question to them." *Oil Well Supply Co. v. Hall*, 128 Fed. 875, 63 C. C. A. 343 (C. C. A. 4th Circuit).

[2] Is it not manifest that the respondent cannot safely and intelligently, under oath, as he must do, join issue with the petitioning creditors upon the vague, indefinite terms in which they set out the nature of their alleged claims against him? An analysis of the allegation discloses that "they hold and own negotiable notes executed by G. C. Farthing" for the amounts named, "now due and owing to petitioners." No dates of the alleged notes are given. It is not stated whether the notes are payable to petitioners, or either of them or whether they hold them, or either of them, by assignment, if so, from whom, no due date is given, it does not appear whether respondent executed the notes as sole or joint maker, or as surety or indorser. They allege that the debts are "provable claims." That, however, is a conclusion of law, rather than an averment of fact, as is the allegation that they are negotiable notes, and this is always bad pleading. The fact that the notes are described as "negotiable" contributes to the uncertainty, indefiniteness, and ambiguity which lurks in the entire allegation. If payable to petitioning creditors, why not say so? If held by assignment, how is the respondent to know or surmise to whom they were payable, date, etc.?—of all of which he is entitled to be apprised and the court to be informed. Would any court, proceeding in accordance with any recognized system of procedural law, entertain an allegation so vague and indefinite as a basis for finding the existence of the essential jurisdictional fact without which it could not proceed to render judgment at law or decree in equity? There is, however, another viewpoint from which the question as to the sufficiency of the allegation should be approached. It is held by the District Court of Florida in *Re Callison*, 130 Fed. 987, that:

"To entitle a creditor to maintain a petition in involuntary bankruptcy against his debtor, he must have been a creditor at the time the act of bankruptcy alleged was committed."

In the opinion of Judge Locke, it is said:

"A literal application of the language of the act would give to any person having a provable debt the power to put a person into bankruptcy for an offense committed before there were any business relations existing between them, and thereby obtain the power of oppressive action by one party by procuring an indebtedness, when, in reality, he had not, in any way, suffered from the act of the alleged bankrupt. The same form of language in the Bankruptcy Act of England and in the Act of 1867 (Act March 2, 1867, c. 176. 14 Stat. 517) has been carefully examined and the construction put upon it has limited the rights of creditors to such as held debts at the date of the alleged act of bankruptcy"—citing a number of cases.

The learned judge concludes:

"This appears to be not only the conclusion of the courts upon well-considered cases, but a reasonable construction."

This decision was rendered December 24, 1903. It was affirmed by the Circuit Court of Appeals (5th Circuit, April 8, 1904) in *Brake v. Callison*, 129 Fed. 201, 63 C. C. A. 359. It is true, as insisted by coun-

sel for petitioners, that it appeared on the face of the petition in the case cited that the claim was based upon a judgment in an action for a tort, rendered subsequent to the alleged act of bankruptcy. It is also true that the authority of the decision is questioned, and a contrary conclusion reached, in *Re Hanyan* (D. C.) 180 Fed. 498. While not holding that the failure to allege that the petitioners were creditors of respondent at the time of the alleged act of bankruptcy because the question is not very clearly presented, I am impressed with the force of the reasons upon which the court, in *Callison's Case*, so held. It would be an injustice in many cases, and, upon the disclosures made upon the argument, in this case a gross injustice, to put it in the power of a person to work a great injury, not only to the debtor, but to his other creditors by permitting him to obtain control of a sufficient number of claims, after the execution of the deed of assignment, to give him a status enabling him, in collusion with others, to institute involuntary proceedings in bankruptcy, and thereby invalidate an arrangement to which more than 95 per cent. of the creditors had assented, and in which provision is made for the claims purchased by him. Certainly, it can be no hardship upon such petitioners nor savor of a technical objection to require them to set forth truly and frankly when and by what means they acquired "provable claims."

[3] It is uniformly held that where provision is made by a debtor with the concurrence of his creditors for the payment of his debts, creditors who assented to, or concurred in, such an arrangement will not be permitted to petition their debtor into involuntary bankruptcy, assigning as ground therefor the making such arrangement or provision. Bankruptcy cases, in which the doctrine of estoppel is enforced, are based upon the fact that such a proceeding would work wrong, not only to the debtor, but to his creditors, who, together with petitioners, concurred in making the provisions or arrangement. "When a creditor has voluntarily assented to the administration of the bankrupt's estate by means of an assignment, as by accepting its terms, or otherwise actively co-operating in its execution, he is estopped from thereafter filing an involuntary petition." *Collier, Bankruptcy* (9th Ed.) 774, citing *Durham Paper Co. v. Seaboard Knitting Mills* (D. C.) 121 Fed. 179 (E. D. N. C.). This case is decided upon the authority of *Simonson v. Sinsheimer*, 95 Fed. 948, 37 C. C. A. 337 (C. C. A. 6th Circuit), in which the opinion is written by Judge Taft, concurred in by Judge, now Justice, Lurton. Following a very carefully considered review of the English and American cases, the learned judge says:

"While the doctrine may have rested wholly on estoppel, it would be difficult now to explain thus all the cases of election. We think the only just ground for refusing to allow a man to complain of an act of bankruptcy is that he induced the act, or, after its commission, he so acted with regard to it that he gave others the right to act on the faith of its validity so far as his subsequent conduct would affect it. On the one hand, it would be gross inequity to allow him to subject the debtor to judgment for an act he induced; and, on the other, it would be equally unjust to allow him to repudiate, as invalid, a transaction when, by his conduct, he had induced others to change their position on the faith of its validity."

This is but the enforcement of the rule which requires a man to act in good faith, without which, as said by Pearson, C. J., in *Armfield*

v. Moore, 44 N. C. 157, it would be impossible to conduct the ordinary business affairs of life. While it is true that petitioners are not called upon to negative in their petition the existence of this defense, yet, if the nature of the claims held and owned by them was set out with reasonable particularity, respondent would be informed whether, if held and owned by assignment, the assignors had, by their concurrence in the execution of the deed of assignment, relied on as the sole act of bankruptcy, been estopped from petitioning him into bankruptcy and thereafter sought, by assigning their claims, to enable petitioning assignees to do so. These and many other reasons occur to the mind why the demand that the petitioners should set out, with reasonable particularity, the nature—that is, dates—to whom payable, whether acquired by assignment, etc., of their claims, is neither technical nor violative of the liberal system of pleading now enforced by courts. While the demurrer must be disposed of by reference only to what appears upon the petition, yet it is suggestive, if not persuasive, that the failure to apprise respondent of the essential facts to which he was entitled upon the face of the petition was not accidental, nor the result of oversight, is found in the facts appearing upon the petition and the deed of assignment attached thereto. The deed was made August 23, 1912, while the petition was not filed until December 12, 1912, eleven days prior to the expiration of the four months within which the law required it to be filed. There was evidently no haste in its preparation. Again, it is evident from an inspection of the deed that property, both real and personal, of large value is conveyed and assigned. The terms of the trust are singularly fair and reasonable, securing an economical administration of the estate and equal distribution, without preference, among the creditors. The dower rights of respondent's wife is released, so that the property may be brought to sale free from incumbrance. It will be noted that there are no suggestions in the petition of any concealment or retention of property nor any wrongful purpose or intent. Certainly, in view of these significant facts, pregnant with suggestions of some other purpose on the part of petitioners than securing an equitable distribution of respondent's estate, they should be required to conform to well-settled principles and rules of pleading. Courts of bankruptcy deal with the substantial rights of parties, upon the maxim of a refined equitable jurisprudence, that "equality is equity," but they, as do all other courts, require a frank, concise, and reasonably definite statement of the facts upon which their jurisdiction is invoked. When it is in the power of a party asking relief to make such statement, the court will not, by strained inferences or intendment, aid an obscure, indefinite pleading. The petitioners could, without the slightest trouble, have either given the requisite information or attached to the petition a copy of the negotiable notes held by them. I am of the opinion that the demurrer, in respect to the first and second causes, should be sustained.

The third ground, that the petition fails to show the nature, amount, and character of the securities, if any, held by the petitioners, is not pressed and is overruled.

[4] The fourth ground of demurrer, that it does not appear from the petition that respondent has committed an act of bankruptcy within the meaning of the act, is overruled. Section 3 (4) of the act declares that, if a person has "made a general assignment for the benefit of his creditors," he thereby commits an act of bankruptcy. A clear distinction is made between acts of bankruptcy defined by subdivisions (2), a preference, and (3), permitting a creditor to secure a preference, and the last clause of (4) applied for a receiver, etc., and subdivision (1), (4) and (5). The acts declared in (2), (3), and the last clause of (4) involve the fact of "being insolvent"; the others do not. In *West Co. v. Lea*, 174 U. S. 594, 19 Sup. Ct. 836, 43 L. Ed. 1098, it is held that solvency is not a valid defense to a petition in involuntary bankruptcy when the debtor has made a general assignment for the benefit of his creditors. It is clear that the deed of assignment made by respondent is a general assignment within the meaning of the act and of the laws of their state.

[5] The fifth ground attacks the validity of the verification. It is manifest that the verification does not comply with order No. 38, form No. 3. It will be noted that forms Nos. 1 (18 Sup. Ct. xi) and 2 (18 Sup. Ct. xviii) require that the verification be made only "upon information and belief." These are petitions in voluntary bankruptcy, and have attached to them, individually and as partnerships, the schedules. It may be that the court made the distinction because in the former the schedules of necessity contained much matter in regard to which the petitioners could speak only upon information and belief. The forms are found in the official promulgation of the orders. 172 U. S. 667 et seq., 18 Sup. Ct. xi. It is held by the Supreme Court of North Carolina that, where the statute prescribes the form of verification of a pleading, it must be followed and a verification according to affiant's "best knowledge, information, and belief" does not meet the requirement. In *Benedict v. Hall*, 76 N. C. 113, the court held that, for a failure to comply with the prescribed form, the defendant was entitled to have a warrant of attachment vacated. In *Cowles v. Hardin*, 79 N. C. 577, judgment was rendered against defendant for want of an answer. The complaint was verified according to plaintiff's "best knowledge, information and belief." Smith, C. J., said:

"The form of the oath is such a departure from that prescribed that it has already been declared insufficient. * * * The court ought not to have proceeded to final judgment until the complaint was sworn to." *Cole v. Boyd*, 125 N. C. 499, 34 S. E. 557.

It is due counsel for petitioners to say that they were misled, as to the form of the verification, by following the supplementary form No. 118 in *Collier on Bankruptcy*, which he is careful to say is "in no sense, official." In the volume issued by Mr. Hagan and Mr. Alexander (Mathew Bender & Co. publishers) form No. 5, page 2, the verification is in the language used by petitioners. This form is not "official." While I am of the opinion that the verification does not comply with the official form, it is well settled that the defect is not fatal, the verification is not jurisdictional, and should not, because of infirmity, work a dismissal of the petition. It may be cured. *Green River De-*

posit *Bank v. Craig* (D. C.) 110 Fed. 137, and many other cases. 3 Standard Enc. Proc. 973. The petitioners would be permitted to verify the petition in accordance with the prescribed form. I am, however, of the opinion that the failure to comply with the rules of pleading in failing to set out with sufficient particularity the nature of the claims is a fatal defect, and unless amended, works a dismissal of the petition.

[6] Counsel for petitioners, while not conceding the validity of the ground of demurrer, frankly recognized that it presented an arguable question, and asked permission to amend the petition. The court would not hesitate to allow the amendment, unless it was made to appear, beyond controversy, that to do so would not only not be in furtherance of justice, but would work manifest and substantial injustice to the respondent and his other creditors. Upon the argument, to meet this phase of the case, several gentlemen of the bar, representing a very large majority of the creditors other than petitioners, appeared in person and also filed from counsel not present urgent requests that permission to amend be denied. Letters from creditors holding claims against respondent aggregating more than \$150,000 were filed urging that the deed of assignment be executed. It was conceded, on the argument, that out of an indebtedness of about \$293,000 the holders of 97 per cent. and a large majority in number were represented by counsel or by letter and telegram concurring in the request that the petition be dismissed. The petitioning creditors represent \$6,500 of respondent's indebtedness. The facts disclosed, upon statements made at the hearing, affidavits filed, etc., none of which were controverted, are as follows: Respondent was the owner of a large quantity of real estate in the city of Durham, N. C., and in Durham and adjoining counties, much of which is very valuable, stocks in banks and industrial companies, and choses in action. His real estate is estimated to be worth about \$212,500, personally about \$102,800. He owed as principal debtor some \$50,000. In addition thereto, by reason of indorsing notes for others, a large part of which was in aid of the establishment of a school designed for the religious training of the colored people at Durham, and for other friends, he found during the summer of 1912 that his total liabilities, as nearly as he could ascertain, aggregated some \$293,150. Finding that some of the persons holding notes upon which he was indorser were threatening, or had brought suit against him, he consulted counsel with a view of making provision for applying his property to the payment of his debts and liabilities. Acting upon their advice, a meeting of his creditors and those holding claims upon which he was liable as indorser, so far as he could then ascertain, was called; notice thereof being given. At this meeting Mr. Farthing stated that, while he thought that, if not sacrificed, his property was of sufficient value to pay his debts and liabilities, he desired to pay all just debts, when ascertained, and would adopt any plan that would make this possible without sacrificing his estate; that he desired to pay the just amount due; that he had learned that some of the notes indorsed by him for James E. Shepherd had been discounted at large and usurious rates; that he was willing to convey all of his property, including exemptions allowed by law, to trustees for the benefit of his creditors,

if they should determine that was the best thing to do, but that his wife would not join in such conveyance, unless the residence and household and kitchen furniture was conveyed to her in consideration of the surrender of her inchoate right of dower. The home was estimated to be worth \$12,000, and the personal property not exceeding \$1,500. She had but little other estate. After discussing the situation, the creditors appointed a committee consisting of business men who were of his creditors, and attorneys representing creditors, to consider the situation, etc. The committee, in view of the conditions existing, including the fact that some creditors had brought suit and would recover judgments at the approaching term of the court, decided that it was best that he should convey the residence and furniture to his wife, and, together with his wife, execute a deed for his other property to trustees. A majority in number and amount having concurred in this suggestion, the deed of August 23, 1912, was executed. An examination of this deed discovers an absolute surrender by Mr. Farthing and his wife of their entire property, except the residence and furniture, real and personal, to trustees for the payment of his just debts and liabilities. The trustee, Mr. Clements, is an experienced real estate dealer in the city of Durham, of admittedly high character for integrity, capacity, and acquaintance with the property assigned. Mr. Sykes is a lawyer of conceded ability and integrity, being, at the time, judge of the city criminal court of Durham. The trustees are directed to take immediate possession of all of the property assigned, and "as speedily as possible, without detriment to the interest of the parties concerned, collect all choses in action, accounts, etc., collect the rents, dividends, interest, or other income arising therefrom and sell the property of all kinds herein conveyed, at either public or private sale at such times, upon such terms, and in such parcels as may to them seem best for the interest of the creditors." The trustees are directed to rent the real estate until sold. They are required to file bonds, etc., to be approved by the clerk of the superior court of Durham county. For their services in executing the trusts they are each to be paid \$75 per month, and are empowered to employ Mr. Farthing at the price of \$100 per month to collect the rents and aid in caring for and making sale of the property, etc. The real estate in Durham consists of several stores and a large number of small tenant houses; the rents therefrom being about \$1,000 a month. The trustees are directed to sell, at the end of 12 months, the real estate not theretofore disposed of. Careful provision is made for advertising the sale of the property. The trustees are directed to apply the proceeds of the collection of debts, rents, dividends, and proceeds of sale of real and personal estate to the payment of "all just indebtedness of G. C. Farthing, distributing the funds pro rata among each and every one of his creditors according to the respective amounts lawfully due, those who hold security or collateral shall prove against and share in the general fund only on the basis of the balance due after applying the proceeds of such security or collateral to their indebtedness." A resulting trust, after the full discharge of the debts, is declared in favor of G. C. Farthing. Provision is made for the selection of a successor to either

of the trustees in the event of death, or failure to act, as to Sykes by the creditors and Clements by Farthing. The trustees are directed to make "distribution and dividends among the creditors herein provided for of funds collected as promptly and at such intervals as the nature of their trust will permit; it being the purpose of this instrument to reduce the indebtedness of creditors as promptly as possible and to reduce interest items to a minimum." The trustees immediately, after giving the bonds, entered upon the execution of their trust. A report, under oath, filed herein shows a careful estimate of the value of the property and the amount of the indebtedness, leaving a margin of \$21,285 after paying all debts in full. Judge Sykes states that since making the estimate they have received an offer for two of the stores at a price \$10,000 in excess of their estimate. They state that they were prevented from consummating sales of the real property by the continued threats of petitioner J. W. Smith to have Mr. Farthing adjudged bankrupt, thereby invalidating the title of the trustees and their vendees; that the income from the property will cover the cost of expenses and interest on the debts. They report that:

"It is the belief of the undersigned trustees that the estate is solvent, and, if handled judiciously, will pay the creditors all of the indebtedness which has thus far come to the attention of the trustees."

The transaction thus brought under investigation bears manifest and indisputable evidence of absolute good faith and honest purpose on the part of the unfortunate debtor to dedicate his entire estate, the result of 42 years' hard work and economy, to the payment of his debts. It is further manifest that the plan adopted by the creditors and carried out by him is the best possible way to promote the end in view—the payment of the debts. That the deed executed in pursuance of the plan and manner in which its provisions are being executed will result in the payment of the debts and probably saving a remnant for the debtor and his wife in their old age. He is about 64 and his wife 57 years of age. It is manifest that if he is adjudged a bankrupt and the deed of assignment invalidated, thereby bringing his valuable real estate to sale incumbered with his wife's inchoate right of dower, the creditors will lose very heavily with no resultant benefit to him. A sale of the property so incumbered will inure only to the benefit of purchasers who are willing to speculate with death. If called upon to decide whether, if the property is managed and brought to sale by the trustees, in accordance with the terms of the deed, the debts will be paid in full, I should, upon the evidence before me, find the affirmative. If, on the other hand, the deed is set aside and the property brought to sale incumbered with the dower right of his wife, I would not hesitate to find the negative. A decree, therefore, adjudging respondent a bankrupt with the legal results incident thereto, would be not to declare an existing condition but to create such a condition by the declaration. The moment he is adjudged bankrupt in law, he thereby becomes bankrupt in fact. The deed provides for a very economical, inexpensive method of executing the trust. An administration of the estate in and through the bankrupt court, under most favorable conditions, would entail statutory fees, commissions, and

cost very greatly in excess of the amount authorized to be expended by the deed. This expense would be largely, how much it is impossible to suggest, increased by reasonable allowances to attorneys. That an adjudication of bankruptcy would result in immense litigation at immense cost cannot be doubted. Experience teaches that under the most careful control the expenses incident to a proceeding in bankruptcy are very large. If the power to permit an amendment to the petition is to be exercised in "furtherance of justice" to the debtor and his other creditors, the question as to the manner of its exercise is not debatable. What lawful benefit can accrue to the petitioners by bringing the administration of the estate into the bankrupt court? If, as seems quite certain, their debts will be paid in full by the administration of the estate under assignment, and if, as is absolutely certain, they will not be paid by its administration by the bankrupt court, *cui bono* grant the motion to amend? It is difficult to fathom the purpose of the petitioners in seeking to put respondent into bankruptcy. A reason is suggested in the affidavit made by respondent, and not denied, that one of the petitioners of large means has in response to the request that he should not have the estate thrown into bankruptcy, and the deed conveying the wife's inchoate right of dower set aside, lest great injury be done to the creditors and lest the real estate of the respondent be forced upon the market in such form that its true value will not be realized, replied that he would be willing to buy the property at the sale, and, although he might realize less upon his claim, he would more than recoup his losses at the sale of the property, if made in this way. Whether or not the petitioning creditor made this statement, it requires no very great mental acumen to find that such a purpose might lurk in the mind of a person whose conduct is so inconsistent with that which the conceded conditions would suggest as wise and fair to himself and others similarly situated. It is difficult, if not impossible, to conceive how, unless in the way suggested, or by obtaining some other unfair advantage, the interest of petitioners can be different from that of all the other creditors. It is suggested that one or more of the other petitioners holding the smaller claims were either present or were represented at the meeting held by the creditors when the execution of the assignment was agreed upon, and acquiesced therein, and have since given their assent thereto. It is not necessary to pursue this suggestion. The power to allow amendments to pleading is, and should always be, exercised liberally, limited only by the inquiry whether to do so is "in furtherance of justice." It is, however, a power not to be exercised arbitrarily, but with a careful, wise, judicial discretion, in the light of all the facts and conditions, and the rights of all persons concerned. I have investigated, with more than usual care, and set forth, at more than usual length, the facts developed upon the motion to amend because usually the motion is granted as a matter of course, and because the interests, both personal and financial, involved are large. Nothing short of a strong conviction that to grant the motion in this case would work great injustice to an honest, unfortunate debtor overtaken, at an age when he may not recover his estate, by debts largely incurred for the benefit of others, who, complying with the wishes of the large majority

of his creditors in the manner suggested by them, has applied his entire estate to the payment of his debts and that the interest of 97 per cent. of the creditors, who, wisely and in good faith, made the arrangement and now insist that it be executed, would suffer. To deny the motion deprives the petitioners of no lawful or just right to which in a court of equity they are entitled. To grant the motion would result in throwing upon the market a large quantity of real estate in many parcels, incumbered with a burden of uncertain extent, impossible of ascertainment. It is of common knowledge that at sales made under such conditions speculators have an advantage over men who wish to buy fair titles at fair prices. While the exercise of the power to allow amendments is of necessity dependent very largely upon the facts of each case, it is enlightening to have the opinion of other courts dealing with similar conditions. I find a strikingly analogous case in *Woolford v. Diamond State Steel Co.*, 138 Fed. 582, in which Judge Bradford (District Court Delaware), deals with a motion to amend a petition in involuntary bankruptcy. His opinion is so well considered, and his views so clearly and forcibly expressed, that I venture to appropriate them, so far as relevant to the instant case. There, the property of the corporation had at the suit of a large number of its creditors been placed in the hands of a receiver appointed by the state court in a creditor's bill. While being administered for the benefit of all of the creditors, a small number of them filed two petitions against the corporation for the purpose of having it adjudged bankrupt. The court, upon a motion to dismiss, found the petition defective. Upon a motion to amend the learned judge reviewed, and discussed, at length, the evidence offered upon that question. He said:

"The granting of leave to amend the petition, which might result in throwing the Diamond State Steel Company into bankruptcy, is a subject which has received careful consideration. In a suit between two individuals, when one of them has made a slip in his pleadings, fatal unless corrected, the court usually will allow an amendment on, or without, terms if not calculated to subject the other party to undue hardship or prejudice. Under such circumstances, to refuse an amendment may, and probably would, not be an exercise of sound discretion. But there are cases in which leave to amend should be denied in the exercise of such discretion, owing to the character and relationship of the persons and interests to be affected. In one of the pending cases, three of the unsecured creditors, and in the other, four, seek to have a large estate, real and personal, in which hundreds of creditors are interested, now in custodia legis, and in course of administration by the Circuit Court, pursuant to the desire of an overwhelming majority of creditors holding an overwhelming proportion of the amount of the unsecured claims, turned over to this court for administration in bankruptcy. * * *

But, the petitions being fatally defective, leave to amend should not be granted and the administration drawn from the Circuit Court, unless for cogent reasons. It should at least appear that a clear preponderance of the interest of the unsecured creditors, to say nothing of the holders of mortgage bonds, would better be conserved or promoted by proceedings in bankruptcy than by the administration of receivers acting by authority of the Circuit Court."

Referring to the suggestion that some of the petitioning creditors acquiesced in the proceeding in which the receivers were appointed, Judge Bradford said:

"It is true that such an objection, although presented in the argument, was not included among the grounds assigned upon the motion to dismiss.

Should, however, the proposed amendments be allowed, the objection undoubtedly would be raised by answer. This circumstance may be entitled to some weight in the determination of the motion to amend."

He concludes, after a very full discussion of the merits of the motion:

"I can perceive no possible advantage to the creditors of the company to be derived from the prosecution of the bankruptcy proceedings and am convinced that such proceedings could inure to their detriment. An administration of the property of the company under the present receivership, I have no doubt, will be advantageous to its creditors and possibly to its stockholders."

Reaching the same conclusion in this case for the reasons set forth and others not referred to, the motion to amend must be denied. The petition will be dismissed at the cost of petitioners. Let an order be drawn accordingly.

In re LARKIN & METCALF et al.

(District Court, D. South Dakota, Northern Division. December 9, 1912.)

No. 711.

1. BANKRUPTCY (§ 140*)—PERSONAL PROPERTY—SALE ON COMMISSION.

Where claimant sent certain flour to the bankrupts and their representative before bankruptcy for sale on commission, there being no promise by the bankrupts to pay for the flour or any personal responsibility therefor, the flour at all times before sale and the proceeds thereof after sale remained the property of the claimants.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 221, 225; Dec. Dig. § 140.*]

2. TRUSTS (§ 358*)—PROPERTY MISAPPROPRIATED—FOLLOWING TRUST FUNDS.

Money misappropriated may be recovered as a trust fund from any one not an innocent purchaser in any shape into which it may have been transmuted, provided complainant can establish the fact that it is his property or the proceeds of his property, or that his property has gone into it, and remains in a mass from which it cannot be distinguished.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 523, 553; Dec. Dig. § 358.*]

3. BANKRUPTCY (§ 345*)—PREFERRED CLAIMS—TRUST FUNDS—MISAPPROPRIATION.

The proceeds of flour shipped to the bankrupts for sale on commission could not be followed and recovered as a preferred claim against the bankrupts' estate, where such proceeds were entirely used in paying claims of the bankrupt, and in conducting the bankrupts' business before adjudication, and no part thereof came into the hands of the bankrupts' trustee, either in money or other property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 554, 539, 540; Dec. Dig. § 345.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Larkin & Metcalf. Petition by the representatives in bankruptcy of the Hubbard Milling Company for a preferred claim against the estate of the bankrupts for the proceeds of certain flour shipped to the bankrupts and their representative for sale on commission. On petition to review an order denying the claim. Affirmed.

Taubman & Williamson, of Aberdeen, S. D., for petitioning creditors.

C. O. Newcomb, of Aberdeen, S. D., for bankrupt.

ELLIOTT, District Judge. On November 1, 1911, an involuntary petition in bankruptcy was filed against the bankrupts above named, and they were adjudged bankrupts December 5, 1911, and thereafter E. J. Grover was duly appointed trustee in bankruptcy. On the 15th day of July, 1912, the Hubbard Milling Company, a corporation, of Mankato, Minn., filed its petition in the bankruptcy proceedings, representing, in substance, that prior to the instituting of the bankruptcy proceedings herein, the bankrupts and their representative E. J. Grover, and others, had in their possession the sum of \$1,567.40 from the sale of two car loads of flour, which flour was claimed by the petitioners to have been consigned to said bankrupts. It further appeared in said petition that petitioners claimed that the bankrupts and said E. J. Grover and others received said flour from the petitioners under and by virtue of a verbal contract entered into by and between the said bankrupts and the petitioners, whereby the bankrupts were to handle certain brands of flour therein referred to, manufactured by petitioners, at their places of business in South Dakota on consignment. In said petition it further appears from the claim of said petitioners that said flour in the aggregate amounted to 629 sacks, consigned to the bankrupts under the terms of said oral agreement, which remained and was the property of the petitioners, and was held and possessed by said bankrupts as the agents of the petitioners as consigned property. It further appears from said petition that bankrupts were not concerned in disposing of said flour except as commission men, and as agents of petitioners, and that the same was disposed of as the property of the petitioners, and the bankrupts and their representatives collected all of the money belonging to the petitioners, the value of said flour, from the persons to whom it was delivered by them, as the agents of the petitioners, in the sum of \$1,538.60. It is further alleged in said petition that this amount of money had been collected from the parties to whom the flour was delivered by the bankrupts and their agent, and that said money so arising from such sale belonged to petitioners, and at all times had belonged to them, and to no one else. It further appears from the petition that the said funds were, in fact, the property of the petitioners, were in the hands of the trustee, and did not belong to the trustee nor to the estate, and petitioners thereupon demanded the funds in said estate to whatever extent said funds had been derived from said flour so consigned to said bankrupts.

Upon the hearing upon the issue presented by this petition the referee made and filed an order, dated March 28, 1912, which order, omitting the title and formal portions, is as follows:

"The court finds that during the months of May and August, 1911, two car loads of flour were shipped to Larkin & Metcalf on consignment; that about July 12, 1911, through an arrangement made with the firm of Larkin & Metcalf and a portion of the creditors of said firm, E. J. Grover et al. were placed in charge of the business of the said firm; that a portion of said flour was sold by Larkin & Metcalf prior to this arrangement, and that

the balance of the said flour was sold after the 12th day of July, 1911; that at the time E. J. Grover et al. took charge as the trustees or agents of Larkin & Metcalf of the business of said firm there was no cash on hand, and that all of the proceeds from the sale of this flour, together with all other business done in conducting said business by said agents or trustees, up to and including the 1st day of November, 1911, was all used and paid out in the conducting and carrying on of said business; that on the 1st day of November, 1911, an involuntary petition was filed against said bankrupt firm, and that on the 5th day of December, 1911, the members of said firm were adjudicated bankrupts; that no part of the moneys received and now in the hands of the trustee of the above estate came from the proceeds of the sale of flour so shipped on consignment.

"It is therefore ordered that the application of the Hubbard Milling Company made herein for the payment of \$1,538.60 from moneys in the hands of the trustee of the above-entitled estate be, and the same is hereby, disallowed, for the reason that it does not appear that any of the money from the sale of goods made under the contract for the handling and disposing of the flour shipped on consignment actually passed into the hands of the trustee of this bankrupt estate, or is held at this time by him."

Thereupon the petitioners filed a petition for review of said order, which is as follows:

"That such order was, and is erroneous, in that:

"(1) That there was no evidence to support said order in the following particulars: (a) There was no evidence to support the finding in said order 'that a portion of said flour was sold by Larkin & Metcalf prior to the appointment of E. J. Grover et al. to have charge of the business of the bankrupts.' (b) There was no evidence to support the findings in said order 'that at the time E. J. Grover et al. took charge as the trustees or agents of Larkin & Metcalf of the business of said firm there was no cash on hand, and that all of the proceeds from the sale of this flour, together with all other business done in conducting said business by said agents or trustees up to and including the 1st day of November, 1911, was all used and paid out in the conducting and carrying on of said business.' (c) There was no evidence to support the finding 'that no part of the moneys received and now in the hands of the trustee of the above estate came from the proceeds of the sale of flour so shipped on consignment.'

"(2) That the uncontradicted evidence in the case shows as follows: (a) That during the months of May and August, 1911, the petitioner, the Hubbard Milling Company, a corporation, shipped and delivered to said Larkin & Metcalf, as their agents, two cars of flour, which said two cars of flour was sold by said Larkin & Metcalf as agents of said Hubbard Milling Company, a corporation, and the proceeds of the sales thereof were afterwards collected and paid into the hands of the trustees of the above bankrupt estate, and said proceeds of the sale of said flour aforesaid was and is still held by said trustee, and that said proceeds of the sale of said flour is the property and money of the Hubbard Milling Company, a corporation, petitioner herein.

"(3) That said referee in bankruptcy erred in finding and holding that the \$1,538.60, proceeds of the sale of said property, was not the property of the petitioner and disallowing the application and petition of the petitioner, and also erred in not ordering and directing the trustee to pay to the petitioner the sum of \$1,538.60, or such portion thereof as had been taken and used in the conduct of the business of said bankrupt estate prior to the appointment of the trustee in bankruptcy herein.

"(4) The referee erred in finding and holding that the claim of the petitioner was not a preferred claim against the estate of said bankrupts, in so far as the proceeds of the sale of said flour had been taken and used in the operation of said business by said E. J. Grover et al. during the time they were in charge and control of said business.

"(5) That the referee erred in finding and holding that the proceeds of the sale of such flour mentioned above that came into the hands of E. J. Grover et al., trustees appointed by the creditors and by them accounted for in the

operation of said business, did not constitute a preferred claim in favor of the petitioner and against the trustee in bankruptcy.

"Wherefore, your petitioner feeling aggrieved because of such order prays that the same may be reviewed as provided in the bankruptcy law of 1898 and its amendments and general order xxvii."

It appears from an examination of the record herein: That a verbal contract was entered into by and between the members of the firm of Larkin & Metcalf and a representative of the Hubbard Milling Company, whereby the firm of Larkin & Metcalf were to handle, on consignment, certain brands of flour therein referred to manufactured by the Hubbard Milling Company at their various places of business. That, in compliance with said agreement, the Hubbard Milling Company on or about the 17th day of May, 1911, shipped to the bankrupts at Madison, S. D., one car load of flour, and on the 3d day of August, 1911, another. That on or about the 10th day of July, 1911, by an arrangement with a part of the creditors of Larkin & Metcalf, three persons were placed in charge of the business affairs of Larkin & Metcalf. That at the time of this arrangement by which these representatives of certain of the creditors of Larkin & Metcalf took possession of the business of Larkin & Metcalf, a portion, if not all of the shipment of May 17th had been delivered by Larkin & Metcalf to purchasers, and that the shipment of August 3, 1911, to Larkin & Metcalf was delivered, sold, and disposed of by the acting representatives of the firm of Larkin & Metcalf, all of which was done under the verbal contract, whereby the same was to be handled by them upon consignment, and I think it may fairly be said that there is no dispute in the record as to the relation of the bankrupts and these petitioners, with reference to these transactions. The flour was and remained the property of the petitioners. The money collected therefor, less the commissions agreed upon, was, and remained, the property of the petitioners.

It further appears from the record that at the time of the filing of the petition in bankruptcy both of said car loads of flour had been disposed of and delivered to the purchasers, and the proceeds thereof collected by the bankrupts and their representatives, and used in paying the debts of Larkin & Metcalf and the expense of running the business. It further affirmatively appears that all moneys had been paid out, and there were no moneys belonging to said estate in the hands of the representatives of the bankrupts just prior to the date of filing the petition in bankruptcy; that all moneys that had been received by them had been paid out, including the money received for these two car loads of flour, and used toward the payment of debts of the bankrupts, and the expenses in the management of the business of the bankrupts; that thereafter, and about the time of the filing of the involuntary petition herein, certain property consisting of grain, etc., belonging to the bankrupts, was disposed of, and money in the sum of a little more than \$12,000 realized from the sale thereof was turned over to the bank-

rupt, and is held by him as assets of said estate. The referee found, as appears from the above order:

"All of the proceeds from the sale of this flour, together with all other business done in conducting said business by said agents or trustees up to and including the 1st day of November, 1911, was all used and paid out in the conducting and carrying on of said business; that on the 1st day of November, 1911, an involuntary petition was filed against said bankrupt firm, and that on the 5th day of December, 1911, the members of said firm were adjudicated bankrupts; that no part of the moneys received and now in the hands of the trustee of above estate came from the proceeds of the sale of the flour so shipped on consignment."

The questions suggested by the record are:

(1) What was the interest of these petitioners in these two car loads of flour, and the proceeds of the sale of said flour in the hands of the bankrupt?

(2) Did the money collected from the purchasers of said flour by the bankrupts and their representatives belong to the petitioners?

(3) If the petitioners were the owners of the flour and of the proceeds thereof intrusted to the bankrupts and their agents, by whom it has been misapplied, are they entitled to a general lien upon the assets of the trustee in bankruptcy of the estate of the bankrupts for the value of such property as against the general creditors, or have they such right to the moneys acquired about the time of the filing of the petition solely from the sale of other property of the bankrupts, it affirmatively appearing from the findings that the entire property of the petitioners was delivered to purchasers, and the entire proceeds of such sale misappropriated by the bankrupts and their agents, and the whole thereof, together with all other moneys on hand after such collections were made, were thereafter and before bankruptcy used by the bankrupts and their representatives in the payment of debts and other expenses of the business?

The contention of the petitioners that the findings of fact contained in the order made by the referee are not supported by the evidence is untenable. Without attempting a review of the testimony, it is sufficient to say that, after a careful examination of all of the evidence, I am of the opinion that the findings of the referee are fully supported by the evidence, or, at least, that there is no clear preponderance of the evidence against the referee's findings.

The referee's findings are therefore sustained.

[1] It seems clear upon a consideration of all of the evidence that Grover and others, who had charge of the business prior to the time of the filing of the petition in bankruptcy, were the representatives of these bankrupts, and that whatever was done by them with reference to this transaction was the act of the bankrupts. The relation of debtor and creditor never existed between petitioners and the bankrupts, and, in answer to the first question above suggested, these petitioners were the actual owners of the two car loads of flour in dispute. There was never any promise on the part of the bankrupts to pay for the flour or any personal responsibility

therefor, and the petitioners could have obtained possession of the flour at any time before it was sold, whether before or after Larkin & Metcalf were declared bankrupts. This being true, the money collected by the bankrupts, or by Grover and others, before the bankruptcy petition was filed, upon the sale of this flour, belonged to the petitioners.

Answering the third question, it is contended on behalf of the petitioners that the proceeds of the sale of this flour, even though wholly misapplied by the bankrupts to the payment of their debts and the expenses of managing the business, was impressed with the character of a trust fund, and that the trust may be enforced against any assets of the bankrupts in the hands of their trustee, and especially that they are entitled to a preference to the amount of their said claim to the moneys in the hands of the trustee. It is found by the referee that none of this money of the petitioners, collected for the sale of said flour, came into the hands of this trustee, and it is further shown by the evidence that the proceeds of the sale of the petitioners' flour, together with all other money on hand, was paid out, and that the bankrupts had no money of any kind or character just prior to the time of the filing of the petition in bankruptcy herein, with the affirmative finding that all of the assets of said estate represented by the money in the hands of the trustee in bankruptcy herein, was the proceeds of and received upon the sale of distinct separate items of property of the bankrupts, indicated and referred to in the evidence herein, and in no way connected with the flour of the petitioners in question herein, and had never been commingled with any part of the proceeds of the sale of said flour.

There is no recognized ground upon which equity can pursue this fund and impose upon it the character of a trust, except upon the theory that the money is still the property of the petitioners. If the petitioners herein are to be permitted to follow the fund received by the bankrupts or their agents upon the sale of this flour, and recover it, it is because the property belongs to the petitioners whether in the form in which they parted with its possession or in a substituted form. Under the earlier rule, petitioners would have been required to identify it as the very property which they had confided to another.

[2] The modern and more equitable doctrine permits the recovery of a trust fund from any one, not an innocent purchaser, and in any shape into which it may have been transmuted, provided he can establish the fact that it is his property or the proceeds of his property, or that his property has gone into it and remains in a mass from which it cannot be distinguished. *Spokane County v. First Nat. Bank*, 68 Fed. 979, 16 C. C. A. 81.

[3] The earlier English doctrine was to the effect that the owner of property intrusted to another could follow and retake the same from the possession of the holder whether he was agent, bailee, or trustee, or from others who were in privity with him, so long as they were not bona fide purchasers for value, and this, irrespective of whether such property remained in its original form or had been changed into some other form, so long as it could be ascertained to be

the same property or the proceeds of the same property but that the right ceased when the means of ascertainment failed. It was further held that such means of ascertainment failed when the property was in the form of money, and had been mixed and confused in a general mass of money of the same description. The more recent doctrine, however, follows the rule announced in *Re Hallett's Estate* (Knatchbull v. Hallett) 13 Ch. Div. 696, which is to the effect that, if money held by one in a fiduciary character has been paid by him to his account at his banker's, the person for whom he held the money can follow it and has a charge on the balance in the banker's hands, and that if the depositor has commingled it with his own funds in the bank, and has afterwards drawn out sums upon checks in the ordinary manner, he must be held to have drawn out his own money in preference to the trust money, and that, if he destroyed the trust fund by dissipating it altogether, there remains nothing to be the subject of the trust; that only so long as the trust property can be traced and followed into other property into which it has been converted does it remain subject to the trust.

There has been some diversity of opinion as to the meaning of these decisions, but I think a reasonably uniform approval of the doctrine generally. Some have interpreted it to mean that in a suit brought to pursue trust property it is only necessary to show that the estate has actually received the benefit of the trust fund, and that it makes no difference that the plaintiff is unable to show that his fund, or property which represents it, is then in the estate in any form, or has actually gone into the hands of the assignee or receiver. *Spokane County v. First Nat. Bank*, supra. See citations at page 981 of 68 Fed., at page 83 of 16 C. C. A. By a careful reading of these various opinions it is clear that the courts were influenced largely by the consideration that the estate of the insolvent, and thereby the general creditors thereof must have received the benefit of all the trust funds unlawfully used by the insolvent in the course of business or the payment of debts. Thus it is said in *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90, one of the cases cited:

"As the estate was augmented by the conversion of the trust fund, no reason is seen under the equitable principle which has been mentioned why they should not become a charge upon the entire estate."

Another court has said:

"The creditors, if permitted to enforce their claims as against the trust, would secure the payment of their claims out of trust moneys." *Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. 1049, 20 Am. St. Rep. 442; *Harrison v. Smith*, 83 Mo. 216, 53 Am. Rep. 571.

I am of the opinion, however, that it cannot be said that because these bankrupts or their representatives misapplied trust funds and paid debts of the bankrupt, and paid the expenses of running the business with such funds, that, therefore, the general creditors of the estate are by that amount benefited, and that because of such benefit therefore equitable considerations require that the owners of the trust fund be paid out of the estate, to the exclusion of general creditors. If, as in this particular case, it is shown that this money was recently

used to pay debts of the bankrupt, and the expenses of conducting the business, that would otherwise be claims against the estate of these bankrupts, it would be a great injustice to require that the money so paid out should be refunded out of the other assets; and why? Because by paying out of the general assets the amount of this trust fund that had been used for the payment in full of other obligations and the expenses of running the business the general creditors who are entitled to the general assets of the bankrupts are thereby required to contribute toward the payment in full of these creditors whose demands have been extinguished by the trust fund. It does not appear that the money for distribution in this case includes any part of that belonging to the petitioners herein. If it did appear, the lien of the petitioners would attach, and they would have preference. The commingling of this trust fund of the petitioners with the private funds of the bankrupts would not destroy the right of the petitioners to follow it. The commingling being wrong, the entire fund of the bankrupts was impressed with the trust, until it was all used for other purposes as above stated, but the trust does not extend to funds with which it was never commingled. *Mercantile Trust Co. v. St. L. & S. F. Ry. Co. et al.* (C. C.) 99 Fed. 485; *In re Wolff* (C. C.) 99 Fed. 485.

Judge Adams, then District Judge for the Eastern District of Missouri, after announcing the above doctrine, said:

"There is another line of authority announcing the proposition that, because a trust fund when appropriated by a trustee to his own use swells his assets, the general estate of the trustee when insolvency supervenes will be impressed with the trust for the reimbursement of the cestui que trust on the ground that such estate has been benefited to an equal amount by the trustee's breach of duty. But this rule, as I understand it, has not received the sanction of any federal court and of but few state courts. The equity or rather the want of equity of such a rule is well characterized by the Court of Appeals of New York in the case of *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504." *Mercantile Trust Co. v. St. L. & S. F. Ry. Co.*, *supra*, 99 Fed. 488.

The court in that case further says:

"Following the well-settled rule already stated that the entire account with which the trust funds have been commingled may be appropriated for the satisfaction of the trust, and giving the intervenor the full benefit of that rule, I am of the opinion that the minimum amount found at any one time in the account of the company must be the maximum amount of the trust fund which by any possibility can be traced into the receiver's hands." *Mercantile Trust Co. v. St. L. & S. F. Ry. Co.* (C. C.) 99 Fed. 488.

In the case at bar, "the minimum amount found at any one time" in the cash account of the bankrupts and their agents, after the collection and misappropriation of the proceeds of the sale of the flour in question, was absolutely nothing. All of the money received from the sale of the flour and all other sources had, shortly before the involuntary petition in bankruptcy was filed, been used in the payment of claims against the bankrupt and in the payment of the expenses of the management of the business. The identification of the original trust fund of the petitioners was lost when the whole of the proceeds of the flour in question were, with all of the other funds with which

it has been intermingled, paid out to the creditors of the bankrupt, and for the payment of the expenses of the conduct of the business of the bankrupts.

The decisions of the state of South Dakota recognize the principle here stated, as I read them.

In *Farmers' & Traders' Bank v. Kimball Milling Co.*, 1 S. D. 388, 47 N. W. 402, 36 Am. St. Rep. 739, the property conveyed in that particular case could be identified and was acquired with fraudulently or unlawfully obtained funds. The property so obtained had been used in the purchase of other property, and it was there held that that particular property was impressed and chargeable with a trust in favor of the beneficiary to the extent of the fund traceable into the property.

In *Kimmel v. Dickson*, 5 S. D. 221, 58 N. W. 561, 25 L. R. A. 309, 49 Am. St. Rep. 869, \$265 was placed in the bank at Armour, in Douglas county. That same was held to be a trust fund. There was no attempt, however, to impress this trust fund a lien upon all of the assets of the bank. The bank failed and had only \$259.71 in cash assets, with which it was shown this trust fund of \$265 had been commingled. In this case plaintiff was only allowed to recover the amount of the cash assets, \$259.71, the amount left in the fund in which it was shown by the record it had been deposited.

In *Plano Mfg. Co. v. Auld*, 14 S. D. 518, 86 N. W. 23, 86 Am. St. Rep. 769, the same principle is recognized in the opinion of Judge Fuller, as follows:

"One dollar being the same as another in every material respect, an earmark is not essential to its identification, and, if a sufficient amount in cash remains in the vault of an insolvent bank, it may be reclaimed by its owner to the exclusion of general creditors. The presumption governing modern courts in tracing a trust fund wrongfully mingled by a trustee with his own funds out of which aggregate he has made disbursements in the due course of business is that he used his own money in preference to embezzling that of others."

In the case at bar it appears from the record that the cash assets of the bankrupts with which this trust fund of these petitioners was mingled was fully dissipated, wholly paid out, no part of it left, and the specified source from which the moneys on hand when the petition in bankruptcy was filed were acquired is set forth in the record.

In *McCormick H. M. Co. v. Yankton Sav. Bank et al.*, 15 S. D. 196, 87 N. W. 974, the court found that the relation of debtor and creditor existed between the bank and the machine company and therefore that there was no trust fund.

Under the facts in this case, as they have been herein referred to, it is manifest that these petitioners are not here claiming their own property intrusted to the bankrupts, nor the proceeds thereof, nor seeking to recover from a cash fund with which the proceeds of the sale of this flour was mingled, but are here claiming a preference over other creditors out of a cash fund realized upon sale of specified property of the bankrupts. I am of the opinion that there is no statute in this state giving any such preference, nor any bankruptcy statute of the United States giving such preference to the petitioners herein. Little

v. Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; Association v. Austin, 100 Ala. 313, 13 South. 908; Shields v. Thomas, 71 Miss. 260, 14 South. 85, 42 Am. St. Rep. 458; Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383; Slater v. Oriental Mills, 18 R. I. 352, 27 Atl. 443; Armstrong v. Bank (D. C.) 38 Fed. 883; Multnomah County v. Bank (C. C.) 61 Fed. 912; Massey v. Fisher (C. C.) 62 Fed. 958; Board of Fire & Water Commissioner of Marquette v. Wilkinson et al., 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493; Ill. Trust & Sav. Bank of Chicago v. First Nat. Bank of Buffalo (C. C.) 15 Fed. 858; In re Richard (D. C.) 104 Fed. 792; In re Galt, 120 Fed. 64, 56 C. C. A. 470. This same doctrine has been sustained by the Wisconsin Supreme Court consistently since the date of Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383, which specifically overruled the different doctrine announced in McLeod v. Evans, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287.

The doctrine announced in Peak v. Ellicott, relied upon by the petitioners herein, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90, was referred to by Circuit Judge Gilbert in Re Spokane Co. v. First Nat. Bank of Spokane, 68 Fed. 979, 16 C. C. A. 81, and the rule therein announced was repudiated.

It follows that, the petitioner having failed to prove that any of the property belonging to petitioners either in its original, commingled or in any form came into the hands of the trustee in bankruptcy herein, any trace or identification of the original trust fund or any part thereof is impossible.

The exceptions of the petitioners herein are overruled, and the order of the referee should be affirmed. It is so ordered.

FT. SMITH LIGHT & TRACTION CO. V. CITY OF FT. SMITH et al.

(District Court, W. D. Arkansas, Ft. Smith Division. December 31, 1912.)

1. GAS (§ 14*)—GAS COMPANIES—MUNICIPAL REGULATION OF CHARGES.

A city having statutory authority to regulate the price charged its inhabitants for water, gas, and electricity by reducing any charge found on a hearing to be exorbitant does not surrender such power in respect to a gas company by granting it a franchise subject to the condition that it shall not charge to exceed \$1 per thousand feet.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

2. GAS (§ 14*)—GAS COMPANIES—MUNICIPAL REGULATION OF CHARGES.

Where the statute giving the city such authority was in force when the franchise was granted, it became a part of the contract.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

3. MUNICIPAL CORPORATIONS (§ 591*)—POWERS—REGULATION OF PUBLIC SERVICE CORPORATIONS—CONTRACTS.

A city cannot by contract divest itself of power vested in it by the Legislature to regulate prices to be charged its inhabitants by gas companies, or other public service corporations.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1310; Dec. Dig. § 591.*]

4. GAS (§ 14*)—CHARGES—TEMPORARY RESTRAINING ORDER—SUFFICIENCY OF SHOWING.

Allegations in a bill by a gas company to restrain enforcement of an ordinance fixing rates that such rates are confiscatory, supported by uncontradicted affidavits showing that the company furnished gas at a loss under rates previously charged, which were higher than those fixed by the ordinance, are sufficient to entitle complainant to a temporary restraining order.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

5. GAS (§ 14*)—GAS COMPANIES—MUNICIPAL REGULATION OF CHARGES—VALIDITY OF ORDINANCE.

Kirby's Dig. Ark. §§ 5445, 5446, authorize the council of any city or town on complaint to make such examination as necessary to determine whether or not rates charged by any water, gas, or electric company are reasonable, and, if found to be unreasonable, to fix such rates as it shall deem reasonable. They also require any person or company operating any such works or plant in a city or town to appear before the council or any committee as often as the council may deem necessary and exhibit the books of the business. *Held*, that the statute contemplates such an investigation by the council as will enable it to come to a just conclusion as to what price is reasonable to be charged, and that an ordinance arbitrarily fixing rates to be charged by a natural gas company, without making any examination of its books or ascertaining the value of its plant, the expense of maintenance, or the cost of operation, was beyond the power of the council, and void.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

In Equity. Suit by the Ft. Smith Light & Traction Company against the City of Ft. Smith, Fagan Bourland, Mayor, John Harrington, Police Judge, and Vincent M. Miles, City Attorney. On application for temporary restraining order. Motion granted.

Hill, Brizzolara & Fitzhugh, of Ft. Smith, Ark., for plaintiff.

Vincent M. Miles and J. F. O'Melia, both of Ft. Smith, Ark., for defendants.

YOUMANS, District Judge. This is an application for a temporary restraining order to restrain the city of Ft. Smith and its mayor, police judge, and city attorney from enforcing Ordinance No. 1053, passed by the council of the city of Ft. Smith on the 16th day of December, 1912, in which the maximum price at which natural gas may be sold to consumers in said city is fixed at 25 cents per thousand cubic feet. The application is based on the allegations of the bill filed herein, affidavits, and oral proof introduced by both plaintiff and defendants. No answer has yet been filed. The bill sets up three grounds on which the plaintiff relies for a temporary restraining order at this time, and a perpetual injunction at the final hearing: (1) That the rate fixed by Ordinance 1053 changes plaintiff's contract with the city as set out in the ordinance under which plaintiff sells natural gas in Ft. Smith, and that, therefore, said contract is impaired, in violation of section 10, art. 1, of the Constitution of the United States. (2) That the rate fixed by the ordinance is confiscatory, and therefore in violation of section 1 of the fourteenth amendment to the Constitution of the

United States, prohibiting the making or enforcing by a state of any law depriving any person of property without due process of law. (3) That the ordinance was passed and the rate fixed without making the examination required by the statute of the state. Section 5445 and 5446 of Kirby's Digest.

The ordinance, the enforcement of which is sought to be enjoined, is as follows:

Ordinance No. 1053:

"An ordinance entitled an ordinance regulating the price of gas in the city of Fort Smith, Arkansas.

"Whereas more than five citizens of the city of Fort Smith, Arkansas, have filed with the city council a complaint alleging that the Fort Smith Light & Traction Company is charging an exorbitant price for the supply of gas to the citizens of Fort Smith, and

"Whereas the city council of the city of Fort Smith have made an examination to determine whether or not the prices charged are reasonable, and

"Whereas upon said examination it developed that the price charged by the Fort Smith Light & Traction Company for natural gas is unreasonable, said price being forty cents per one thousand feet with a deduction of five cents per thousand feet if paid by the 10th of the succeeding month for the amount consumed the month before, and

"Whereas it appears to the city council that the said Fort Smith Light & Traction Company have greatly raised their rates during the past twelve months, and

"Whereas it appears to the city council that the rate charged for natural gas in Fort Smith is much higher than that charged in nearby Oklahoma towns for natural gas, and

"Whereas it appears to the city council that twenty-five cents per thousand feet is a reasonable rate for natural gas,

"Therefore be it ordained by the city council of the city of Fort Smith, Arkansas,

"Section 1. That no person, firm or corporation, shall charge from and after the 1st day of January, 1913, more than twenty-five cents per thousand feet for natural gas.

"Sec. 2. Nothing contained in this ordinance shall be so construed as to prohibit any natural gas company from the right to charge and bill against the consumer a minimum charge of fifty cents each and every month when the amount of gas consumed in any month fails to amount to fifty cents.

"Sec. 3. That this ordinance shall be in full force and effect from and after its passage and publication, and that all ordinances or parts of ordinances in conflict herewith are hereby expressly repealed."

In passing this ordinance the council acted under the authority conferred by sections 5445 and 5446 of Kirby's Digest of the Statutes of Arkansas, which are as follows:

"Sec. 5445. The city council of any city or town in this state is hereby authorized when complaint is filed with them by five or more citizens of such city or town that any water company, gas or electric light plant, or any person, managing such water, gas or electric light plant, is charging an exorbitant rate for the supply of water, gas or electricity, to summons all such persons together with their books and make such examination as will be necessary to determine whether or not the prices charged for water, gas or electricity, is reasonable; and if upon examination the city council shall determine that the citizens, or any number of the citizens of such city or town is being charged an unreasonable price for water, gas or electricity, it shall be their duty to fix such prices to be paid for water, gas or electricity, as they may deem to be a reasonable charge.

"Sec. 5446. Any person, company or corporation now owning or operating, or who may hereafter own or operate any water, gas or electric light plant

in this state, situated in any of the cities or towns of this state, for the purpose of furnishing the inhabitants of such city or town with water, gas or electricity, is hereby required to appear before the city council or any committee thereof as often as such city council may deem necessary and exhibit the books of water, gas or electric light plant, and are hereby required to adopt such rates to be charged for water, gas or electricity as shall be fixed by the city council of such city or town."

Under the authority given by these sections, the city council of Ft. Smith, upon complying with the provisions therein contained, has the power to fix rates for the sale of natural gas, and such rates when legally fixed, and when not confiscatory, are legally binding on plaintiff, unless they are in conflict with a contract already made between the city and plaintiff which the city had authority to make.

It is alleged in the complaint that the plaintiff is selling natural gas in Ft. Smith under Ordinance No. 634, passed December 21, 1903, and that said ordinance provides that the price charged for natural gas should not exceed the sum of \$1 per thousand cubic feet. It is contended by the plaintiff that this provision for a maximum rate of \$1, together with certain other provisions in the ordinance requiring the grantee of the franchise, and his successors, to furnish gas free to certain public buildings, constitutes a contract which prevents the city from making a lower maximum than \$1. This contention is not good for three reasons:

[1] (1) The city by the ordinance did not undertake to surrender any right or power it had. On the other hand, the grantee of the franchise in accepting the ordinance undertook to sell natural gas at a price not to exceed one dollar per thousand cubic feet, regardless of conditions. With reference to fixing the price of gas the ordinance was a limitation on the grantee of the franchise, and not upon the city. *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887.

[2] (2) The law giving municipalities the power to fix rates was in force at the time of the passage of the ordinance in December, 1903. It therefore became a part of the contract between the city and the plaintiff as the successor of the original grantee of the franchise. *Arkadelphia Electric Light Co. v. Arkadelphia*, 99 Ark. 178-186, 137 S. W. 1093.

[3] (3) The city could not by contract divest itself of the power conferred upon it by the Legislature. *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594.

The plaintiff is therefore not entitled to a restraining order on the ground of impairment of a contract.

[4] It appears from the allegations of the complaint and the affidavits in support thereof that prior to May 1, 1912, the plaintiff had in force a certain scale of rates, which were increased on that day, the reason assigned being that the wells from which the supply of gas was obtained by the plaintiff were becoming exhausted. It is further alleged that the company sustained a loss on gas sold by it prior to May 1, 1912, and that the enforcement of the ordinance in question will compel it to sell gas at a loss in the future. These allegations are supported by affidavits filed by plaintiff, and were not controverted by affi-

davits or otherwise. They are sufficient to warrant the issuance of a temporary restraining order on the ground that the rate fixed by the ordinance is confiscatory. *American Water Supply Co. v. Kankakee (C. C. A.)* 199 Fed. 757.

[5] The third ground upon which plaintiff relies is based on the allegation that the council passed the ordinance in question without making the examination required by law. The sections of the statute under which the council of the city of Ft. Smith acted are not in violation of section 1 of the fourteenth amendment to the Constitution of the United States, because they authorize a fixing of rates only after examination and notice. The council cannot act arbitrarily. In this case the allegation is that the council did not, in fact, make the examination. The contention here is, in effect, that the fixing of rates without examination, under a valid state law requiring examination, is not only a violation of such law, but also a violation of the Constitution of the United States, and that arbitrary action under a valid law requiring the exercise of discretion upon investigation is as bad as arbitrary action under an invalid law. If a statute authorizes the fixing of rates arbitrarily, it is void. *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970. If, under a statute authorizing the fixing of rates after investigation, the body authorized to act, after making an investigation, in fact acts without investigation, its action is void. *San Diego Land Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154; *Siler v. L. & N. R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; *Louisiana R. Comm. v. Cumberland Tel. Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 577.

Justice must be done both to the public and the corporation, or individual whose rates are involved. This can be accomplished only by an investigation, after notice, of the factors which enter into the question of reasonable price. The public can demand no more. The corporation or individual can be accorded no less. The question of what the duty of the governing body of a state is in fixing rates under a valid law came before the Supreme Court of California in the case of *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116. The statute of that state required that the rates of compensation to be collected by any person, company, or corporation of that state for the use of water supply for any city or town, or inhabitant thereof should be fixed annually by the governing body of such town by ordinance or otherwise; that such ordinance should be passed in the month of February, each year, and take effect on the 1st day of July thereafter. The Legislature passed an act to put into effect that constitutional provision. The board of supervisors of San Francisco proceeded to fix rates under that act and provision of the Constitution. The *Spring Valley Waterworks* brought a suit in equity to enjoin the enforcement of the ordinance. Among other things its complaint alleged:

"That the rates purporting to be fixed by said ordinance or order were fixed arbitrarily at random, and by mere guesswork, without any consideration of or with regard to the right of plaintiff to a reasonable compensation for supplying water to said city and county and its inhabitants, or to a rea-

sonable income, or any income upon its investment, and without any consideration of or regard to the value of the plaintiff's works and property, or to the amount of its interest-bearing indebtedness, and the annual interest charge thereon, or its operating expenses, or the amount of taxes which it would be required to pay, or the right of the plaintiff's stockholders to reasonable or any dividends upon their stock, and without any reference to or consideration of the actual cost of supplying it water, but in total disregard of all such matters, and that in the passage or pretended passage of said ordinance or order the said board of supervisors acted wholly without jurisdiction, power, or authority, and in excess of their lawful jurisdiction, power, and authority."

A demurrer was filed to this complaint. The contention on the part of the city was that the courts had no power to set aside any order or ordinance of the board with regard to rates. The lower court overruled the demurrer, and, upon the refusal of the city to plead further, rendered a decree for the plaintiff. Upon appeal the Supreme Court of California said:

"It must be conceded in the outset that the use of water for sale is a public use, and that the price at which it shall be sold is matter within the power of the board of supervisors to determine. *Munn v. Illinois*, 94 U. S. 113 [24 L. Ed. 77]; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347 [4 Sup. Ct. 48, 28 L. Ed. 173]. Indeed, this is not controverted by the respondent. The Constitution does not in terms confer upon the courts of the state any power or jurisdiction to control, supervise, or set aside any action of the board in respect to such rates. It may also be conceded, for the purposes of this case, that when the board of supervisors have fairly investigated, and exercised their discretion in fixing the rates, the courts have no right to interfere, on the sole ground that in the judgment of the court the rates thus fixed and determined are not reasonable. That such is the case is attested by numerous authorities. *Nisbitt v. Board of Works*, L. R. 10 Q. B. 10; *Davis v. Mayor of New York*, 1 Duer [N. Y.] 451-497; *Munn v. Illinois*, 94 U. S. 113 [24 L. Ed. 77]; *Spring Valley Water Co. v. Schottler*, 110 U. S. 347 [4 Sup. Ct. 48, 28 L. Ed. 173]; *Chicago & N. W. Ry. Co. v. Dey* [C. C.] 35 Fed. 866 [1 L. R. A. 744].

"But it seems to us that this complaint presents an entirely different question from this. The whole gist of the complaint is that the board of supervisors have not exercised their judgment or discretion in the matter; that they have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without any reference to what they should be, without reference either to the expense to the plaintiff necessary to furnish the water, or to what is a fair and reasonable compensation therefor; that the rates are so fixed as to render it impossible to furnish the water without loss, and so low as to amount to a practical confiscation of the plaintiff's property. If this be true, and the demurrer admits it, a party whose property is thus jeopardized should not be without a remedy. If the action of the board of supervisors was taken as the complaint alleges, they have not in any sense complied with the requirements of the Constitution, and their pretended action was a palpable fraud, which might result injuriously either to the plaintiff or the city and its inhabitants, and would almost certainly work injustice to one or the other. The Constitution does not contemplate any such mode of fixing rates. It is not a matter of guesswork or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the Constitution provides for the fixing of rates or compensation, it means reasonable rates and just compensation. It does not follow, however, that, because no notice is necessary, the board are for that reason excused from applying to corporations or individuals interested to obtain all information necessary to enable it to act intelligibly and fairly in fixing the rates. This is its plain duty, and a failure to make the proper effort to procure all necessary information may defeat its action. Both the

corporation and the individuals furnishing the water, as well as the public, who must pay for its use, are entitled to an honest effort on the part of the board to obtain such information, and to have it act accordingly."

This case was quoted from and approved by the Supreme Court of the United States in the case of *San Diego Land Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154.

In the case of *San Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261, the Supreme Court of California had occasion again to pass upon the question of the duty of a governing body of a municipality in fixing water rates. Referring to the section of the state Constitution above mentioned, the court said:

"The meaning of the section is that the governing body of the municipality upon a fair investigation, and with the exercise of judgment and discretion, shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily, without investigation, or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty, and go beyond the powers conferred upon them."

In the case of *Arkadelphia Electric Light Co. v. Arkadelphia*, 99 Ark. 178, 137 S. W. 1093, it was held that:

"The rates having been fixed by the city council, which is given authority to investigate and determine reasonable rates, the presumption is that they are reasonable, and the burden of proof is upon the company to show affirmatively that they are not."

This is not a conclusive presumption, however. The council might so conduct its investigation, or might ignore or disregard essential facts to such an extent, as to overcome the presumption of the correctness of its decision. *San Diego Water Co. v. San Diego*, 118 Cal. 576, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261. What then must the council consider?

In the case of *Smyth v. Ames*, 169 U. S. 546, 18 Sup. Ct. 434, 42 L. Ed. 819, the Supreme Court of the United States said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of the public highway than the services rendered by it are reasonably worth."

In the case of *San Diego Land Co. v. National City*, 174 U. S. 757, 19 Sup. Ct. 811, 43 L. Ed. 1154, the same court said:

"The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its

plant, the cost per annum of operating the plant, including interest paid on money borrowed, and reasonably necessary to be used in constructing the same, the annual depreciation of the plant from natural causes resulting from its use, and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly all these matters ought to be taken into consideration, and such weight be given them when rates are being fixed as under all the circumstances will be just to the company and the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and the public."

In the case of *Willcox v. Consolidated Gas Co.*, 212 U. S. 41, 29 Sup. Ct. 195, 53 L. Ed. 382, 15 Ann. Cas. 1034, the court said:

"There must be a fair return upon the reasonable value of the property at the time it is being used for the public."

In the case of the *Lincoln Gas Co. v. Lincoln*, 223 U. S. 357, 32 Sup. Ct. 272, 56 L. Ed. 466, the court said:

"In this, as in every other legislative rate case, there are presented three questions of prime importance: First, the present reasonable value of the company's plant engaged in the regulated business; second, what will be the probable effect of the reduced rate upon the future net income from the property engaged in serving the public; and, third, in ascertaining the probable net income, under the reduced rates prescribed, what deduction, if any, should be made from the gross receipts as a fund to preserve the property from future depreciation?"

In the case of *Brymer v. Butler Water Co.*, 179 Pa. 231, 250, 36 Atl. 249-251 (36 L. R. A. 260), the Supreme Court of Pennsylvania said:

"Ordinarily, that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for. Then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be unreasonable."

In the case of the *Kennebec Water District v. Waterville*, 97 Me. 185, 204, 54 Atl. 6, 14 (60 L. R. A. 856), the Supreme Court of Maine said:

"The elemental principles thus far noted may be summarized as, on the one hand, the right of the company to derive fair income, based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation, and current operating expenses; and, on the other hand, the right of the public to have no more exacted than the services in themselves are worth."

The law of this state empowers the city council to make such examination as will be necessary to determine whether or not the prices charged for water, gas, or electricity are reasonable, and, if upon examination the council shall determine that an exorbitant price is being charged, it will be its duty to fix such price to be paid as it may deem to be reasonable. Any person, company, or corporation owning or operating any water, gas, or electric lighting plant in any city or town of the state is required to appear before the city council, or any committee thereof, as often as such city council may deem necessary, and exhibit the books of the water, gas, or electric lighting plant. The law clearly contemplates such an investigation as will enable the council to come to a just conclusion as to a reasonable price to be charged. According to the allegations of the complaint and the evidence, no examination was made of the books of the plaintiff. The value of its plant used in the distribution and sale of gas was not ascertained; the cost of operation was not inquired into; no allowance was made for depreciation. If these allegations are true, the same conditions are present here as were present in the California cases above cited, and it was impossible for the council to form a just conclusion as to a reasonable price.

According to the testimony introduced by the city, the manager of plaintiff was asked to give a reason why the company increased its rate on May 1, 1912. As one of his reasons the manager said that a number of other cities were charging a higher rate. Thereupon he was told by the city attorney that the fact that such cities were charging a higher rate could not control in that inquiry. That was a correct statement of the law, but the council according to the evidence, and a recital of the ordinance, made controlling the fact that gas was being sold in nearby Oklahoma towns at a less rate. The fact that gas was being sold in certain towns at a greater rate did not in itself, in an inquiry as to its reasonableness, justify the plaintiff in increasing its rate. Nor did the fact, in itself, that gas was being sold in nearby Oklahoma towns at a less rate, justify the council in fixing a less rate than the one charged by plaintiff.

In the case of *Smyth v. Ames*, above cited, the Supreme Court said:

"It is said by the appellants that the local rates established by the Nebraska statute are much higher than in the state of Iowa, and that fact shows that the Nebraska rates are reasonable. This contention was thus met by the Circuit Court: 'It is, however, urged by the defendants that in the general tariffs of these companies there is an inequality, that the rates in Nebraska are higher than those in adjoining states, and that the reduction by House Roll 33 simply establishes an equality between Nebraska and the other states through which the roads run. The question is asked, Are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively they are. That is, the roads may not discriminate against the people of any one state, but they are not necessarily bound to give absolutely the same rates to the people of all the states; for the kind and amount of business and the cost thereof are factors which determine largely the question of rates, and these vary in the several states. The volume of business in the one state may be greater per mile, while the cost of construction and maintenance is less. Hence, to enforce the same rates in both states might result in one in great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two states are of little value, unless all the elements that enter into the

problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 per cent. higher than similar rates in the state of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two states is of comparatively little significance.' [Ames v. Union Pac. Ry. Co. (C. C.) 64 Fed. 165. In these views we concur, and it is unnecessary to add anything to what was said by the circuit court on this point.]

In the case of *Storrs v. Pensacola & A. R. Co.*, 29 Fla. 617, 11 South. 226, in passing on the question of reasonable rates as determined by comparison, the Supreme Court of Florida said:

"The allegation in the bill before us is that the rates are unreasonable and unjust when compared with rates permitted by the commissioners upon lines of railroad in the state of Florida existing and operating under the same conditions as those under which the road of appellee exists and operates, and an example is given in the rates fixed for the Florida Railway & Navigation Company and appellee which connect with each other. We are not informed of the facts upon which the commissioners fixed the rates for the other lines of railroad; nor is it even alleged that these rates are reasonable and just. Two roads may operate under the same conditions—that is, the same mode of existence, or the same state or situation, with regard to external circumstances—and still many things may exist in connection therewith and which would determine a reasonable rate for it different in amount from that of the other. The cost of construction, the length of the road, amount of traffic, and many other things may properly enter into a consideration of what is a reasonable rate."

In the case of *Brymer v. Butler Water Co.*, above cited, the court said:

"Some towns are so situated as to make the procurement of an ample supply of water comparatively inexpensive. Some are so situated as to make the work both difficult and expensive. What would be an extortionate charge in the first case might be the very least at which the water could be afforded in the other."

It is alleged in the bill, and testimony was introduced by the plaintiff to show, that the field from which plaintiff obtained its supply of gas is becoming exhausted. On cross-examination by counsel for the city one of the witnesses was asked whether the determination of the question of the quantity of gas in the field was not speculative. The witness answered in the affirmative. Upon that answer counsel for the city urged that the company was not warranted in increasing its price, because of the uncertainty of the fact of the exhaustion of the field. There does not seem to me to be any force in that argument. The logical conclusion from the uncertainty with regard to the question of supply is directly opposed to the argument made. In the case of the *Kennebec Water District v. Waterville*, above cited, the court said:

"There is another matter which we think may fairly be conceded in connection with the reasonableness of rates. We think something may be allowed in this respect for the risks of the original enterprise, if there were any. It is common sense that they who invest their money in hazardous enterprises may reasonably be entitled, for a time at least, to larger returns than would be the case if the success of the undertaking were assured from the beginning."

Uncertainty in any venture is always an element to be considered in fixing a price upon the product or results of that venture.

The allegations of the bill and the testimony warrant the issuance of a temporary restraining order on the ground of the failure of the council to make the investigation required by the law of the state. *Siler v. Louisville & Nashville R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753.

The temporary restraining order will be issued upon the giving of a bond sufficient to protect all consumers paying the rate charged by the company, and the company will be required to furnish to consumers such evidence of payment as will enable them to determine readily and accurately the amount they may pay over and above the rate fixed by the ordinance.

WASHINGTON-OREGON CORP. et al. v. CITY OF CHEHALIS et al.

(District Court, W. D. Washington, S. D. January 27, 1913.)

No. 1,215.

1. FRANCHISES (§ 2*)—CONSTRUCTION OF GRANT.

A grant of a franchise or privilege is to be strictly construed in favor of the public. Whatever is not unequivocally granted is withheld, and nothing passes by implication.

[Ed. Note.—For other cases, see Franchises, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. WATERS AND WATER COURSES (§ 183*)—FRANCHISE TO WATER COMPANY—CONSTRUCTION.

A provision, in an ordinance granting a franchise to a water company and contracting for hydrants, that during the term of the grant the city would not "contract with any other person or persons, corporation or corporations, for a supply of water," does not preclude the city from constructing a water system of its own during the term.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 277, 278; Dec. Dig. § 183.*]

3. COURTS (§ 282*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

Where a water company alleges in good faith that it has a contract with a city, a federal court has jurisdiction of a suit to enjoin its impairment, and also to decide all other questions arising in the case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

Jurisdiction in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7; *Barnhart v. Switzler*, 105 C. C. A. 262.]

4. WATERS AND WATER COURSES (§ 183*)—WATER COMPANIES—CONTRACT WITH CITY.

Where an ordinance granting a franchise to a water company gave the city an option to purchase its plant at a value to be fixed by appraisers, and provided that in case the city decided to purchase it should serve notice of such determination 6 months prior to the time the purchase was to be made, but did not specify whether such notice should be given before or after appraisal, a mere request by the city for the appointment

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

of appraisers did not bind it as an election to purchase, after the appraisers had failed to agree

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 277, 278; Dec. Dig. § 183.*]

In Equity. Suit by the Washington-Oregon Corporation and the Fidelity Trust Company against the City of Chehalis, John T. Coleman, Mayor, Edward Deggeller, Commissioner and City Clerk, Frank J. Allen, City Treasurer, and C. A. Studebaker, City Attorney. On motion to modify injunction. Motion granted.

C. A. Johns, of Portland, Or., and Sullivan & Christian, of Tacoma, Wash., for complainants.

W. A. Reynolds, of Chehalis, Wash., for defendants.

CUSHMAN, District Judge. This matter is now before the court upon respondents' motion to modify an order, heretofore granted upon a stipulation, the modification to allow the respondents to award a certain contract for the construction of certain waterworks and to sell bonds of the city of Chehalis therefor. At the time of making the order upon stipulation, the demurrer to the complaint was overruled, and respondents have answered. The hearing upon the motion to modify the order, whether it be considered as a rehearing of the demurrer or a motion for decree on bill and answer, goes to the merits of the whole controversy. The order referred to in the motion was one denying an interlocutory injunction; respondents having stipulated with complainants that they would not award the contracts sought to be awarded, or market their bonds therefor, until the further order of the court, both complainants and respondents reserving the right to ask for a modification of the order.

The bill and answer show that the Washington-Oregon Corporation is a corporation of the state of Washington, and that, in 1891, that corporation's grantors secured, from the respondent the city of Chehalis, a 30 years' franchise, granting the right to use the streets, alleys, and other public grounds in said city for water mains and pipes, for the purpose of furnishing the said city and its inhabitants with pure, fresh water. It was provided that the water was to be taken from the Newaukum river, or one of its branches. Provision was made for a certain number of fire hydrants, and that the city should pay an annual rental of \$100 for each hydrant, for 30 years, for the first 20 hydrants furnished, and not more than \$50 per annum for each additional hydrant. Water was to be furnished free for certain city purposes. Sections 9 and 10 of the franchise are as follows:

"Sec. 9. It shall be and is within the option and right of the city of Chehalis, anything in this ordinance to the contrary notwithstanding, at any time after ten years, to terminate all the rights and privileges granted and conferred herein to the said Francis Donahoe, La Fayette Lawrence and C. W. Maynard, their and each of their heirs and assigns and successors, by purchasing from them the entire plant and property by them owned and used for supplying, storing, and distributing water to the city of Chehalis and its inhabitants. This right of purchase includes all dams and rights

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

thereto, flumes, ditches, and rights of way therefor, reservoirs and rights thereto, property pipes and mains and fixtures for supplying and distributing water. The terms of such purchase are as hereinafter stated, to wit: That in order to determine the value of the plant a commission be selected for that purpose, two of said commissioners to be appointed by the said city and two to be appointed by Francis Donahoe, La Fayette Lawrence and C. W. Maynard, their heirs, assigns and successors, and the four commissioners thus selected shall elect a man and the five thus chosen shall constitute a full board of appraisers to determine the value of said water plant, and in case said city shall determine to make such purchase it shall serve notice of such determination on the proper party or parties at least six months prior to the time the purchase is to be made and take effect.

"Sec. 10. The city of Chehalis, for the consideration hereinbefore stated, hereby agrees that this ordinance and franchises and rights contained and granted thereby to the said Francis Donahoe, La Fayette Lawrence and C. W. Maynard, their heirs, assigns and successors, shall continue in full force for a period of thirty years, unless sooner terminated as in this ordinance provided, during which time the city of Chehalis agrees not to contract with any other person or persons, corporation or corporations for a supply of water. Said period of thirty years is to date from the passage and taking effect of this ordinance. Provided, that the said Francis Donahoe, La Fayette Lawrence and C. W. Maynard shall for themselves, their heirs, assigns and successors, within twenty days from the date of the passage and approval of this ordinance, accept the same and signify such acceptance with its terms and provisions in writing signed by them and filed with the city clerk of said city. Such acceptance may be substantially in the following form: [Setting out form.]"

Acceptance of the franchise is shown, and full performance by complainant Washington-Oregon Corporation is alleged in the bill. During the year 1912 the voters of said city, at an election held for the purpose, voted the issuance of bonds for the construction of a water system and authorized the construction of such works by the city. The bonds have been advertised for sale, and bids for the construction called for and received by the city officers.

The bill avers that the complainant Fidelity Trust Company is the holder of the mortgage bonds of the Washington-Oregon Corporation to a large amount, that the latter's franchise is an exclusive one, and that the city, by its ordinance calling the election to vote upon the question of a city water system and the proceedings taken thereunder, impaired the obligation of its contract with the complainant Washington-Oregon Corporation, in violation of section 10, art. 1, of the Constitution of the United States. The bill of complaint reads, in part, as follows:

"That under the terms and provisions of said ordinance, and to carry such terms and provisions into effect, the defendant city, on or about the 1st day of August, 1912, did select two commissioners on its part, and your orator selected two commissioners on its part. That pursuant to agreement, such commissioners met for the purpose of selecting the fifth, and that the commissioners representing your orator, acting in good faith, did undertake to select and agree upon the fifth commissioner for such purpose, but that in truth and in fact the two commissioners so selected by the defendant city, and at the instance and request of the city, did not act in good faith for such purpose and would not agree to the selection of a fifth commissioner who was fair and reasonable and had a knowledge of the duties which he was to perform and the value of the properties, and for such reason the fifth commissioner was not selected.

"That to carry out the terms and provisions of section 9 of said ordinance, your orator, Washington-Oregon Corporation, is ready and willing and hereby

undertakes and agrees that your honor, the judge of this court may select such fifth commissioner, and that it will abide by such selection, and that the two commissioners selected by the said city and the two commissioners selected by your orator, together with the commissioner to be appointed and selected by your honor, may and shall meet, and that such board of five commissioners so selected shall then ascertain and determine the amount which your orator shall have and receive for its property, plant, and water system invested in and for said city pursuant to said ordinances, and that it will abide by the decision of such commissioners, and will execute good and sufficient conveyances to said city pursuant to the award made by said commissioners upon the receipt of the price ascertained and agreed upon by the said commissioners.

"Your orator further shows that the contracts between it and the city, granted under the provisions of Ordinances No. 135 and 137, which is for a period of thirty (30) years from and after the date of acceptances, and of which it is now the owner and holder, would be impaired and practically destroyed if subjected to the competition of a system of waterworks owned and operated by the city, which the city proposes to operate and construct under the pending proceedings, and which the defendant city will construct, maintain, and operate if it is permitted to sell and does sell its bonds, and if it is permitted to contract and does contract for the construction and operation of such plant or water system under the pending proceedings."

The answer, in part, reads as follows:

"It is admitted that on or about the 1st day of August, 1912, the defendant city selected two commissioners on its part, and that the plaintiff Washington-Oregon Corporation selected two commissioners on its part, in pursuance of the provisions of said section 9 of said Ordinance No. 135, and that said commissioners met for the purpose of determining the value of the plant of said plaintiff; but it is denied that the commissioners representing the plaintiff company acted in good faith, or undertook to select and agree upon a fifth commissioner in good faith, for the purpose of ascertaining the value of said plant, and defendants allege that in truth and fact the commissioners so selected by the plaintiff company would not agree to the selection of a fifth commissioner who was fair and reasonable and had knowledge of the duties which he was to perform and the value of the water plant of said company, and defendants aver the fact to be that said commissioners so selected by the plaintiff company would agree to no other value of the plant of said company, other than upon its then net income and revenue, return to said company, or upon any fifth commissioner who it was not known or reasonably believed would fix the value of the plant upon any other value than the net income and revenue return upon said plant, and that because of the determination of the commissioners representing the plaintiff company to agree upon and fix no other value, or upon any fifth commissioner who would take into account any other than the net income-producing value of said plant, the said commissioners failed to agree, and they made and entered into a finding, and that they agreed to disagree, and the company so notified said city."

It is further alleged that the present water supply furnished by plaintiff is polluted, by reason of its being taken from the river below the outlet of tributaries flowing through thickly settled communities; that, in order to provide suitable water, a more distant supply will have to be obtained; and that complainant will not be able, during the life of its franchise, to provide such suitable supply.

The following authorities are relied upon by complainant: *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *Mer. Trust & Dep. Co. of Baltimore v. City of Columbus*, 203 U. S. 311, 27 Sup. Ct. 83, 51 L. Ed. 198; *Vicksburg v. Vicksburg Water Co.*, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann.

Cas. 253; Cogswell et al. v. Cogswell et al. (Wash.) 126 Pac. 433; Cooke v. Miller, 25 R. I. 92, 54 Atl. 927, 1 Ann. Cas. 30; Grosvenor v. Flint, 20 R. I. 21, 37 Atl. 304; Town of Bristol v. Bristol & Warren Waterworks, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740; Foster, page 127, 17(a).

The following authorities are relied upon by the defendants: Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353; Helena Waterworks Co. v. Helena, 195 U. S. 383, 25 Sup. Ct. 40, 49 L. Ed. 245; Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 28 Sup. Ct. 135, 52 L. Ed. 257; City of Joplin v. Southwest Missouri Light Co., 191 U. S. 150, 24 Sup. Ct. 43, 48 L. Ed. 127; Hamilton Gas, Light & Coke Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; Bienville Water Supply Co. v. Mobile, 175 U. S. 109, 20 Sup. Ct. 40, 44 L. Ed. 92; Skaneateles Waterworks v. Skaneateles, 184 U. S. 354, 22 Sup. Ct. 400, 46 L. Ed. 585; Tillamook Water Co. v. Tillamook (C. C.) 139 Fed. 405; North Springs Water Co. v. Tacoma, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214; Farmington Village v. Farmington Water Co., 93 Me. 192, 44 Atl. 609.

[1] It is the contention of complainants that the water company's franchise is exclusive, and that the city is precluded thereby from constructing a water system of its own. Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353; Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253.

"Only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public. Whatever is not unequivocally granted is withheld; and nothing passes by implication." Knoxville Water Co. v. Knoxville, *supra*.

[2] As in any other contract, the language of the franchise must be looked to for the intention of the parties. In the Walla Walla Case, the franchise was for 25 years, and provided that, until it was avoided by a court of competent jurisdiction, the city could not erect, maintain, or become interested in other waterworks. Held, in the absence of such a judgment, the city could not take steps to provide a water system of its own. In the Knoxville Case, by the franchise, the city agreed "not to grant to any other person or corporation any contract or privilege to furnish water to the city of Knoxville * * * for the full period of 30 years." Held, that the city was not, in the absence of a special stipulation to that effect, precluded from establishing its own system of waterworks. In the Vicksburg Case, the exclusive right and privilege was granted for a period of 30 years to erect, maintain, and operate a system of waterworks. Held, that the franchise precluded the city from erecting its own waterworks during the life of the franchise. While so holding, the court reiterated that grants and franchises are to be strictly construed in favor of the public, and that nothing is to be taken by implication. The Knoxville Case is distinguished.

As shown above, in the case now under consideration, the language of the franchise, which it is contended is exclusive, is that:

"The city of Chehalis * * * hereby agrees that this ordinance and franchise and the rights contained and granted thereby * * * shall continue in full force for a period of 30 years, * * * during which time the city of Chehalis agrees not to contract with any other person, or persons, corporation or corporations, for a supply of water."

In the light of the foregoing authorities, without citing others, the court holds that the city of Chehalis has not, by the franchise in question, precluded itself from erecting a water system.

Complainants further contend that the city should not be allowed to proceed with the erection of a water system, without carrying out the appraisement by a commission, as provided in the franchise, and purchase of complainant's waterworks under such appraisal. Complainants contend for a specific performance of this provision.

Respondents in defense, as above set out, allege that the arbitration failed, not through the city's fault, but through the fault of complainants, and that, owing to the impure water supply, complainant's inability to furnish pure water, and the city's action already taken, in authorizing, by election, the construction of waterworks of its own, together with the receipt of bids therefor, it should not now be compelled to undertake further arbitration and the purchase of complainant's water system.

In the Knoxville Case, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353, supra, where there had been a failure to arbitrate such a matter, it is said:

"It is not important to inquire which side, if either, was to blame in this matter."

[3] On this phase of the contention, involving the general law, and not the Constitution, the court's jurisdiction has been questioned.

"All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair." *City R. R. v. Citizens' R. R. Co.*, 166 U. S. 557, at page 563, 17 Sup. Ct. 653, at page 655 (41 L. Ed. 1114).

There is no question but that the federal question in the case now before the court was raised in good faith.

"The federal question, as to the invalidity of the state statute, because, as alleged, it was in violation of the federal Constitution, gave the Circuit Court jurisdiction and, having properly obtained it, that court had the right to decide all of the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, or decided the case on local or state questions only." *Siler v. Louisville & Nashville R. R. Co.*, 213 U. S. 175, at page 191, 29 Sup. Ct. 451, at page 454 (53 L. Ed. 753).

The court would, therefore, have jurisdiction of the whole controversy, though holding against complainants on the question of the impairment of the contract.

[4] Passing to the merits of complainant's claim to specific performance of the provision for the appraisal and purchase of its water system, it will be seen that section 9 of the ordinance is of doubtful

meaning. After giving the city an option to buy after ten years, it is provided that "the terms of such purchase are as hereinafter stated." Provision is then made for determining the value by commissioners, two to be chosen by the city and two by the owners of the franchise, and these four to select a fifth. The section then ends with this provision:

"And, in case said city shall determine to make said purchase, it shall serve notice of such determination on the proper party or parties at least six months prior to the time the purchase is to be made and take effect."

It is not clear whether the valuation contemplated was to precede or follow the six months' notice. There is nothing in the record to show the giving of this notice by or on behalf of the city. Aside from the allegations from the pleadings above set out, all that there is in this particular, disclosing the intention of the parties, is a letter from the city clerk to the complainant Washington-Oregon Corporation, requesting the appointment by that complainant of two appraisers to meet with two appraisers appointed by the city to appraise the value of the waterworks owned by the complainant. Complainant, before selecting its two appraisers, then requested the city to agree:

"That, if you do not purchase the waterworks, you will stand the entire charge of assignment [appraisement], including ours."

This the city agreed to do, and the four appraisers chosen reported, after three meetings, that they were unable to agree upon a fifth man to act with them, and that it was useless for them to remain longer in session. Complainant thereafter wrote the city, offering, "as the arbitration had fallen through," to sell the waterworks to the city for \$95,000. The city refused their offer, and offered the complainant \$50,000.

It is clear that the parties construed the ordinance as not requiring the city to bind itself to buy until after an appraisal and the fixing of a definite price. It is also clear that the appraisal was abandoned both by the appraisers and the parties to the suit. The Fidelity Trust Company, though taking no part in these negotiations, would be in no better position to insist on the carrying out of the appraisalment than the water company.

"The acceptance [of an option], to be effective, must be unequivocal and unconditional, and must correspond to the terms of the option." 39 Cyc. 1238 et seq.

The action taken on the part of the city would not amount to such an acceptance. The contract giving the city the right to purchase upon certain conditions, it is not necessary to consider the extent of the city's rights in determining the price at which it might purchase the water system, should it desire to do so after an attempt and failure to arbitrate. It may be that, so far as the city is concerned, having granted a franchise, which has been accepted and used for more than 20 years, the grant being the consideration for the option, equity would find a way, upon suit by the city, to fix the price at which the city might purchase, upon the failure of such arbitration. Such a ruling would find support in the authorities cited by complainants.

The city could not be put in statu quo as before the grant; but, as complainants could not compel the city, in the first instance, to take advantage of its option, it is now in the same situation, in all respects, as before the city's request and suggestion for the appointment of appraisers. There has been no such part performance of the contract as to take it out of the general rule that an executory agreement to arbitrate is revocable by either of the parties, and bring it within the exception upon which the cases cited are based.

The motion to modify the order will be granted, the order to become effective 10 days from the date of this order, unless otherwise directed.

CILLEY v. UNITED SHOE MACHINERY CO.

(District Court, D. Massachusetts. January 31, 1913.)

No. 6 (C. C. No. 27).

1. PLEADING (§ 64*)—DUPLICITY—VIOLATION OF ANTI-TRUST ACT.

Since the thing forbidden by Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), may consist of a scheme or an unlawful combination as a whole, a declaration for civil damages authorized by section 7, charging in a single count that defendant was an illegal combination in restraint of trade, etc., and that by reason of conspiracy and monopoly defendant had practically monopolized the entire business of manufacturing shoe machinery in the United States, and had utterly destroyed plaintiff's interstate trade and commerce in such machinery and rendered plaintiff's patents valueless, etc., was not objectionable for duplicity and uncertainty on the theory that each one of the things forbidden in sections 1 and 2 were distinct offenses, and that the declaration should charge such separate offenses in separate counts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.*]

2. MONOPOLIES (§ 28*)—SHERMAN ACT—VIOLATION—CIVIL DAMAGES—DECLARATION.

A declaration for civil damages for violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), alleged that defendant was, and since its organization had been, an illegal combination in restraint of trade and a monopoly, that each of its leases of machinery, copies of which were annexed, was a contract in restraint of trade and commerce, and that defendant by a created scheme and conspiracy monopolized the entire trade in shoe machinery and had excluded plaintiff from participation therein. It also charged that by reason of such conspiracy and monopoly defendant had prevented plaintiff from selling shoe machinery covered by plaintiff's patents and had rendered the same valueless, etc. *Held*, that the complaint was not demurrable for want of facts.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

3. MONOPOLIES (§ 28*)—CIVIL DAMAGES—DECLARATION—INJURY.

The declaration sufficiently alleged injury to plaintiff's business and property by reason of defendant's unlawful acts to withstand a demurrer.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

At Law. Action by Harry E. Cilley against United Shoe Machinery Company. On demurrer to declaration. Overruled.

Everett N. Curtis, of Boston, Mass., for plaintiff.
Coolidge & Hight, of Boston, Mass., for defendant.

COLT, Circuit Judge. This case is now before the court on demurrer to the declaration.

The case is an action at law brought under section 7 of the act of Congress of July 2, 1890, known as the Anti-Trust Act (26 Stat. 210, c. 647 [U. S. Comp. St. 1901, p. 3202]).

Section 7 reads as follows:

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The essential averments in a declaration under this section would appear to be: (1) That the defendant has done one or more of the things forbidden by the first and second sections of the statute; (2) that by such action of the defendant the plaintiff has been injured in his business or property; and (3) that damages were sustained. *People's Tobacco Co. v. American Tobacco Co.*, 170 Fed. 396, 407, 95 C. A. 566.

The declaration in the case at bar is limited to a single count in a narrative form. It comprises 13 printed pages, and with the attached exhibits some 69 printed pages. Both the briefs of counsel contain an accurate summary of the declaration, which may be stated as follows:

It alleges in detail the establishment of the shoe machinery business of the plaintiff at Boston in 1893, his engaging thereafter in interstate commerce, his building up of the business, his procuring of patents and the construction of shoe machines thereunder, the expenditure of nearly \$100,000 to develop the business, the profits of the business immediately prior to the alleged wrongful acts of the defendant and the entire loss of profits thereafter, a list of the customers with whom he had done business and persons with whom he was negotiating for further business, the trade conditions prior to the organization of the defendant company, the illegal combination and conspiracy of its promoters, the organization of the company, its acquisition of competing concerns, its utilization of leases and licenses as an instrumentality to create an illegal monopoly and combination (the general forms of leases and licenses being set forth verbatim in an exhibit), the effect of these leases and licenses in excluding the plaintiff from the market, the attempt through the leases and licenses to extend the scope and operation of the defendant company's patents, the superior merit and efficiency of the plaintiff's line of shoe machinery, the threats of the officers of the defendant company to the plaintiff made in pursuance of its scheme to monopolize, the destruction of the established business and interstate commerce of the plaintiff, the diversion of his customers, the destruction of the value of his patent interests, and other injuries to his business and property.

In the two final paragraphs of the declaration the plaintiff thus sums up his cause of action and the damages alleged:

"13. Accordingly, the plaintiff says that the defendant is and has been since its organization an illegal combination in restraint of trade and a monopoly existing wrongfully and in violation of the act of Congress of July 2, 1890, chapter 647, commonly known as the Sherman Act; that each and every one of the leases, copies of which are hereto annexed, is a contract in restraint of trade and commerce among the several states and with foreign nations, in that the effect has been to prevent practically all of the shoe manufacturers in the United States from purchasing, leasing, or otherwise acquiring or obtaining in any of the states of the United States or in any foreign market or elsewhere, except from the defendant shoe machinery and mechanisms; that said group or system of leases which the defendant has required and secured to be signed by nearly all the shoe manufacturers in the United States have created and now maintain a conspiracy and combination in restraint of trade and commerce among the several states and with foreign nations, to which the defendant and all its acquired concerns and companies are parties, whereby the defendant has monopolized and now monopolizes substantially the entire trade and commerce in shoe machinery and mechanisms among the several states and with foreign nations and suppresses all competition therein, and has entirely excluded the plaintiff from participation in such trade and commerce; that said leases are essential parts of an illegal scheme, combination, and conspiracy in restraint of trade and commerce, and have been utilized by the defendant as an important instrumentality in creating and supporting its illegal monopoly in the business of dealing in and with shoe machinery and mechanisms.

"14. That through and by reason of the said conspiracy and monopoly acquired by the defendant company of practically the entire business of manufacturing shoe machinery throughout the United States the plaintiff has been prevented from selling shoe machinery manufactured by him, including machines covered by said patents relating thereto enumerated in paragraph 1 to the manufacturers included in Exhibit A and to the other shoe manufacturers in the various states of the United States, and by means of each and all acts done by the defendant in pursuance of said monopoly the defendant has utterly destroyed the interstate trade and commerce of the plaintiff with said shoe manufacturers by the loss of many orders and customers directly resulting therefrom, the interests of the plaintiff in the aforesaid patents enumerated in paragraph 1 have been rendered valueless, and the plaintiff has otherwise been greatly injured in his business and property by reason of said monopoly and the acts of the defendant done in pursuance thereof, and to carry the same into effect, which are declared to be unlawful by the aforesaid act of Congress of July 2, 1890, chapter 647, to the amount of three hundred thousand (\$300,000) dollars, to recover threefold which damages and costs of suit, including a reasonable attorney's fee under section 7 of said act, this suit is brought."

The several grounds of demurrer may be grouped under three heads:

- (1) That the declaration is bad for duplicity and uncertainty.
- (2) That the declaration fails to set forth with substantial certainty substantive facts showing that the defendant has been guilty of anything forbidden or declared to be unlawful by the Anti-Trust Act.
- (3) That the declaration fails to show that the plaintiff has been injured in his business or property by reason of anything forbidden or declared to be unlawful by this act.

[1] 1. With respect to the first ground of demurrer, it is by no means clear under the recent decisions of the Supreme Court that this declaration is bad for duplicity and uncertainty.

In the construction of this statute the Supreme Court has held that the thing forbidden by the statute may reside in the scheme or combi-

nation considered as a whole. In *Swift v. United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 279 (49 L. Ed. 518), the court said:

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

Again, in *United States v. American Tobacco Co.*, 221 U. S. 106, 184, 31 Sup. Ct. 632, 650 (55 L. Ed. 663), the court said:

"Our conclusion being that the combination as a whole, involving all its co-operating or associated parts, in whatever form clothed, constitutes a restraint of trade within the first section, and an attempt to monopolize or a monopolization within the second section of the Anti-Trust Act, it follows," etc.

The defendant's theory of this case is that each one of the things forbidden by sections 1 and 2 are distinct offenses, and that in a civil action brought under section 7 the declaration should charge these separate offenses in separate counts. This theory does not accord with the view taken by the Supreme Court that the thing forbidden by the act may consist of "the scheme as a whole" or "the combination as a whole." Under this construction of the statute it is plain that the separate elements considered by themselves may not be illegal, and yet that the scheme or combination as a whole may be.

The declaration in this case is founded upon the theory that under section 7 the thing "forbidden or declared to be unlawful by this act" may reside in the scheme or combination as a whole, and under the decisions of the Supreme Court I am not prepared to rule that a declaration so framed is void for duplicity and uncertainty.

[2] 2. With respect to the second ground of demurrer, I am not convinced, assuming the truth of all the allegations which are well pleaded, that the declaration does not sufficiently set forth a scheme or combination in restraint of trade within the meaning of sections 1 and 2 of the Sherman Act as construed by the Supreme Court. Since, then, it does not clearly appear that the declaration does not set forth a cause of action, this ground of demurrer should be overruled.

[3] 3. With respect to the third ground of demurrer, I am of the opinion, upon an examination of the declaration, that the allegations therein respecting injuries to the plaintiff's business and property by reason of the defendant's unlawful acts are a sufficient compliance with the statute.

Upon the whole, and notwithstanding that the questions here raised cannot be said to be fully settled or free from doubt, I do not think this demurrer should be sustained.

It is a familiar rule on demurrer that every doubt should be resolved in favor of the plaintiff, and hence a demurrer should not be sustained unless the court is fully satisfied that some of the grounds are well founded.

Demurrer overruled.

STROUT v. UNITED SHOE MACHINERY CO. et al.

(District Court, D Massachusetts. January 31, 1913.)

No. 203 (C. C. No. 855).

1. MONOPOLIES (§ 28*)—ANTI-TRUST ACT—VIOLATION—DECLARATION.

A declaration for civil damages for violating Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), alleged that complainant trustee had succeeded to all the rights of a metal shoe fastening company owning patents on shoe machinery, which it was incorporated to manufacture and sell to the trade, that defendant shoe machinery company was organized and continued to exist to maintain a monopoly of the shoe machinery business, that it had acquired such monopoly, and, having obtained a majority of the stock of plaintiff's corporation, refused to permit it to do business in order to prevent competition with other machines controlled by it, permitted the corporation's property to remain idle and become wasted until the patents were about to expire and had become practically worthless, and that the corporation had been greatly injured in its business by reason thereof. *Held* to state a sufficient cause of action to withstand a demurrer.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.*]

2. PLEADING (§ 64*)—DUPLICITY—VIOLATION OF ANTI-TRUST ACT.

Since the thing forbidden by Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), may consist of a scheme as a whole or an unlawful combination as a whole, a declaration for civil damages authorized by section 7, charging in a single count that defendant was an illegal combination in restraint of trade, etc., and that by reason of conspiracy and monopoly defendant had practically monopolized the entire business of manufacturing shoe machinery in the United States, and had utterly destroyed plaintiff's interstate trade and commerce in such machinery, and rendered plaintiff's patents valueless, etc., was not objectionable for duplicity and uncertainty, on the theory that each one of the things forbidden in sections 1 and 2 were distinct offenses, and that the declaration should charge such separate offenses in separate counts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.*]

At Law. Action by Charles A. Strout, trustee, against the United Shoe Machinery Company and others. On demurrer to declaration. Overruled.

See, also, 195 Fed. 313.

Whipple, Sears & Ogden and Dunbar & Rackemann, all of Boston, Mass., for plaintiff.

Coolidge & Hight, of Boston, Mass., for defendants.

COLT, Circuit Judge. This is an action at law, brought under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat. 210, c. 647 [U. S. Comp. St. 1901, p. 3202]); and the case was heard on demurrer to the declaration. Section 7 reads as follows:

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without re-

spect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The material averments in the declaration may be thus summarized:

The declaration alleges in substance that the plaintiff is trustee of the Goddu Sons Metal Fastening Company, duly appointed by the Supreme Judicial Court of Maine in proceedings for the dissolution of that corporation; that as such trustee he holds title to all property and rights of action of the Goddu Sons Metal Fastening Company; that the Goddu Sons Metal Fastening Company, after its organization in 1897, acquired certain patents pertaining to shoe machinery, and that it made preparations to place upon the market machines constructed under its patents, and spent a considerable sum in advertising; that it constructed machines ready for sale or lease; that a number of shoe manufacturers were desirous of using these machines upon terms beneficial to the company; that the company was prepared and intended to engage in trade and commerce, and to do a large and profitable business in shoe machinery among the several states and with foreign nations; that the defendant the United Shoe Machinery Company was organized in 1899, for the purpose of acquiring by legal and illegal means certain companies engaged in manufacturing and dealing in shoe machinery, and of driving out of business other companies or concerns engaged in that business, and of preventing other companies or concerns from entering into that business, thereby suppressing and preventing competition and acquiring and maintaining a monopoly of the shoe machinery business, and that it has acquired and now maintains a practical monopoly of that business; that the defendants Winslow, Brown, and Hurd are, and have been since the organization of the United Shoe Machinery Company, officers and directors and members of the executive committee of that corporation, exercising management and control of its business affairs; that in pursuance of the plan to suppress and eliminate competition, and to support and protect the monopoly of the United Shoe Machinery Company, the individual defendants, or some of them, entered into negotiations with certain of the stockholders of the Goddu Sons Metal Fastening Company for the purchase of their stock, and that as a result of these negotiations the United Shoe Machinery Company acquired a majority of the stock and the control and management of the Goddu Sons Metal Fastening Company; that in pursuance of its plan to eliminate competition, and to support and protect its monopoly, the United Shoe Machinery Company caused its president, the defendant Winslow, to be elected president of the Goddu Sons Metal Fastening Company, its own treasurer, the defendant Brown, to be elected treasurer of the Goddu Sons Metal Fastening Company, and a part of its own directors, including the defendant Hurd, to be elected as the entire board of directors of the Goddu Sons Metal Fastening Company; that the persons so elected have ever since been continued in their respective offices by means of the stock control exercised by the United Shoe Machinery Company; that the control thus acquired by the United Shoe Machinery Com-

pany has been exercised, not for the purpose of carrying on and developing the business for which the Goddu Sons Metal Fastening Company was organized, but for the purpose of preventing that company from doing business, thereby preventing and destroying its competition, and protecting and supporting the monopoly of the United Shoe Machinery Company; that the officers of the Goddu Sons Metal Fastening Company, in pursuance of the plan and purpose of the United Shoe Machinery Company, have continuously declined to cause the Goddu Sons Metal Fastening Company to make any use of its patents and patent rights, or to permit it to do any business; that the assets of the Goddu Sons Metal Fastening Company have thus remained idle and have become wasted, and that its patents are now about to expire and have become practically worthless; that the United Shoe Machinery Company and the individual defendants have thus accomplished their purpose of destroying the competition of the Goddu Sons Metal Fastening Company, and of sustaining the monopoly of the United Shoe Machinery Company; that the Goddu Sons Metal Fastening Company has been greatly injured in its business and property; and that the plaintiff is entitled, under the Sherman Anti-Trust Act, to recover threefold damages, costs of suit, and a reasonable attorney's fee.

[1] It is sufficient to state the main ground of demurrer upon which the defendant relies in its brief and oral argument:

"The declaration fails to set forth with substantial certainty substantive facts constituting a cause of action against the defendants under the Sherman Anti-Trust Act."

Upon a careful reading of this declaration, and admitting, as the demurrer does admit, the truth of the material allegations contained therein, I am not prepared to hold that the defendant fails to state a cause of action under the Sherman Anti-Trust Act.

[2] The main argument of the defendant in this case is the same as was advanced in *Cilley v. United Shoe Machinery Company*, 202 Fed. 598, namely, that the Sherman Act forbids six or seven distinct and separate things, and that in an action brought under section 7 the declaration should set forth in one or more counts the separate thing or things declared to be unlawful by the act.

As was said in the opinion in the *Cilley Case*, this is not the construction given to the first and second sections of the act by the Supreme Court. *Swift v. United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 49 L. Ed. 518; *United States v. American Tobacco Co.*, 221 U. S. 106, 184, 31 Sup. Ct. 632, 55 L. Ed. 663. Under these decisions it cannot be said with confidence that a declaration under section 7 may not state, in a narrative form, a scheme, or plan, or combination, which, as a whole, may constitute an unreasonable or undue restraint of trade within the meaning of the act.

In the case at bar I am not prepared to say that the declaration does not state sufficient facts which, if proved, would show a plan or combination in restraint of trade within the meaning of the act.

Demurrer overruled.

STAFFORD v. NORFOLK & W. RY. CO.

(District Court, E. D. Kentucky. February 10, 1913.)

REMOVAL OF CAUSES (§ 25*)—ACTIONS NOT REMOVABLE—DEATH OF EMPLOYÉ—FEDERAL EMPLOYER'S LIABILITY ACT—PETITION—REMAND.

Where plaintiff sued for death of intestate, a track repairer on defendant's railroad, and the petition, after alleging that defendant was a common carrier engaged in interstate commerce and that plaintiff, at the time he was killed, was engaged in repairing the track, which was a necessary and essential part of defendant's interstate commerce, alleged the West Virginia wrongful death act, and prayed a recovery of \$3,000, and before the filing of a petition for removal plaintiff raised the damages by amendment to \$10,000, and alleged that the action was based on the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), etc., the case made by the petition was within such act, and not removable, without reference to whether decedent was in fact employed in interstate commerce within the act.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

Action by John H. Stafford, as administrator, etc., against the Norfolk & Western Railway Company. On motion to remand. Sustained.

Willis Staton, George Pinson, Jr., and Roscoe Vanover, all of Pikeville, Ky., for plaintiff.

Holt, Duncan & Holt, of Huntington, W. Va., for defendant.

COCHRAN, District Judge. This case is before me on motion to remand. It is a suit to recover damages for the death of plaintiff's intestate, alleged to have been wrongfully caused by the defendant. He was run down and killed by one of its trains whilst he was employed by it in repairing its railway tracks near Rose Siding, in Mingo county, W. Va. The suit was brought in the circuit court of Pike county, in this state, and has been duly removed from thence here.

The plaintiff's petition alleged that the defendant is a common carrier engaged in interstate commerce, and that the repairing of its track by the decedent, in which he was engaged at the time of his death, "was necessary and an essential part of carrying on the interstate commerce herein set out, and that it was entirely impossible for defendant to have carried on said interstate commerce as herein set out without the aid of track repairers, and that the work of repairing said tracks was a necessary and essential part of carrying on the interstate commerce between said states by the defendant herein." It did not allege whether the train that killed decedent was an interstate or intrastate train. It set forth in terms the West Virginia wrongful death statute, and prayed recovery of \$3,000 damages. By an amended petition, filed before the petition for removal, the amount of recovery sought was raised to \$10,000, and it was alleged as follows, to wit:

"That plaintiff bases this action on what is known as the Employer's Liability Act, being an act of the Congress of the United States of America;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the title to said act being 'An act relating to the liability of common carriers by railroad to their employes in certain cases,' approved April 22, 1908 [Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322)], with an amendment thereto approved April 5, 1910 [Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324)]."

The removability of the case depends upon the question whether it is one arising under that act. If it is not it was removable, for the petition for removal alleges diversity of citizenship between the parties; the plaintiff being alleged to be a citizen of the state of Kentucky and the defendant a West Virginia corporation. If it is the amendment prohibits its removal.

Counsel treat the question as to whether the case is one so arising as depending solely upon the question whether, on the facts alleged in the petition, the plaintiff is entitled to recover under the Employer's Liability Act. To recover under that act it is essential that the employe should at the time of his injury be employed by the carrier in interstate commerce. It is contended on behalf of the plaintiff that according to the facts alleged in the petition the decedent was so engaged when run down by defendant's train. Such being the claim, the ultimate fact that he was so employed should have been distinctly alleged. This contention is disputed by the defendant. There is thus raised the question whether a track repairer of a common carrier engaged in both interstate and intrastate commerce is employed by such carrier in interstate commerce within the meaning of the act.

In support of the position that he is, the plaintiff's counsel cite Thornton on Federal Employer's Liability and Safety Appliance Acts, pp. 56, 58, 59, 60; Interstate Com. Com. v. I. C. R. R. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; Employer's Liability Cases, 207 U. S. 495, 28 Sup. Ct. 141, 52 L. Ed. 297; Zikos v. Oregon R. Co. (C. C.) 179 Fed. 893; Colasurdo v. Central R. R. of New Jersey (C. C.) 180 Fed. 832. Against this position defendant's counsel cite Taylor v. Southern Ry. Co. (C. C.) 178 Fed. 380; Pedersen v. D., L. & W. R. R. Co. (C. C. A.) 197 Fed. 537; Charleston & W. C. Ry. Co. v. Anchors, 10 Ga. App. 322, 73 S. E. 551; St. L., S. F. & T. Ry. Co. v. Seale (Tex. Civ. App.) 148 S. W. 1099. To the same effect may be cited the case of Pierson v. N. Y. S. & W. Ry. Co. (N. J.) 85 Atl. 233. In support of the position may be cited the case of Jones v. C. & O. Ry. Co., 149 Ky. 566, 149 S. W. 951, which is still pending on a petition for rehearing.

The question thus raised I do not feel called upon to decide in this case, as I am constrained to hold that the case is one arising under the Employer's Liability Act, even though it be conceded that plaintiff's intestate was not employed in interstate commerce within its meaning, and ultimately plaintiff will not be able to recover thereunder. It is clear that the plaintiff claims that the case comes within the act, and bases his right to recover solely upon its provisions. The setting forth in terms of the West Virginia wrongful death statute in the original petition to no extent militates against this view. However it may have been under the original petition, the amended petition, which raised the amount in controversy to an amount within this court's jurisdiction, leaves no room for question as to this. It is clear, also, that

this claim is not a frivolous one, but one for which a substantial basis exists. This I understand to be sufficient to make the case one arising under the act. In the case of *Pac. Elec. Ry. Co. v. Los Angeles*, 194 U. S. 112, 24 Sup. Ct. 586, 48 L. Ed. 896, Mr. Justice McKenna said:

"Jurisdiction depends primarily upon the allegations of the bill, not upon the facts as they may subsequently turn out. * * * nor upon the actual sufficiency, in the opinion of the court, of the facts alleged to justify the relief prayed for. We do not mean, however, that a mere claim in words is sufficient; a substantial controversy must be presented. This requirement is satisfied in the case at bar. The Circuit Court, therefore, had jurisdiction, and the case was properly brought here from that court, since it involves the construction and application of the Constitution of the United States."

The motion to remand is sustained.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.
and three other causes.

In re HUGH THOMAS CO.

(District Court, S. D. New York. February 7, 1913.)

Nos. 2-9, 2-33, 2-149, 3-37.

RECEIVERS (§ 147*)—CLAIMS—SPECIAL FUNDS—SPECIFICATION.

A street railway company, after coming into possession of a railroad under a lease, purchased from petitioner certain paving gravel at the agreed price of \$869.09. Thereafter both the lessor and the lessee companies passed into the hands of separate receivers, who received a fund owned by both companies, in severalty. In certain litigation over the fund, it was determined that the amount due plaintiff should be taken out of the share of the fund due the lessor company, and paid over to the receiver of the lessee company. *Held*, that such determination earmarked the fund as a special one to use for the payment of petitioner's claim, and that petitioner was therefore entitled to receive the same from the lessee company's receiver.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 257-259; Dec. Dig. § 147.*]

Action by the Pennsylvania Steel Company and others against the New York City Railway Company and others. Petition by the Hugh Thomas Company holding a claim against the City Railway Company for the price of certain gravel. Application allowed.

See, also, 201 Fed. 418.

O'Brien, Boardman & Platt, of New York City, for Hugh Thomas Co.

Geller, Rolston & Horan, of New York City, for Farmers' Loan & Trust Co.

Dexter, Osborn & Fleming, of New York City, for receiver of New York Ry. Co.

Davies, Auerbach, Cornell & Barry, of New York City, for Guaranty Trust Co.

Masten & Nichols, of New York City, for receiver of Metropolitan St. Ry. Co.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LACOMBE, Circuit Judge. The argument has been quite extended, but it seems to the writer that the question is a narrow one, and that it may be quite simply stated.

At a time when, under the terms of its lease from the Metropolitan, the City Company was in possession of the street railroad in First avenue, it bought from the petitioner paving gravel at the agreed price of \$869.09. He was not informed as to what the City Company expected to do with this; but it bought it with the purpose and intent of using it to reconstruct the First Avenue line for operation by electricity, and the gravel was in fact all used for that purpose. The City Company did not pay the petitioner, and, when it went into the hands of receivers, petitioner was one of its creditors, with a claim against its estate to be paid so far as that estate might be able to respond.

A fund came into being, after receivers were appointed, which was reduced to cash, aggregating X plus Y dollars. This fund was owned by both railroad companies, not jointly, but each owning part of it. Not being able to agree as to how much belonged to each, the companies brought their controversy to a court of equity. After an exhaustive examination of the prior history of both roads, that court decided that, of the fund, the Metropolitan owned X dollars and the City Company owned Y dollars. The court went further, and decided that, because the City Company had bought petitioner's gravel, but never paid him for it, and had used it for the purpose above stated, the sum of \$869.09 should be taken out of X, the share of the Metropolitan, and turned over to the receiver of the City Company.

It seems to the writer that this earmarked the \$869.09 as belonging to this claim for gravel, that it was constituted a special fund, to be used for the payment of such claim, and that it should be paid to petitioner (as soon as it may be actually deducted), not upon any theory of preference over general creditors, but because to this particular \$869.09, thus specially set apart only because it is due to this petitioner, no other creditor of the City Company has any claim at all. It is not sufficient to say that the circumstances attending the sale of the gravel did not give petitioner a lien on the estate of the City Company. This \$869.09 is not a part of the general estate of that company, but a special fund its receiver is to disburse.

An order may be taken directing the city receiver, after he shall have deducted this \$869.09 from the distributive share of the fund arising from the settlement of the two actions, to turn over to petitioner.

WARD v. FIRST NAT. BANK OF IRONTON, OHIO.

In re IRONTON DOOR & MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. February 14, 1913.)

No. 2,259.

1. BANKRUPTCY (§ 334*)—SECURED CLAIMS—DUTY TO FILE.

A creditor of a bankrupt holding security is not bound to make formal proof of claims against the bankrupt's estate, but may instead rely on his security and enforce it otherwise.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501-507; Dec. Dig. § 334.*]

2. BANKRUPTCY (§ 214*)—SECURED CREDITOR—CLAIMS—ENFORCEMENT—INTERVENTION.

Where a bank held claims against a bankrupt secured by pledges of specific property and by certain insurance policies, and the proceeds of at least part of the property pledged and of the insurance came into the hands of the trustee, the bank was entitled to enforce its claim by an intervening petition asking that the trustee account and pay over the money to which the bank was entitled without any formal proof by the bank of its debt against the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 320, 324-327, 343, 344; Dec. Dig. § 214.*]

3. BANKRUPTCY (§ 214*)—PLEGDED PROPERTY—DELIVERY.

A bankrupt corporation having certain lumber in specific piles in its yards, a bank agreed to loan the bankrupt a sum equal to 90 per cent. of the value of the lumber which was to be pledged to the bank as security for the loan. The lumber was tagged with the initials of the bank's name, and a diagram of the yard made showing the location of each of the piles and delivered to it. The bank had full control and possession of the lumber pledged, and exercised the right to free access to the yard and to the lumber piles, none of which pursuant to the agreement was removed by the bankrupt without the consent of the bank and paying the full amount for which it was pledged. *Held*, to show a sufficient delivery of the lumber to the bank, and that the pledge was valid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 320, 324-327, 343, 344; Dec. Dig. § 214.*]

4. PLEDGES (§ 11*)—INSURANCE POLICY—PROCEEDS—EQUITABLE LIEN.

A bank having agreed to loan money to a bankrupt on a pledge of certain lumber, it was agreed that the lumber should be insured, and that the policies should contain a clause that the loss, if any, should be paid to the bank as its interest might appear. This clause was inserted in some of the policies, but, by inadvertence, was omitted from two of them, though all were held by the bank as further security for the loan. A loss having been sustained, and the insurers, under the two policies, refusing to pay the loss to the bank, it delivered the policies to the bankrupt's receiver for collection without any intention to waive or surrender its claim to the proceeds as pledgee. *Held*, that the bank did not thereby waive or lose its right to the proceeds of the policies, but, in any event, had an equitable lien thereon, and was entitled to such proceeds less the cost of collection.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35; Dec. Dig. § 11.*]

Appeal from the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

In the matter of bankruptcy proceedings of the Ironton Door & Manufacturing Company. Intervening petition by First National

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes
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Bank of Ironton, Ohio, to compel an accounting and surrender of the proceeds of certain securities collected by the bankrupt's trustee. From an order granting the relief prayed, W. G. Ward, as trustee, and C. Crane & Company, appeal. Affirmed.

Ledyard Lincoln and Chas. H. Stephens, Jr., both of Cincinnati, Ohio, and A. R. Johnson, of Ironton, Ohio, for appellants.

Carmi A. Thompson, of Washington, D. C., and J. L. Anderson and T. N. Ross, both of Ironton, Ohio, for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. The Ironton Door & Manufacturing Company was incorporated in 1900 under the laws of the state of Ohio, and began business in March, 1901. On September 7, 1904, on the petition of certain of its creditors, filed in the court of common pleas of Lawrence county, Ohio, and upon the ground that it was unable to pay its debts as they matured or to carry on its business, that court appointed Edmund S. Culbertson its receiver to take charge of the affairs of the corporation. He continued to operate and conduct its business under the order of that court until October 27, 1904, when the corporation was adjudged a bankrupt by the District Court of the United States for the Southern District of Ohio, which court appointed as its receiver W. G. Ward. On November 18, 1904, Ward was elected and qualified as the trustee of the bankrupt.

To Ward, as receiver, Culbertson turned over the estate of the bankrupt. Before he did so the state court ascertained and adjudged that under its orders its receiver, with the consent of the First National Bank of Ironton, Ohio, which we shall hereinafter speak of as the "Bank," had consumed for the benefit of the bankrupt's business and estate certain of the lumber which had come to his hands but which was claimed by the Bank as having been pledged to it. The value of the lumber thus used was \$195.84, and this sum was adjudged by the state court to be a valid and preferred claim against the estate when it directed Culbertson, its receiver, to turn over the assets to Ward. This lumber was used for the benefit of the estate before the adjudication in bankruptcy, and for that and other reasons not necessary to be stated in detail both the referee and the court below held that the Bank should be reimbursed by the trustee for the value of this lumber which had been pledged to it by the bankrupt, and which had been used for the benefit of the bankrupt's estate. The Bank's claim therefor was accordingly allowed.

In December, 1904, upon the application of Ward, trustee, and after full hearing, the referee made an order directing him to work up certain lumber and material on the bankrupt's premises, which lumber and material were claimed by the Bank as having been pledged to it. The order of the referee provided that this should all be done without prejudice to the rights of the Bank, and the value of the lumber and material was directed to be deposited as a special fund which was to stand in place of the lumber and be appropriated according to the rights of the parties as they might afterwards be determined.

The amount of lumber and material consumed under this arrangement, including the amount which was sold, was of the value of \$3,567.78, which sum made up the special fund referred to.

There were two policies of insurance, each for \$700, issued to the bankrupt upon certain parts of its lumber. These policies were delivered by the bankrupt to the Bank, which held them until after the loss occurred. Thereafter they were placed by the Bank in the hands of Ward while he was receiver in the way and for the purpose presently to be shown more in detail, and upon each of them he collected \$693—a total of \$1,386—and that sum also remains in the trustee's hands to be disposed of by this litigation.

Without making formal proofs of its claims for these three sums, or any of them, on April 30, 1906, the Bank filed its petition in the bankruptcy proceeding and prayed the referee for an order directing the trustee to pay all of them to it. The trustee and C. Crane & Co., the latter being one of the bankrupt's creditors, contested the right of the Bank to the order prayed for, and much testimony was heard upon the issues raised. After very full consideration the referee made an order substantially as prayed for by the Bank. Due proceedings were taken by which the questions involved were brought before the court below, with the result that each of the sums we have mentioned was adjudged to be due the Bank and payment to it was directed. The case was then brought here.

It appears that between December 18, 1902, and September 6, 1904, in pursuance of agreements presently to be more fully stated, the Bank, from time to time, loaned and advanced to the bankrupt large sums, to secure the payment of which it contends there were pledged to it numerous piles of lumber and certain policies of insurance thereon, and the principal question to be determined is whether this contention of the Bank is well founded. On September 6, 1904, much of the lumber covered by the insurance and by the alleged pledges to the Bank was destroyed by fire. On certain policies of insurance issued to the bankrupt but held by the Bank the latter collected \$18,500 and applied it toward the payment of that much of the indebtedness due to it from the bankrupt. This latter sum is not directly involved in the present litigation, but the right of the Bank to retain it was much discussed at the argument.

Stating it as briefly as may be consistent with clearness, the arrangement between the bankrupt and the Bank was substantially this: The bankrupt was to execute to the Bank its notes for the money the Bank might loan or advance to the bankrupt from time to time, and payment of these notes was to be secured in both of two ways. One of them was to be by policies of insurance to be obtained by the bankrupt on certain lumber on its yard for its full value, each of the policies to have put upon it a clause or indorsement that the loss thereunder, if any, should be paid to the Bank as its interest might appear. These policies were to be delivered to the Bank. All of this was done except that the clause providing that payment should be made to the Bank as its interest might appear, unintentionally upon the part of the bankrupt and without the Bank's consent or knowledge,

was not put upon the two policies for \$700 each, to which we have referred. These two policies, however, like the others, were procured by the bankrupt and with intent to pledge them were delivered to the Bank in pursuance of the agreement and remained in its possession until turned over to the receiver, Ward, for the purpose of being collected. This course became necessary when the insurance company declined otherwise to pay upon discovering, after the fire, that the clause authorizing payment to the Bank had been omitted. The other way of securing payment of the bankrupt's indebtedness to the Bank was by pledges of lumber stacked on the bankrupt's yard. As to this the parties agreed as follows: The lumber was to be put into separate piles, each of which was to be numbered and tagged with the letters "F. N. B.," the initials of the Bank's name. A diagram was to be made of the yard, showing the location of each of the piles of lumber so numbered and tagged, and the diagram was to be delivered to the Bank. The Bank was to have full control and possession of the lumber pledged, and was to have and it did have and it exercised, from time to time, the right of free and full access to the yard and to the piles of lumber so numbered and tagged, and no one of the piles was to be removed by the bankrupt without the consent of the Bank nor without paying the full amount for which it was pledged. The bankrupt was to deliver to the Bank invoices of the lumber showing the amount thereof in each pile and its value, and the Bank was to loan the bankrupt thereon 90 per cent. of that value. The bankrupt was to execute to the Bank its note for each sum so advanced from time to time, and the note was to contain a contract of pledge of the lumber describing the piles and their numbers. In this contract of pledge was also contained a clause which devoted the pledged property generally to the payment of any indebtedness which might be owing from the bankrupt to the Bank as well as the specific note of which it was a part. All of these stipulations, with the exception stated as to the two policies of insurance, were performed, and there is no indication in the record that at the time the respective loans were made, the Bank had reasonable cause to believe or did believe that the bankrupt was insolvent. Nor does the record give any indication that there was anything but perfect good faith in the dealings between the parties. There is nothing, indeed, to indicate that any one of the numerous transactions under these agreements was a mere pretense. And it satisfactorily appears that all of the pledges, whether of lumber or of insurance, were made fairly and for a present consideration.

[1, 2] 1. It is contended that the court below erred in not holding, as was there insisted, that the Bank should have made a formal proof of its claims against the bankrupt's estate. There is no requirement that a creditor holding a security shall do this, although he may do so at his option. He can rely upon his security and enforce it otherwise. Besides, in this instance each of the claims made by the Bank in its intervening petition was, in a specific sense, against the trustee, as such, and not against the bankrupt except in a general way. Under these circumstances the Bank filed its petition before the referee and prayed for an order directing the trustee to pay directly to it certain moneys held by him, but to which, upon the facts it stated, the

Bank claimed to be entitled. We think this was a convenient and proper way to secure a determination of the questions involved, and that a formal proof of debt against the bankrupt was not necessary to that end. Among the authorities supporting this conclusion are *In re Goldsmith* (D. C.) 118 Fed. 763, and 2 *Loveland on Bankruptcy* (4th Ed.) § 576, p. 1098, and section 579, p. 1103.

[3] 2. It is a perfectly well-established rule that delivery of possession is indispensable to a pledge of personal property. Indeed, possession is the essence of a pledge. But, while this is the general principle, there frequently is difficulty in determining from the testimony whether in a given case possession was, in fact, passed to the pledgee. Oftentimes this may be a question of much complexity, its solution depending upon a correct interpretation of conflicting evidence. Delivery of possession may be made symbolically; and, while the delivery of the map to the Bank presents characteristics of symbolic delivery, yet we are disposed to believe that the rights of access to and control over the piles of lumber which were given to the Bank and exercised by it present stronger features of actual than of symbolic delivery. Speaking generally, the question of possession may largely depend upon the intention of the parties dealing in good faith and upon the nature and location of the property itself. Also the circumstances of the entire situation may be considered. Here the property was bulky and ponderous. Its removal from the bankrupt's yard to another place of storage would have been difficult and expensive. It was stacked in separate piles, each of which, as we have seen, was numbered and tagged with the initials of the Bank's name. The diagram of the premises furnished by the bankrupt clearly showed the number and location of every tagged pile. The intention of the bankrupt was made clear by thus identifying and segregating the several piles of lumber. Manifestly all this was done to make it certain that the bankrupt's purpose was to give the Bank exclusive dominion and control over the property. It also indicated this purpose by giving the Bank full right of ingress to look after the lumber, which right the Bank freely, and from time to time, exercised. In short, in a way which, under the circumstances, was reasonable and practical, the intention of the parties was given effect.

Upon the facts as we find them from the record we have reached the conclusion that there was, in respect to each pile of the lumber so numbered and tagged, including that used by Culbertson, a delivery of possession to the Bank, and that all the pledges of lumber were thus validated. Many authorities might be cited, but the recent decision of the Supreme Court in *Sexton, Trustee in Bankruptcy, v. Kessler*, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995, and that of this court in *Re Cincinnati Iron Store Co.*, 167 Fed. 486, 93 C. C. A. 122, so clearly support our conclusion that no others need be mentioned. *True, Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779, was much relied upon by counsel for appellant; but, as the court held upon the testimony in that case that possession had not in fact been given, we need give it no further consideration, especially as the distinction is very clear between it and *Sexton v. Kessler* and *In re Cincinnati Iron Store Co.*, just referred to.

It may again be said that each of the pledges was made in good faith and for a present consideration then passing. It is not contended that pledges thus made would be in violation of the laws of Ohio if possession passed to the pledgee.

3. What we have said in regard to the lumber renders it unnecessary to say anything in regard to the policies of insurance upon which the bank collected the \$18,500, except that the conclusion to be drawn from the facts respecting those policies and their delivery to the Bank is quite as apparent as that drawn from the facts respecting the lumber.

[4] 4. As we have seen, two of the policies for \$700, each, did not have put upon them the clause directing that the loss thereunder, if any, should be paid to the Bank as its interest might appear. This provision was omitted by inadvertence and without either party noticing the omission. Pursuant to its agreement the bankrupt procured the insurance, and, intending to further perform that agreement and thinking it was doing so, it delivered both of these policies to the Bank in pledge for its indebtedness, and the Bank held them until after the loss. Upon examination made then, the omission was discovered. Without that clause on the policies the insurance company would not pay the loss to the Bank. Then it was that the Bank placed the policies in the hands of the receiver, so that the money might be collected. In doing this, there was no intention on the part of the Bank to waive or surrender its claim, as pledgee, to the proceeds of the policies, nor was there any intention upon its part to waive or abandon its claim to the money thus collected. These facts are made apparent by the testimony. Nevertheless, the trustee has retained the money thus collected. In respect to this phase of the case we hold that as there was an absence of intention to do so on the Bank's part there was no waiver or abandonment of its claim to the proceeds of the policies. *Saxlehner v. Eisner & M. Co.*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60. Furthermore, we are of opinion that the Bank is entitled as pledgee to the proceeds of the two policies. But, should any doubt exist as to that view, we are of opinion, upon the facts shown, that the Bank had an equitable lien upon the policies, and is entitled to the money obtained thereon by the receiver and now in the hands of the trustee, subject to the cost of its collection. In addition to the delivery of the policies to the Bank there had been a distinct appropriation of any money collected thereon to the payment of any debt due the Bank from the bankrupt, and an agreement that it should be thus applied. *Sexton v. Kessler*, 225 U. S. 90, 99, 32 Sup. Ct. 657, 56 L. Ed. 995; *Hurley v. Atchison, Topeka & Sante Fé Ry. Co.*, 213 U. S. 134, 29 Sup. Ct. 466, 53 L. Ed. 729; *Pattison v. Dale*, 196 Fed. 5, 115 C. C. A. 639; *Wright v. Ellison*, 1 Wall. 16, 17 L. Ed. 555.

5. Appellant's counsel very strenuously urged upon our attention the case of *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. We need only say that that case is in no respect like the one before us. The question there was whether the manufacturing company had a lien upon certain machinery it had supplied under a contract of conditional sale to another who had posses-

sion of it, which contract was not recorded as required by section 4155 of the Revised Statutes of Ohio.

We do not deem it necessary to notice in detail numerous other assignments of error, as those involved in what we have said are decisive of the case.

It results that the judgment of the court below should be, and it is in all respects, affirmed, with costs to the appellee.

LEXINGTON MILL & ELEVATOR CO. v. UNITED STATES (two cases).

(Circuit Court of Appeals, Eighth Circuit. January 23, 1913.)

Nos. 3,533, 3,534.

1. APPEAL AND ERROR (§ 5*)—PROCEEDINGS FOR FORFEITURE UNDER FOOD AND DRUGS ACT—MODE OF REVIEW.

A proceeding by the United States under Food and Drugs Act June 30, 1906, c. 3915, § 10, 34 Stat. 771 (U. S. Comp. St. Supp. 1911, p. 1359), for the condemnation and forfeiture of an article being transported in interstate commerce which is alleged to be adulterated or misbranded, in which either party is given the right to demand a trial by jury of any issue of fact, where such trial is demanded and had, is essentially an action at law and is reviewable only on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. § 5.*]

2. FOOD (§ 5*)—FOOD AND DRUGS ACT—"ADULTERATION"—"INJURIOUS TO HEALTH."

The object of Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354), is (1) to insure to the purchaser that the article purchased is what it purports to be, and (2) to safeguard the public health by prohibiting the inclusion of any foreign ingredient deleterious to health, and the act is to be construed in the light of these objects. In the provision of section 7 that an article of food shall be deemed to be adulterated "if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health," the words "injurious to health" must be considered and given their natural meaning, and the addition of an ingredient to an article of food which is poisonous in sufficient quantity does not constitute an adulteration unless the quantity used is such as may render the article injurious to health, which is a question of fact to be determined on evidence.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 1, pp. 210-212.

What constitutes violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

3. FOOD (§ 5*)—FOOD AND DRUGS ACT—ADULTERATION—"MIXED" AND "COLORED" DEFINED.

In the first and fourth subdivisions of said section relating to food, which provide, respectively, that it shall be deemed to be adulterated "if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength," or "if it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed," the word "mixed" is used in its common acceptance, and a substance added which produces a chemical compound is within the first, as well as one which produces a mechanical mixture,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and similarly the word "colored" must be held to include any artificially produced change in the natural color of the article "in a manner whereby damage or inferiority is concealed."

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 5, p. 4546.]

4. FOOD (§ 24*)—FOOD AND DRUGS ACT—ADULTERATION.

Whether the bleaching of flour with nitrogen peroxide gas by the Alsop patented process, which results in the formation of nitrites therein, lowers or injuriously affects the quality or strength of the flour so as to constitute an adulteration within the meaning of Food and Drugs Act June 30, 1906, c. 3915, § 7, subd. 1, 34 Stat. 769 (U. S. Comp. St. Supp. 1911, p. 1357), is a question to be determined as one of fact in a proceeding for forfeiture of the flour.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 17; Dec. Dig. § 24.*]

5. FOOD (§ 5*)—FOOD AND DRUGS ACT—ADULTERATION.

That all grades of flour so bleached are whiter than the unbleached and might be taken by a purchaser for superior grades is not sufficient to prove that such bleaching constitutes an adulteration, under subdivision 4 of said section, by so coloring the flour as to conceal inferiority, in view of the fact that whiteness is generally known to be an uncertain index of quality and is desired because bread baked from it is whiter and considered better in appearance, and the further fact that the color produced by bleaching is not the same as that produced by aging.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

6. FOOD (§ 15*)—FOOD AND DRUGS ACT—"MISBRANDING"—"PATENT FLOUR."

In view of undisputed testimony that the term "patent flour" does not connote flour containing any fixed or maximum percentage of the wheat berry, and that it may differ with different kinds of wheat, a "misbranding" within the meaning of Food and Drugs Act June 30, 1906, c. 3915, § 8, 34 Stat. 771 (U. S. Comp. St. Supp. 1911, p. 1358), cannot be predicated alone on the percentage in a flour so branded.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. § 15.*

For other definitions, see Words and Phrases, vol. 6, p. 5232.]

7. FOOD (§ 24*)—FOOD AND DRUGS ACT—MISBRANDING—LIBEL FOR FORFEITURE—EVIDENCE.

A libel by the United States charging a misbranding of an article of food in a particular specified cannot be supported by evidence of misbranding in a different particular.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 17; Dec. Dig. § 24.*]

Appeal from and in Error to the District Court of the United States for the Western District of Missouri; Smith McPherson, Judge.

Proceeding by the United States by libel for the forfeiture of 625 sacks of flour; Lexington Mill & Elevator Company, claimant. Judgment for libelant, and claimant appeals and brings error. Appeal dismissed and reversed on writ of error.

Edward P. Smith, of Omaha, Neb., and E. L. Scarritt, of Kansas City, Mo. (Bruce S. Elliott, of St. Louis, Mo., A. E. Helm, of Wichita, Kan., C. J. Smyth, of Omaha, Neb., and W. C. Scarritt, of Kansas City, Mo., on the brief), for plaintiff in error and appellants.

Leslie J. Lyons, U. S. Atty., of Kansas City, Mo., and Pierce Butler, Special Asst. Atty. Gen., of St. Paul, Minn. (William G. Graves, of St. Paul, Minn., on the brief), for defendant in error and appellee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before SANBORN, Circuit Judge, and WM. H. MUNGER and MARSHALL, District Judges.

MARSHALL, District Judge. The Lexington Mill & Elevator Company is a corporation of the state of Nebraska and is engaged in the manufacture of flour at Lexington, Neb. On April 1, 1910, it shipped from Lexington to B. O. Terry at Castle, Mo., 625 sacks of flour manufactured by it. On April 9, 1910, a libel was filed by the United States under the provisions of section 10 of the Food and Drugs Act (34 Stat. 768), and a warrant of seizure issued, by virtue of which the flour was seized under the claim that it was adulterated and misbranded in violation of the provisions of that act. The Lexington Mill & Elevator Company appeared as claimant. It averred that it had sold the flour under a guaranty that it was not adulterated within the meaning of the Food and Drugs Act, and that pursuant to that guaranty it had furnished to the purchaser other flour in lieu of that seized, and had become the owner of the flour in litigation. It was permitted to answer the libel, and the case was then tried to a court and jury with the result that the United States had a verdict that the flour was adulterated and misbranded. From the judgment of condemnation rendered on this verdict the claimant prosecutes an appeal and a writ of error. A motion is made to dismiss the appeal, and this must be sustained.

[1] The act under which this libel was filed provides in section 10 for the process of libel for condemnation and that:

"The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand a trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States."

This did not change the essential character of the action or make it other than an action at law. As a matter of procedure it has to conform "as near as may be to proceedings in admiralty"; but a trial by jury at the demand of either party is provided, and a review of the facts so tried by appeal was not expressly granted. The question as to the proper method of review was decided in this court in the case of *United States v. 779 Cases of Molasses*, 174 Fed. 325, 98 C. C. A. 197. The Supreme Court of the United States has had occasion to pass on the principle involved in cases arising under the Act of July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels and for other purposes," which provided that the proceedings against the property seized shall be in rem and "shall conform as nearly as may be to proceedings in admiralty or in revenue cases." That court held that a writ of error was the only method of review.

The appeal in No. 3,534 will be dismissed and jurisdiction will be taken of the writ of error in No. 3,533.

Before a consideration of the questions arising on the writ of error, a more complete statement of the facts is necessary. The claimant in the manufacture of the flour seized uses the Alsop patented process. A complete description of this process may be found in the

opinion of this court in *Naylor v. Alsop Process Co.*, 168 Fed. 911, 94 C. C. A. 315. It is sufficient for the present purpose to say that by it nitrogen peroxide gas is formed by electric discharges. This gas mixed with air is brought into contact with the freshly milled flour, with the result of bleaching it. The method is this: In a small chamber one electrode is fixed; the other is given a reciprocating motion so as to alternately touch and separate from the fixed electrode. A current of high potential is used. The circuit is completed by the contact. Separation of the electrodes results in an arc. The inert nitrogen of the air is oxidized and nitrogen peroxide gas formed. This gas diluted by mixture with air is conveyed to a box or agitator, through which the flour is permitted to fall, and the bleaching is at once effected. The chemical reaction seems to be as follows: The nitrogen peroxide gas, coming in contact with the moisture of the flour, splits and forms nitric and nitrous acids, both oxidizing agents, but the nitric acid the more powerful. The nitric acid certainly and the nitrous acid probably unite with the coloring matter of the flour and bleach it. Nitrites are formed by the union of the nitrous acid with the bases in the flour and nitrates by the union of the nitric acid with those bases. The nitrates may be disregarded as noninjurious; the nitrites are claimed to be poisonous. The flour seized was subjected to the Griess-Ilsovoy test, an extremely delicate test for the detection of the presence of nitrites, and was shown to contain nitrites or material reacting as nitrites to the amount of three parts per million. The misbranding is predicated on this: The sacks containing the flour were labeled "L 48, Lexington cream XXXXX, fancy patent. This flour is made of first quality hard wheat." In fact, the flour was milled from Turkey red wheat. This wheat replanted from year to year gradually degenerates and becomes mixed with a wheat of a yellow color, called locally "yellow berry." This admixture with yellow berry deteriorates the quality of the wheat. The wheat in question contained this yellow berry to the extent of from 15 to 25 per cent. of its total quantity. Both Turkey red and yellow berry are hard wheats. This wheat graded as No. 2, and this was the best grade of wheat grown or milled in Nebraska or neighboring states. In other sections of the country wheat grading as No. 1 is grown. There can be milled from the same wheat flour of different grades. That flour which contains the entire flour content of the berry is called "straight flour"; patent flour excludes a part of the flour content; that part of the berry nearest the bran coat containing the greater part of the oil and coloring matter. Clear flour is the residue of the flour content of the wheat after taking out the patent flour. The result is that patent flour is whiter than straight and straight is whiter than clear flour.

[2] The jury found separate verdicts: (1) That the flour seized was adulterated; and (2) that it was misbranded. The court charged the jury:

"It is clear that it was intended by Congress to prohibit the adding to the food of any quantity of the prohibited substance. The fact that poisonous substances are to be found in the bodies of human beings, in the air, in potable water, and in articles of food such as ham, bacon, fruits, certain

vegetables, and other articles, does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore the court charges you that the government need not prove that this flour or foodstuffs made by the use of it would injure the health of any consumer. It is the character, not the quantity, of the added substance, if any, which is to determine this case."

This was excepted to and was assigned as error. There was evidence tending to prove that flour containing the percentage of nitrites found in the seized flour might be injurious to health when used as a food for a considerable period, but this was disputed, and the converse supported by substantial testimony. This was the most stubbornly contested issue in the case, and that it was an issue was recognized by the government at all stages of the trial.

The part of the statute material to a consideration of the correctness of this instruction is found in section 7 of the act, which reads:

"Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated: * * *

"In the case of food:

"First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

"Second. If any substance has been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed."

"Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health. * * *

The instruction complained of referred to the charge in the libel under the fifth subdivision just quoted. The trial judge decided that if the added substance was qualitatively poisonous, although in fact added in such minute quantity as to be noninjurious to health, it still fell under the ban of the statute; and the distinction is sought to be drawn between substances admittedly poisonous when administered in considerable quantities but which serve some beneficial purpose when administered in small amounts, and those substances which it is claimed never can benefit and which in large doses must injure. This distinction is refined. To apply it must presuppose that science has exhausted the entire field of investigation as to the effect upon the human body of these various substances; that nothing remains to be learned. Otherwise the court would be required to solemnly adjudge to-day that a certain substance is qualitatively poisonous because it can never serve a useful purpose in the human system only to have this conclusion made absurd by some new discovery. There is no warrant in the statute for such a strained construction. The object of the law was evidently: (1) To insure to the purchaser that the article purchased was what it purported to be; and (2) to safeguard the public health by prohibiting the inclusion of any foreign ingredient deleterious to health. *Hall-Baker Grain Co. v. United States* (C. C. A.) 198 Fed. 614. The statute is to be read in the light of these objects, and the words "injurious to health" must be given their natural meaning. It will be observed that this paragraph of the statute

does not end with the words "added deleterious ingredient"; but, as a precaution against the idea embodied in the instruction complained of, it says "which may render such article injurious to health." Without these latter words it might, with more force, be argued that deleterious and beneficent ingredients are to be divided into two general classes independent of their particular effect in the actual quantities administered, but the possibility of injury to health due to the added ingredient and in the quantity in which it is added is plainly made an essential element of the prohibition. The investigation does not stop with the consideration of the poisonous nature of the added substance. It is added to the article of food, and the statute only prohibits it if it may render such article—the article of food—injurious to health.

In *French Silver Dragée Co. v. United States*, 179 Fed. 824, 103 C. C. A. 316, this question was considered by the Court of Appeals of the Second Circuit. In that case adulteration was charged in confectionery by the addition of silver. The article in question was made of sugar and thinly coated with pure silver. The statute declares that confectionery shall be deemed to be adulterated "if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor or compound or narcotic drug." The element of injury to health is not expressed as a qualification of mineral substance. Silver is admittedly a mineral substance, and the act of the defendant was within the letter of the prohibition; but the court, construing the statute in the light of the evils it was intended to remedy, the objects sought to be accomplished, held that there was implied in this clause relating to confectionery the very limitation expressed in the paragraph relating to food, and, as there was no proof that the coating of silver might render the article injurious to health, it did not fall within the ban of the statute. It was there said:

"Stated in another way, we think that the history of the act, the objects to be accomplished by it, and the language of all its provisions, require that it should be so interpreted that in the case of confectionery, as in the case of foods and drugs, the government should establish with respect to products not specifically named that they either deceive or are calculated to deceive the public or are detrimental to health."

In *Friend v. Matt*, 68 J. P. 589, there was under consideration section 3 of 38-39 Victoria, c. 63, which reads:

"No person shall mix, color, stain, or powder or alter, or permit another person to mix, color, stain or powder any article of food or any ingredient or material so as to render the article injurious to health."

In that case the respondent was charged with selling preserved peas, the color of which had been retained by the addition of sulphate of copper. It was contended that, as sulphate of copper in substantial quantity was injurious to health, the peas so treated with it were within the statute even if the treated peas were not injurious to health. This view prevailed in the trial court, but the judgment was reversed on appeal; Lord Alverstone, Chief Justice, saying:

"I have no doubt that, in order to convict under section 3, the article of food must be shown to be injurious to health by the addition of some ingredient."

The instruction complained of eliminated a consideration of any possible injurious effect from the use of the flour as an article of food, and was erroneous. We are not unmindful of the contention that the evidence conclusively shows that flour subjected to the bleaching process is injurious to health in some degree, even if its injurious effect is so slight as to be incapable of observation, and that hence the instruction we have found to be error was error without prejudice. This contention is founded upon expert testimony as to the result from the taking of nitrites into the human system. It is said that nitrites taken into the human body act upon the coloring matter of the red corpuscles of the blood so as to change the hemoglobin of the blood into methemoglobin. In the language of one of the chief chemical experts of the government this effect is thus described:

"In the blood stream there are red corpuscles, invisible to the naked eye, which contain a red coloring substance known as hemoglobin, when not combined with oxygen, and when combined with oxygen forming a dissociable compound, oxyhemoglobin. In respiration, the hemoglobin contained in the red corpuscles of the venous blood is brought into the lungs, where it having an affinity for the oxygen, which is one of the gaseous constituents of the air, combines with the oxygen to form oxyhemoglobin. This oxyhemoglobin contained in the red blood corpuscles is then conveyed, through the arterial system, to the various parts of the body, and of the terminals of the arterial system, passing through a mass of tissue, it gives up its oxygen, to oxidize the tissues, or materials that may be in solution there, to form carbon dioxide and to form water, and this oxyhemoglobin is thereby reduced to the condition of hemoglobin which is returned by the venous system to the lungs, to be again oxygenated. That is where the hemoglobin will again combine with oxygen to form oxyhemoglobin, and a given quantity of hemoglobin may serve to carry a given quantity of oxygen to the system. Now, however, if any of this hemoglobin is converted into methemoglobin, which is a compound of oxygen with hemoglobin, in which the oxygen is more firmly combined than in the case of oxyhemoglobin, although the quantity of oxygen is the same, the oxygen is so firmly attached—combined with the hemoglobin—that the vital processes are not sufficiently strong to separate the oxygen from the hemoglobin, nor to use the oxygen to oxidize the tissue and tissue material, to sustain life, and, consequently, it passes through the circulation to the arterial system and the venous system, and continues this cycle until, finally, it is destroyed by the liver. Therefore, a certain quantity of the hemoglobin is rendered inefficient. It no longer functionates as a carrier of oxygen to the system, serves, or acts, as a foreign body in the blood circulation, and, therefore, must be removed. As I have said before, an extra strain is placed upon the liver, in order to remove it, and an extra strain is placed upon the red blood marrow, in adults, to regenerate the corpuscles, and to replace the corpuscles of the hemoglobin that have been rendered inactive by the action of nitrite, and the formation of methemoglobin."

It is also said that the continued presence of nitrites in the system does not develop any tolerance on the part of the body or means of neutralizing its normal action. On the other hand, it was proved that no injurious effect had ever been observed from the use of bleached flour, although such flour had been largely used; that nitrites in some or greater amounts are frequently present in potable water, bacon,

ham, fruits, and certain vegetables, and even in the saliva of both adults and children, and no evil result has been detected; that urea usually present in saliva is, when taken into the stomach, a neutralizer of nitrites, and is a method by which nature averts harm from minute quantities of nitrites so constantly taken into the system. In this conflict of evidence it was essentially a matter for the jury to find the fact under proper instructions. Expert testimony is but evidence. In case of dispute the controversy cannot be settled by the judicial knowledge of the court. *U. S. v. McGlue*, 1 Curt. 1-9, Fed. Cas. No. 15,679; *U. S. v. Molloy* (C. C.) 31 Fed. 19. It cannot be held that the evidence was so conclusive in favor of the government as to warrant the court in withdrawing this issue from the jury.

[3] The government also claimed that the seized flour was adulterated within the first and fourth subdivisions of section 7 before quoted, in that a substance, viz., nitrites or nitrite reacting material, had been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength, and that it had been thereby colored in a manner whereby damage or inferiority is concealed. The claimant requested a peremptory instruction in its favor on the issues so tendered by the libel, and assigns the refusal to so instruct as error.

The mixture referred to in the first subdivision must be held to include a chemical compound as well as a mechanical mixture. While this does not accord with the scientific definition of a mixture, yet in common acceptance mixtures and compounds are not discriminated. The evil intended to be remedied by the statute is not limited to a mechanical mixture, but is just as potent when the chemical union results from the two substances with the deleterious effect intended to be prevented by the act. Similarly, the word "colored" must be held to include any artificially produced change in the natural color of the substance "in a manner whereby damage or inferiority is concealed," even if the change is, as in this case, a removing of color. This is the evident intent of the statute. The act is essentially remedial, and its evident purpose is not to be defeated by any narrowness of construction. *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363.

[4] There was evidence that bleached flour did not improve with age in the manner characteristic of unbleached flour, nor did it, as the claimant contended, suddenly take on the condition of properly aged flour which had not been subjected to the bleaching process. That in dough made from bleached flour the gluten never attained the toughness found in dough from unbleached and properly aged flour, and that this toughness was a valuable property in the making of bread. In other words, that as an ultimate result of the mixing of the flour with nitrogen peroxide gas the bread-making quality had been injuriously affected. We are not concerned with the opposing testimony. It was for the jury to determine the fact, and the court did not err in refusing to peremptorily instruct for the claimant so far as the claim of adulteration was based on the first subdivision before quoted.

[5] The claim of adulteration under the fourth subdivision presents a different question. There is evidence that flour made from new wheat is darker in color than the flour made from wheat which has gone through an incipient fermentation or sweating process in the stack, and, second, through a similar process after threshing. This involves time; also that freshly milled flour is darker than it subsequently becomes when kept for a certain period of time; that clear flour is darker than straight flour and straight flour is darker than patent flour; that color is to some extent an index of the quality of the flour, and as such influences the ordinary purchaser; that all grades of bleached flour are whiter than unbleached. In this way the index of color becomes unreliable, and a purchaser may take the bleached straight for unbleached patent flour. With the evidence on which the inferiority of the bleached flour is claimed, this, it is contended, brings the case within the fourth subdivision of section 7. Opposed to this, it appears: That color is at best an uncertain index of quality, and that dealers in flour use other means to ascertain quality. That the color of bleached flour is distinct from that of unbleached flour; the dead white of the bleached is contrasted with the cream white of the unbleached. That bleaching of flour does not obliterate the differences in appearance of different grades of bleached flour. That, while patent flour obtains a higher price in the market than straight flour, this is not due to any superiority in patent flour from a nutritious standpoint, but is due to the fact that bread baked from it is whiter in appearance, and hence more pleasing to the eye. This æsthetic result can be obtained by a certain process of conditioning the wheat and milling the flour. Was it the intention of the statute that this process should have a monopoly? Whiteness in flour is a desirable end in and of itself. Its connection with flour of any particular grade is purely incidental. We are not persuaded that by the bleaching process flour is so colored as to conceal inferiority, or that by it flour is adulterated within the intent of subdivision four of section 7 of this act.

[6] The court submitted to the jury the charge contained in the libel that this flour was misbranded, and in effect instructed the jury that they should find for the government if the flour was not a patent flour or was not made from first quality hard wheat. This was excepted to and is assigned as error. The contention of the plaintiff in error, as presented to the trial court by various requests for instructions, is that no evidence was introduced tending to prove that the seized flour was not a patent flour, and that the issue tendered by the libel as to the quality of the wheat only went to the question whether it was hard or soft wheat, and that there was no evidence that the wheat was soft. It will serve no useful purpose to review at length the evidence. It suffices to say that it appears that the seized flour contains 90 per cent. of the flour content of the wheat; that there is no fixed standard as to the percentage of the flour content which may be properly termed patent flour. When the process first originated, a relatively low percentage was called patent flour; as improvements were made in the methods of manufacture, a higher percentage was customarily so labeled. Different mills adopt different standards,

varying in accordance with the efficiency of their methods of manufacture. The quality of the wheat milled also enters into the question. The better the wheat the higher the percentage of the flour content that may properly be classed as patent flour. The case of the government rests entirely on the evidence of some millers that in their opinion no greater percentage than 85 per cent. can be properly classed as patent flour. This evidence is based upon the experience of those witnesses with different machinery and wheat, and is not predicated upon the claimant's methods of manufacture. There is a concurrence of the witnesses that the term "patent flour" does not connote any fixed or maximum percentage of the flour content of the berry. In other words, by "patent flour" is meant flour containing less than the total of the flour content of the wheat. Giving those words that signification, there was no evidence of falsity, and the claimant was entitled to have that issue withdrawn from the jury by a peremptory instruction in its favor.

[7] It was charged in the amended libel that the seized flour was misbranded in that it was labeled as made of the first quality of hard wheat, whereas, in truth it was made in whole or in part of soft wheat. This charge was denied in the answer. The evidence adduced in its support is that the flour was milled from No. 2 Turkey red wheat and was not of the first quality, but that no soft wheat entered into its composition. The trial court, in substance, instructed the jury that if the wheat was not of the first quality the charge of misbranding was sustained. Fairly construed, the libel tendered the issue of soft wheat as distinguished from hard wheat. The pleader assumed that it was incumbent upon him to specify the particular in which the branding was false. If it be permissible to so specify and failing to support the specification, to prove falsity in another particular within the general averment of falsity, then the specification serves but to draw the attention of the defendant from the actual point of controversy and to mislead. It was error to submit the charge of misbranding to the jury.

Errors are assigned on various rulings in the admission of testimony; but as the pages of the record which presented the testimony objected to are not stated in the brief of the plaintiff in error, as required by rule 24 of this court, we deem it unnecessary to consider them. *Hoge v. Magnes*, 85 Fed. 355-358, 29 C. C. A. 564.

The constitutionality of the Food and Drugs Act is attacked by the plaintiff in error and was exhaustively argued. The point of the attack is that the statute as construed by the trial court applied to food products in fact entirely innocuous and which could not possibly be injurious to health nor deceptive. As we have not so interpreted the statute, it is not necessary to express any opinion as to the validity of a statute excluding from interstate commerce harmless food products which are offered for sale without deception.

The judgment below must be reversed, and the case remanded for a new trial, and it is so ordered.

HINCHMAN et al. v. RIPINSKY.

RIPINSKY v. HINCHMAN et al.

(Circuit Court of Appeals, Ninth Circuit. January 13, 1913.)

Nos. 1,993, 2,015, and 2,045.

1. APPEAL AND ERROR (§ 1208*)—REVERSAL—RESTITUTION OF COSTS COLLECTED IN LOWER COURT.

The awarding of costs to an appellant on reversal of the decree below by a Circuit Court of Appeals is a part of the judgment of that court, which cannot be changed by any action of the court below after the cause is remanded; and where the decree for costs entered in the trial court against the appellant was collected pending the appeal, it is proper for that court, on receipt of the mandate, to award restitution of such costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4701-4709; Dec. Dig. § 1208.*]

2. COSTS (§ 32*)—PUBLIC LANDS—SUIT IN SUPPORT OF ADVERSE CLAIM.

In a suit against a homestead settler in Alaska in aid of an adverse claim, brought under Act May 14, 1898, c. 299, § 1, 30 Stat. 409 et seq. (U. S. Comp. St. 1901, p. 1412), extending the homestead laws to that territory, as amended by Act March 3, 1903, c. 1002, 32 Stat. 1028 (U. S. Comp. St. Supp. 1911, p. 606), to prevent the issuance of a patent to the homestead claimant, where neither party establishes a right to the land, neither should be allowed costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 108-132; Dec. Dig. § 32.*]

3. PUBLIC LANDS (§ 39*)—TOWN SITES—SUIT IN AID OF ADVERSE CLAIM—JOINDER OF CLAIMANTS.

Occupants of lots on public land in an unincorporated town in Alaska, who have made application to have the same surveyed as a townsite, pending the appointment of a town-site trustee, may join in a suit brought in aid of a contest filed against the issuance of a patent on a homestead entry which conflicts with their claims.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 83-90, 92-99; Dec. Dig. § 39.*]

4. PUBLIC LANDS (§ 39*)—CONTEST BETWEEN TOWN SITE AND HOMESTEAD CLAIMANTS—EVIDENCE OF POSSESSION CONSIDERED.

Evidence considered, in a suit by settlers on public land who had made application for its survey as a town site, in aid of an adverse claim filed against defendant's application for a patent on a homestead entry, and *held* not to show such prior and continued possession by defendant as to entitle him to a patent, except as to a portion of the tract claimed which had been actually occupied and improved by him and his predecessors in interest.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 83-90, 92-99; Dec. Dig. § 39.*]

Rights acquired by homestead settlements and entries, see note to *McCune v. Essig*, 59 C. C. A. 434.]

Appeal from the District Court of the United States for Division No. 1 of the District of Alaska; Edward E. Cushman, Judge.

Suit in equity by G. W. Hinchman and others against Solomon Ripinsky. From the decree both parties appeal. Reversed in part.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 202 F.—40

Lewis P. Shackelford, of Juneau, Alaska, and Alfred Sutro, of San Francisco, Cal. (Albert Fink, of San Francisco, Cal., of counsel), for plaintiffs.

R. W. Jennings, of Baltimore, Md., and J. H. Cobb, of Juneau, Alaska, for defendant.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This is the second appeal. The cause was reversed on the first, and remanded for such further proceedings as to the trial court might seem proper. The District Court allowed an amendment of the complaint in such manner as to show that the suit was instituted in support of an adverse claim, entered in the Land Office, to the application of the defendant, Solomon Ripinsky, for a homestead patent in pursuance of survey No. 573. A new trial was had, resulting in a decree that plaintiffs take nothing by the bill of complaint; that defendant is the owner of the following parcels of land, comprised by survey No. 573, namely, a parcel 100x150 feet in area in the extreme east end of said survey, and parcel No. 5, in block 1, according to a plat made by Walter Fogelstrom; and that Ripinsky, the defendant, recover of and from the plaintiffs his costs and disbursements. From this decree, both plaintiffs and defendant prosecute an appeal. The appeal of Ripinsky is known on the docket here as No. 2,015, and that of Hinchman et al. as No. 2,045. When the cause was reversed on the prior appeal, costs were awarded to Ripinsky, the defendant and appellant. The amount of these costs was taxed at \$1,436.95. While the cause was on appeal, the plaintiffs, who were appellees here, issued execution and enforced payment by Ripinsky of the costs and disbursements awarded against him in the trial court, amounting to \$456.75. When the mandate of this court went down, counsel for Ripinsky moved the District Court that, in entering its decree upon the mandate, it include therein a decree also against the plaintiffs for restitution of the costs collected under execution upon the reversed decree, which motion was allowed, and decree entered accordingly. The plaintiffs have filed an appeal from this decree also. Its docket number here is 1,993. All these appeals have been consolidated, and were heard together. It will be convenient to dispose of the last-named appeal first, and then the other two will be disposed of as one cause.

[1] The costs on appeal were awarded by this court. Such award constituted part and parcel of its judgment in reversing the cause brought up. It became a finality, and when the cause went down the court below was bound to observe the injunctions of the mandate. The judgment was binding on the court below, and it had no power or authority to revise or modify it, or to do otherwise than to enter it as the judgment of that court. From such judgment, there was no second appeal to this court. It is almost axiomatic that none of the questions before the court and determined on writ of error or appeal can be heard or re-examined if the case be again brought up. To allow this would lead to endless litigation, and the end of the law could

never be reached. 2 Ency. U. S. Sup. Ct. Reports, p. 412, and notes, pp. 412, 413, 414. In this case the costs on the appeal were a matter determined by this court, and a second appeal as to these falls clearly within the principle stated, and is not allowable.

While it is true that appellant in the first appeal, by his objection to the first amended complaint, as appears now from the record brought here in case No. 2,045, was instrumental in causing the pleadings to be so amended as to present a simple cause for quieting title, and not one in aid of an adverse claim, yet it was within the privilege of the appellees to bring up that record by an amendment to the abstract, and in that way the entire cause could then have been fully presented. It is incumbent on the appellant to bring up so much of the record only, not omitting the evidence, of course, as will present the matters he relies upon for error. If the appellee conceives there is error against him in the record, or such action had as will cure the errors relied upon by appellant, he should bring it to the attention of the court by an amendment of the abstract. Not observing this principle, he alone is to blame, and not the appellant.

As it respects the restitution awarded by the District Court, that was a relief very properly granted, under the condition of the record at that time. The decree of the trial court stood reversed and annulled, and the appellant was entitled to have that returned to him which was taken away by an erroneous judgment. *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 220, 11 Sup. Ct. 523, 35 L. Ed. 151, is decisive of the question. Cause No. 1,993 should therefore be affirmed, with costs against the appellants.

The statute under which this proceeding is now pending is that of May 14, 1898 (30 Stat. 409, 413, 414, c. 299 [U. S. Comp. St. 1901, p. 1412]), extending the homestead laws of the United States to the territory of Alaska, as amended by the act of March 3, 1903 (32 Stat. 1028, 1029, c. 1002 [U. S. Comp. St. Supp. 1911, p. 606]). By that statute, when application for patent is made under the homestead law, and notice given, any person having an adverse interest in or claim to the land for which patent is sought may, within a time fixed by the act, file an adverse claim setting forth the nature and extent thereof, and within 30 days thereafter may begin an action to quiet title in a court of competent jurisdiction in the district of Alaska, after which it is declared:

"No patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of the court."

[2] The statute has in purview, no doubt, adverse claimants who are seeking title from the government to the same parcel of government land, and it is incumbent upon the contestants to show by what right they respectively claim superiority each over his adversary. The final judgment of the court will determine the respective rights of the parties, and the final patent is made dependent upon the result of such adjudication. The statute has its prototype in the statutes providing for the acquisition of mineral lands. Section 2326, Revised Statutes (U. S. Comp. St. 1901, p. 1430), provides for an action of

the kind in case of contest between applicants for the same tract of mineral land. This section was amended March 3, 1881 (21 Stat. 505, c. 140), so that if, in any action brought in pursuance thereof, the title to the ground in controversy be not established by either party, the costs shall not be allowed to either party. While there exists no such amendment or provision with respect to the statute under which this suit is instituted, yet it would seem to be the reasonable course under like conditions. The reference to the courts of the controversy under the statute is in aid of the Land Department, and such form of suit or action may be adopted as would seem most appropriate to meet the exigencies of the case. *Perego v. Dodge*, 163 U. S. 160, 164, 16 Sup. Ct. 971, 41 L. Ed. 113.

In the case at bar the defendant, Ripinsky, is claiming by right of a homestead entry, with possession dating back to about December 2, 1897, derived from Sarah Dickinson. On the other hand, complainants are claiming possession with a view to obtaining title from the government under the town-site statutes. Lands in Alaska may be entered for town-site purposes, for the several use and benefit of the occupants, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section 2387 of the Revised Statutes (U. S. Comp. St. 1901, p. 1457) as near as may be, and, when such entries shall have been made, it is made the duty of the Secretary of the Interior to provide for the proper execution of the trust. 26 Stat. 1099, 1 Fed. Stat. Ann. 53. Section 2387, Revised Statutes, provides that whenever any portion of the public lands has been or may be settled upon and occupied as a town site, not subject to entry under the agricultural pre-emption laws, the corporate authorities, if the town be incorporated, and, if not, the county judge, are empowered to enter the land settled upon and occupied, in trust, for the several use and benefit of the occupants, according to their respective interests. Under these statutes, the initiatory steps to be taken by citizens in establishing a town site upon public land are to settle upon and occupy the land for town-site purposes. When so occupied, they may have the same entered in the Land Office for such purposes, through a trustee or trustees named by the Secretary of the Interior, by whom it is entered in trust for the settlers and occupants.

The plaintiffs by their bill of complaint aver settlement and occupancy, dating from December, 1897, and prior in time to the occupancy of the defendant, of the larger portion of the lands embraced in defendant's homestead survey No. 573, and that they have applied to the proper officers in the United States Land Office for a survey of such lands for the purpose of entering the same as a town site under the laws of the United States.

[3] The question is again presented here, as it was on the first appeal, whether the plaintiffs were entitled to join in a bill of complaint in aid of the contest against the issuance of a patent to the defendant under his homestead application therefor. *Ripinsky v. Hinchman*, 181 Fed. 786, 105 C. C. A. 462. As the cause was then presented, which was in the way of an ordinary suit to quiet title, it was held that such

joinder was not permissible. The case now comes here in a very different aspect. The complaint shows a cause in aid of the complainants' contest in the Land Office against the claim of Ripinsky for a homestead patent.

It is undoubtedly proper and regular under the statute for the settlers and occupants to petition the Secretary of the Interior to name a trustee or trustees to enter the lands so occupied for town-site purposes, who, when so named, would become the trustee or trustees for all, and thereafter administer the trust for all. There exists no good reason why they should not also join in a suit for contest against the issuance of patent prior to the time when a trustee or trustees may be named by the Secretary of the Interior for making such entry for town-site purposes. After the trustees are named and entry made, then the trustees would very properly represent the settlers and occupants. *Ashby v. Hall*, 119 U. S. 526, 7 Sup. Ct. 308, 30 L. Ed. 469; *Martin v. Hoff*, 7 Ariz. 247, 64 Pac. 445. We think, in the present state of the record, it was appropriate for the alleged settlers and occupants to join in the bill of complaint for the particular relief sought.

This brings us to a consideration of the relative rights of the parties contestant. The manner and character of plaintiffs' settlement, occupancy, and holding are sufficiently set out in the opinion heretofore rendered (181 Fed. 789, 105 C. C. A. 462, et seq.), and it is unnecessary that we should do more at this time than to refer to what is there stated upon the subject, except to say that a letter was offered in evidence on the last trial, from the Commissioner of the General Land Office to the United States Surveyor General of Alaska, whereby it appears that George Vogel and 57 other settlers at Haines petitioned for a survey of the boundaries of the town site, which petition had been favorably considered, but advising that further action in the way of making a survey "should be contingent upon the action that may be taken upon a homestead entry that may be made by Sol Ripinsky under survey No. 573." This letter bears date July 17, 1905. It is apparent, therefore, that plaintiffs had proceeded as far as they could in the Land Office when the contest was brought on. Their rights for the establishment of a town site were still initiatory, and had not proceeded further than the filing of a petition for an official survey for a boundary thereof. They had in no way as yet established a right to a patent from the government.

[4] Let us now consider the rights of Ripinsky, the defendant, as acquired under his homestead application, to entitle him to a patent, and determine whether they are superior to the rights of complainants, and, if so, in what respect.

In 1878 George Dickinson, at the time married to an Indian woman named Sarah, being the representative of the Northwest Trading Company, established a trading post at Portage Cove, now known as Haines. He located a tract of land for the company for trading purposes, and erected the buildings now occupied by the defendant. At Dickinson's request, an officer of the United States steamship Jamestown surveyed the tract so located and set the corner posts. It is in evidence that Dickinson constructed an inclosure around the tract,

consisting partly of brush and rails on the south line, and the balance of a single galvanized wire. The lines were also blazed, as they ran mostly through the timber, and a small portion of the ground was cleared and used for garden purposes. In 1880 Dickinson succeeded to the interest of the Trading Company, and continued to occupy the buildings until his death in 1888. He left surviving him his wife, Sarah Dickinson, and a son and daughter, William and Sarah. The widow and son and daughter continued to occupy the buildings and to carry on the business until December, 1897. On December 2d of that year Mrs. Dickinson executed a deed to Ripinsky, describing the premises conveyed as follows:

"Both buildings and all the land adjoining the Presbyterian Mission grounds, situate at Haines Mission, Alaska, except one acre of land claimed by Mrs. J. Dalton. All the above property was left to me by my deceased husband. George Dickinson, and was known as the Dickinson property, which I will defend against all claims. Adjoining the Mission grounds on the south and the Indian village on the north."

Whether Ripinsky went into possession at once is a matter in dispute; but a little later William Dickinson forcibly entered, and maintained possession with force until Ripinsky compromised with him by paying him \$50, and acquired a deed from him bearing date December 21, 1897, containing the following description:

"Both landings and fifteen acres of land adjoining the Presbyterian Mission grounds, situate at Haines Mission, Alaska, except one acre of land claimed by J. Dalton."

It is claimed by Ripinsky that he took immediate possession of the property upon receiving the deed from Mrs. Dickinson, ran a two-wire fence about the land, and has continued in possession ever since, except as dispossessed by the complainants without right.

The real controversy hinges about the question of prior possession as between the parties litigant. We are but little concerned with the manner of conveyance from the Northwest Trading Company to Dickinson, and from Sarah and William Dickinson to Ripinsky. It is sufficient to inquire respecting the transfer of possession.

Ripinsky relates that when he came to trade with Mrs. Dickinson—who was an Indian woman, a native of Alaska, of superior intelligence, with sufficient knowledge of the English language to act as interpreter for the natives—she told him that she had 16 acres of land, less one acre which she had sold to Dalton; that George Dickinson told him, previous to his death, that he had 16 acres, and showed him the posts established about the boundaries. He attempted to locate the position of the stakes on the map, Plaintiffs' Exhibit 1, which was offered in evidence. One he fixed as being near Sixth avenue, but was indefinite about it, and two others he located at the east end of the tract. He further relates that, right after he obtained the deed from Mrs. Dickinson, he ran a fence, consisting of two barbed wires and posts, around the tract; that his brother and some Indians did the work, after he had shown them the lines, and that the fence extended back from the beach westerly 2,400 feet, a little more or less, and that there was not a soul upon the tract other than himself and those work-

ing for him at the time; that the fence remained until the rush of people came in the fall of 1898, who overran the property, tore the fence down, and began their settlement; and, further, that he protested to these people that they were upon his premises. Later, to wit, in 1903, he sent registered letters to persons exercising possession, warning them off, and of his claim.

Ripinsky filed his homestead location June 23, 1903, and an amended notice December 18, 1905, whereby he claimed actual, personal, and continuous occupation and settlement since the month of December, 1897. In the meantime survey No. 573 was made, which was approved by the Surveyor General of Alaska, and later duly filed in the United States Land Office.

On cross-examination Ripinsky states that George Dickinson first showed him the corners of the tract in 1886, and said he was going to clear it, and that he did not know whether that tract contained a good deal more territory than the one in question. He further states that, in showing him the land, Dickinson went along up the Indian trail, now occupied by Main street, "up to Sixth avenue somewhere," and showed him the corner post there, a square post about four feet high, but that he saw no marks upon it; from there they went northerly, somewhere about Sixth avenue, then "over some place to Dalton street," he supposes to where the northwest corner of block No. 5 is now located, and found a corner post, an old one, which might have been there 10 or 15 years; from there they went through the large timber to the locality of the buildings, where Dickinson had a garden, warehouse, storehouse, and woodyard. He further states that Mrs. Dickinson took him out and showed him the corner stakes before he bought, when "Billy" went along, and that he went around the entire tract "lots of times"; that when he got the land he fenced it, beginning the next day; that "perhaps"—using his language—"he [his brother] was fencing one side and I was fencing the other side"; that his brother had natives with him, and he (witness) also had some natives with him; that he attached the wires to trees where convenient, and put posts in elsewhere; that he engaged in building the southern part of the fence; that there was some snow on the ground, and in some places the ground was frozen hard, and that they dug the post holes with pick and shovel. When asked to give the names of the natives who assisted in building the fence, he mentioned "Willy" and "John Jack," both of whom he declared were dead, and further declared:

"We had lots of them. Pretty near all of the natives have died out. There was an epidemic."

Then he said, "We had Adolph;" that prior to the fall of 1898 the fence was nearly all standing, and that in the summer or fall they began tearing it down, but that nearly all the fence was standing in the summer of 1898, and that it was a two-wire fence. When asked why he did not join onto the Misson fence, he answered, "There ought to be a trail so people could walk." It further appeared that he brought an ejectment in the District Court of Alaska, at Sitka, in

1899, against several of the settlers, alleging prior occupancy and possession, and was defeated.

M. Ripin, a brother of defendant, Ripinsky, but having had his name changed, testified that he fenced the tract off from Blind Isaac's, called Dalton street, "away up around and down to the Mission"; that he did not build the fence along the trail on the south side, and that he had seen the fence after it was completed "all around"; that it was probably eight or ten days after his brother bought from Mrs. Dickinson when he began on the building of the fence; that he did not fence the tract as the lines were run by survey No. 573, but ran the fence straight up from Blind Isaac's, and did not inclose the Dalton acre; that neither Mr. Fay nor any one else occupied the land at the time, and the last time he saw the fence was in the middle of January, 1898; that he saw the place after the Porcupine rush in July or August, 1898, and the fence was all broken down, except where Blind Isaac lived, where it was standing pretty well; that he did not go over to the west end of the tract, and could not tell about the fence there; that he heard Mrs. Dickinson say that she sold 15 acres to Ripinsky; that he ran the fence away up to pretty near where the sawmill is, which he thinks is up where Sixth avenue is, and about 300 feet from the Mission line; and that he at one time warned off a man who was building a house for Carl Wilson.

On cross-examination he states that a white man whom they called "Adolph" and a half dozen natives helped him to build the fence; that he guessed the natives were yet in Haines; that it must have been the 10th or 12th of December when he built the fence; that he helped two days in building the fence, and guessed that it took the parties two weeks to build it; that he came over from Chilkat to Haines every other day and saw the natives building the fence; that the fence was there in the spring of 1898, and part of it in the summer—it was in the summer that people began to break it down; that there is no sign of it there now, and has not been for eight or nine years; that his brother got the wire with which to build the fence from Mr. Warne, the Presbyterian missionary, and that he saw the corner post over by the sawmill. When asked for a description of the post, he answered that he guessed it was a "regular post from a tree," and that when he saw it the fence had been built right up to it. Being further asked, "Now, you don't know whether there was a corner post there before the fence was built, or not?" he answered, "I guess there wasn't." He further states that he saw the southeast corner post also, which was after the fence was built, and that he helped build that fence.

Franklin A. Rogers testifies that he was a resident of Haines from May 8 to the last of November, 1896, and from April, 1897, to January, 1898, and off and on to May of that year; that when he went to Haines in 1896 he was informed that the two buildings and ground belonged to Mrs. Dickinson, and that it was the old trading post while Mr. Dickinson was alive; that they lived and had a store in the building next to the Mission, that the second one was the warehouse, and that all the time he was there he never heard it called by any other name than the Dickinson property. He says that Mrs. Dickinson and

William told him that it extended from the north line of the Mission north to Blind Isaac's, less the corner of one acre sold to Dalton, and, from the water on the east, west to embrace 15 acres, and that he went over with Solomon Ripinsky what he said included 15 acres; that the land would have to run from tide water west about 2,500 feet to make 15 acres; that he does not know whether the Dickinson tract was ever fenced or not, but that a portion on the east had been used for a garden and was fenced when he went there in 1896; that he assisted Ripinsky in negotiating the purchase from Mrs. Dickinson; that he had the deed recorded on December 13th; that on the 21st William, the son, had broken into the store building, and that he (witness) brought about a compromise between him and Ripinsky, when William gave the latter a deed to his interest in the premises; that at the time of the transaction with Ripinsky W. W. Warne had a piece of land staked off, which had a notice of claim posted on it; that witness staked off 200x200 feet for himself, and put up a notice which bore date December 7th, and was recorded December 18th; that when he returned from Dyea, on December 19th, he told Warne that Ripinsky had bought Mrs. Dickinson's right; that he (witness) staked out a piece for Miss Manning; that after he had been around the tract with "Billy" Dickinson, he told Mrs. Campbell (née Manning) that part of her piece, his own, Mr. Warne's, Miss McPherson's, and four or five other claims were on the land Mrs. Dickinson had sold to Ripinsky, and told Warne that Ripinsky could claim the "whole business," and that he told Al James and one other party the same; that there were no buildings put on any of the land claimed by Mrs. Dickinson when he (witness) ran the wire fence about his own lot, and when Ripinsky made his claim known and ran his wire around the entire place, including all of Warne's, the witness', Miss Manning's, Al James' and one other on the west; that Ripinsky warned all of them not to put anything on the land, as it was his, but told witness to leave his be as it was, and that he should have it, and to tell Miss Manning the same as to hers; that Spooner was building on the Dalton acre at the time; that witness did no more on his piece, for he was satisfied that it was in the 15-acre tract, and left, trusting "the colonel" to do as he agreed; that the others paid no attention to what he told them, but kept on improving and putting buildings up on the land.

William Dickinson testifies that his father took up ground for the Northwest Trading Company, 40 acres, and also 160 acres for the Mission, the former of which adjoined the latter on the north; that his father put out the posts around his 40 acres; that one of the officers came off the Jamestown and surveyed it, and he and his father put up a single wire fence about it; that they put out three posts—four including the rock at the Mission grounds; that the galvanized wire was put up, and the trees blazed along the way to show the lines; that two posts were set at the west end, one at each corner; that one of them was about six feet long, and close to the Vogel mill, about 100 to 150 feet towards the mountain back of Haines; that he and his mother sold the property they claimed at Haines to Ripinsky; and that

since they sold, at the request of Ripinsky, he (witness) showed Ripinsky the stakes that his father set out.

On cross-examination he relates that the survey for the Trading Company was made in 1878 or 1879, when he was 14 or 15 years old, though a little later he says he was but 11 or 12 years old; that the clearing went farther back than the fence around the garden—that is, beyond where Vogel's building now is—which is on Second avenue; that the tract that was cleared was 300 feet wide, more or less, from the beach; that the posts that were put out by his father and the surveyor included the same tract since conveyed to Ripinsky, with the exception of the Dalton acre and the Blind Isaac tract, and are the same posts that he showed to Ripinsky; that the two westerly posts are in exactly the same place as set by his father and the surveyor, and the same that he showed to Ripinsky; that the southwest corner of the tract was marked by a tree, and the marking was carved on it, and the tree was there when he sold to Ripinsky; that the tract designated by the posts was supposed to contain 40 acres, more or less—that was his understanding; that the galvanized wire fence was constructed about the tract right after the lines were blazed, and that some of the fence was there yet when he showed the lines to Ripinsky; that "there wasn't any on the trail that run to Indu-stuckee, and there was pieces you could see laying over bushes, and there was a piece hanging to the posts, the northwest corner post, and there was a piece hanging on the southwest corner you call it, the lower part towards where the Post is now." Witness continues that at the time he sold to Ripinsky no one was on the ground, and that he showed Ripinsky the posts when he sold his share.

In refutation of this testimony, tending to show the construction of the alleged inclosures about this tract of land, are many witnesses; one class testifying that they went upon the premises beginning December 14, 1897, and continuing through December of 1897 and January and February of 1898, and made lot locations, and settled upon and occupied the premises for dwelling and business purposes. To such an extent was this lot location and settlement carried on that a survey was made and a town-site map prepared, which bears date January 29, 1898, known as the "Fogelstrom Map." This aside from the testimony of Rogers, whereby it appears that Miss Manning and others located certain lots upon the tract in question for trade and business purposes, which they refused to relinquish, notwithstanding the claim of Ripinsky. And another class testifying that, although they were upon this tract in December, 1897, and in January and February, 1898, and throughout that year, they saw nothing of any fencing about it, except such as inclosed the garden and along the Mission tract, extending westerly to Second avenue.

It would be strange, if such an inclosure had been constructed as Ripinsky claims, that so many witnesses could be found, who had ample opportunity of observing the premises, to testify that they saw no sign of such an inclosure. There is much confusion with defendant's own witnesses as to the construction of the inclosure. While Ripinsky and his brother say that they constructed the inclosure, and

Rogers that he saw it after it was put up, Ripinsky says it was constructed at once after he traded with Mrs. Dickinson, and his brother is positive that it was about the 10th to the 12th of December that he was engaged in his part of the work. In this particular, both must be in error, if they built the fence at all, for Ripinsky could not maintain possession until he settled with William Dickinson, which was not until December 21, 1897. The deed fixes the date of that transaction, and William Dickinson swears that he did not even show Ripinsky the boundaries until after that settlement. Then it must have been after that time that the two-wire fence was constructed, which, taking two weeks to do the work, would run it into January. Within that time there were a number of persons who located lots within the tract, and none were found to say that any inclosure was so constructed. Again, Ripinsky seems to think that they did not interfere with his inclosure until the summer of 1898, at the time of the Porcupine excitement. If that be true, the inclosure, or some part of it, should have been seen by some, at least, of the many persons who took up lots and made settlement upon the town site of Haines. Fifteen acres is not so large a tract of ground that its boundaries would entirely escape the notice of all persons settling within its confines. The tract at its widest part, the original tract claimed before survey No. 573 was made, was not to exceed 270 or 280 feet, and was less than one-half mile in length. But Rogers' testimony shows that Miss Manning, Warne, and others laid claim to certain portions of the tract before there could have been any fence constructed, even before any deed was passed from William Dickinson to Ripinsky, and these refused to recognize Ripinsky's claim of right. This is borne out by the fact that Miss Manning, and even Rogers himself, posted notices of claim for trade and manufacturing purposes on December 7th, and Warne and wife and Bigford filed like notices on December 15th. And they continued the locations for dwelling, business, and town-site purposes. Another feature about the testimony respecting the construction of the fence is that Ripinsky has not produced any of the Indians who, he claims, helped in constructing it. Ripinsky's brother said he guessed such Indians were living in Haines when his testimony was being taken, and Ripinsky says they are all dead; all this as it may bear upon the credibility of Ripinsky and his brother in affirming that the inclosure was constructed.

It is necessary, in maintaining right to a patent under homestead entry, to show that the claimant is holding by right of prior and continued possession, unless dispossessed by persons of inferior right. The evidence touching the possession of this tract of 15 acres prior to the entry of Ripinsky is very meager. The only testimony of actual occupancy, outside of the buildings and the garden spot, is that of William Dickinson to the effect that the land was surveyed, the lines blazed, posts set at the corners, and a galvanized wire stretched about the entire tract. He was but 11 or 12 years old at the time this was done, and thinks that the survey contained 40 acres. When he showed Ripinsky the corners, he says he saw some pieces of the old wire hanging from one or two of the posts, and some along through

the brush; but Ripinsky testifies to no such condition. Whether William is right about it or not, it is very evident that this fence was not maintained. The tract, outside of the garden spot and a little clearing to the west, was heavily wooded, and no clearing was attempted of that part, and apparently no use made of it whatever. That fence is supposed to have been constructed in 1886 or 1887, 10 or 11 years before the sale to Ripinsky and his alleged occupancy. It fell into such disuse that nearly, if not quite, the last vestige of it had disappeared. The corner posts, if rightly located, only remained, and it is problematical whether they were really identified. Outside of the survey, and the construction of this single wire fence, there is no evidence whatever of the exercise of any ownership or possession by Mrs. Dickinson or her predecessors over this part of the tract in question.

Now, it may be, but it seems hardly credible, that Ripinsky constructed the fence he describes; but, if so, it was subsequent to a time that others—numerous others—were laying claim to parcels of the tract, and were in occupancy by settlement and otherwise. Ripinsky claims to have derived possession from Mrs. Dickinson and William. But Mrs. Dickinson and William had no actual or even constructive possession when they sold to Ripinsky. (We refer here to the land outside of the buildings, the garden spot, and some clearing to the west.) Hence Ripinsky must depend upon himself having initiated possession such as will support his homestead application. It may be further mentioned that Ripinsky instituted a possessory action against a number of these claimants in 1899, in the District Court of Alaska, at Sitka, and was then defeated in a trial before a jury.

We find that the possession of numerous others was prior to Ripinsky's, and has so continued, so that it cannot be maintained that he has a prior and superior right. Not having such right, he is without that quality of possession which will support his homestead entry. We find, however, that he acquired and has maintained possession of the land immediately about his building, including the garden spot and somewhat to the west, and the cleared land to the eastern boundary of the town of Haines, as shown by the map prepared by Davidson, introduced in evidence and marked "Plaintiffs' Exhibit 1." The tract of which he has been thus possessed may be described by beginning at corner No. 1 of survey No. 573, and running thence north $14^{\circ} 20'$ east 151.8 feet to corner No. 2; thence west 283.4 feet to the east boundary of the town of Haines as shown by the Davidson map, "Plaintiffs' Exhibit 1;" thence southwesterly along the east boundary line of said survey to a point due west of the place of beginning; thence east 269.6 feet to the place of beginning. As to this tract Ripinsky is entitled to his patent. As to the balance of his claim, he must fail. The plaintiffs have established no right to a patent from the government in any respect.

Costs will be awarded plaintiffs and appellants Hinchman et al. in the court below, both trials, and upon this the second appeal in cases Nos. 2,045 and 2,015, but not in the first appeal, the costs wherein were awarded to defendant and appellee Ripinsky by the former judg-

ment of this court; and costs will be awarded defendant and appellee Ripinsky in case No. 1,993, both in the court below and upon this appeal.

DANIELS et al. v. PORTLAND GOLD MINING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1912.)

No. 3,755.

1. INJUNCTION (§§ 34, 102*)—SCOPE OF REMEDY.

Though a writ of injunction may be properly employed to protect rights of property, however great or small, complicated or simple, it should not be made a vehicle for invading the legitimate legislative province of government or a means of establishing a system of rules for the regulation of the business of a community, nor should it be used as an ordinary supplement to the criminal laws of the state.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 74-81, 176; Dec. Dig. §§ 34, 102.*]

2. INJUNCTION (§ 34*)—SUBJECTS OF JURISDICTION—REGULATION OF BUSINESS.

A federal court of equity is without authority at suit of private parties to enjoin certain persons from entering upon and conducting a lawful business in which others are engaged without restrictions, except subject to regulations prescribed by the court, and designed to prevent them from making the business a cover for criminal operations. Such regulation of a business is an exercise of the police power of the state and a legislative function, which, even when so exercised, must be general in its application.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 74-81; Dec. Dig. § 34.*]

3. INJUNCTION (§ 34*)—SCOPE OF REMEDY—REGULATION OF BUSINESS.

At suit of three nonresident mining corporations, brought as alleged in behalf of themselves and many others, some named and some unknown, engaged in mining, milling, buying, and selling ore in a large mining district, a federal court granted an injunction restraining a number of defendants, who were residents of the district, from operating assay offices therein, or purchasing ore produced in the district without first notifying complainants or their representative of any offers of ore and in effect obtaining complainant's consent to its treatment or purchase. The purpose of the injunction was to prevent defendants from conducting business as "high-grade assayers" in purchasing stolen ore, but there were other assayers and dealers in the district, some of whom were, as alleged, interested as complainants. *Held*, that such injunction was an inadmissible exercise of judicial power.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 74-81; Dec. Dig. § 34.*]

Sanborn, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit in equity by the Portland Gold Mining Company and others against Charles Daniels and others. Defendants appeal from an order granting a preliminary injunction. Reversed.

Edward C. Stimson, of Denver, Colo. (James J. Banks, Lawrence Lewis, Francis J. Knauss, and Page M. Brereton, all of Denver, Colo., on the brief), for appellants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Charles S. Thomas, of Denver, Colo. (George L. Nye, W. P. Malburn, and W. H. Bryant, all of Denver, Colo., and Hildreth Frost, of Colorado Springs, Colo., on the brief), for appellees.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

HOOK, Circuit Judge. This is a suit by three mining companies, two being citizens of other states than Colorado and one a citizen of Great Britain, on behalf of themselves and more than a hundred other corporations and individuals named in the bill, and also many others not named because unknown, all engaged in mining, milling, buying, or selling ore in the Cripple Creek mining district of Colorado, to enjoin a number of persons who are citizens of that state from operating assay offices, and from purchasing ore produced in that district. It is alleged that all the mineowners of that territory, whether named or not, have a common interest in the object of the suit, and in the judgment of complainants would join in it if they could be seen. The gist of the complaint set forth with much detail is that high-grade gold ore worth from \$1 to \$100 per pound is being constantly stolen in small quantities, but of large aggregate, from the mines and the mills, smelters, and other places where ore is treated, by employes, lessees, and others, and that the criminal practice is knowingly encouraged and facilitated by defendants, who, under the pretense of conducting assay offices, receive the stolen property and buy it for a percentage of its value. In other words, it is claimed that the defendants, who in the language of the region are called "high-grade assayers," conduct "fences" or places where the thieves dispose of the stolen property. The prayer of the bill is that they be enjoined from conducting assay offices, and from purchasing or receiving ore not only from complainants' employes and lessees, but also from any other person in the mining district.

The trial court gave complainants a temporary injunction restraining defendants from purchasing, receiving for treatment, handling, or in any manner dealing in any ore, ore products, or other materials from mines or mills in the Cripple Creek mining district without first notifying the superintendent of one of the three companies which brought the suit at the company office, or the "secretary of the Cripple Creek District Mineowners & Operators Association" at its office in Victor or Cripple Creek, Colo., as the representative of complainants, of the fact that the ore, product, or material had been offered for sale, treatment, or handling, and giving the name of the person who offered it, the name of the mine or mill from which it purported to come, the owner thereof and the number of pounds, and also stating that its original condition when first offered had not been changed or altered. It was further provided in the order of injunction that, if either of the superintendents or the secretary as the representative of complainants should within 24 hours after receipt of such a notice from a defendant notify him, in turn, that the ore or material had been stolen from a complainant, then the defendant must hold it for

48 hours thereafter before purchasing, treating, or dealing with it or agreeing to do so, and, finally, defendants were enjoined from treating, handling, or dealing in any ore, ore products, or materials of any kind or description except under the foregoing conditions and restrictions.

[1] We think the injunction was an inadmissible exercise of the judicial power. Consistently with the fullest recognition of the progressive and flexible character of equity jurisprudence and its continuing adaptability to the increasing magnitude and complexity of modern affairs, care must nevertheless be taken not to transgress its fundamental limitations. Though the writ of injunction may be properly employed to protect rights of property, however great or small, complicated or simple, it should not be made a vehicle for invading the legitimate legislative province of government or a means of establishing a system of rules for the regulation of the business of a community. Nor should it be used as an ordinary supplement to the criminal laws of the state. There are several features of complainants' bill, which is most skillfully drawn, and of the proofs and order of injunction that at once attract notice. The suit was brought by three out of a large number of corporations and individuals engaged in mining, milling, buying, and selling the products of a great mining district. It was framed for the protection of the interests of all, known and unknown, who were engaged in the business. The presence in the suit of all of them, either actually or in a representative way, was, practically speaking, vital to the relief sought, because it contemplated the exclusion of defendants from the right to assay, treat, buy, sell, or handle in any manner or form any of the products of the mines or mills in the district by whomsoever produced. An injunction as broad as the prayer of the bill would affect the right of every mine and mill owner to do with his product as he pleased. While it was averred that high-grade ore was easily recognized upon casual inspection, it was not claimed that the ore of the three complainants, whether high grade or low grade, was distinguishable from that of the hundred and more other companies and persons named in the bill or of the many others unknown and not named. It was therefore necessary that the suit proceed as upon a common concert of all the mining and milling industries of the district. This is so because if any of them stood upon their right, which the court could not lawfully deny, to employ a defendant as an assayer or to sell or otherwise intrust to him their product, the sweeping object of the suit would be defeated. It cannot be supposed that at the instance of some the court would restrain or regulate all of them in the exercise of their legal rights. At this point we pass by the question of jurisdiction based on the contention that as gauged by the object of the bill all the mine and mill owners were indispensable as parties complainant, and the fact that many of them were citizens of Colorado as were the defendants.

Again, it appears from the bill and the proofs at the hearing that some of those in whose interest the suit was brought were themselves engaged in buying, selling and handling the mine products, also that there were assayers attached to some of the mines and mills and also independent assayers not so attached, but legitimately engaged in the

custom business on their own account. Their methods of doing business and the care they took to avoid stolen property were explained. These people were not to be affected by the suit. The order of injunction itself impliedly recognized the natural right of every person to be an assayer or to buy and sell the products of the mines, but it undertook judicially to establish a general line of cleavage between honesty and dishonesty in the conduct of occupations which are intrinsically lawful and open to the pursuit of all. To do so it prescribed regulations to be observed by defendants and to be worked out through an agency composed of representatives of the complainants; and it prohibited defendants from engaging in the business at all except upon the conditions laid down. Even in legislation of that character the administration is committed, not to interested private parties, but to public officials.

The case did not proceed as upon a series of specific trespasses by particular defendants against the property of particular complainants and to prevent a continuance of them; but there was an attempt to make its scope unusually broad by including as complainants every mine and mill owner in the district, whether or not his ore had been stolen and handled by defendants, and by including all the defendants, whether or not each had trespassed upon the rights of all the complainants. And, even if this were proper, the defendants were enjoined, not merely from continuing their wrongful practices, but also from thereafter following honestly a lawful occupation except according to regulations laid down by the court. The cases relied on as precedents show how far the injunction here has gone afield. Two of them are typical. In *Board of Trade v. Christie*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, the defendants, who kept bucket shops, were enjoined, not from continuing their business except under regulations nor from using the market quotations of others, but only from continuing the use of complainants' quotations which they obtained surreptitiously and without right, and this though the bucket shops were as unlawful as it is claimed the shops of the high-grade assayers were, and depended as much on the quotations as the defendants did on stolen ore. And as for being a public nuisance, which is urged here as a supporting ground, there is no essential difference between a place where gambling is done as in bucket shops, and one where stolen property is handled. In the board of trade case the court confined itself to the protection of the distinct rights of the complainants, and left the prohibition or regulation of defendants' business to other departments of the government. *Bitterman v. Railroad*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693 (reported below as *Louisville & N. R. Co. v. Bitterman*, 75 C. C. A. 192, 144 Fed. 34, and *Id.* [C. C.] 128 Fed. 176), was a suit to enjoin ticket brokers or scalpers from dealing in nontransferable reduced rate railroad tickets over the complainant's line of road. It has the same distinguishing aspects as the bucket shop case. It may be further noted that the injunction granted was only against the defendants, their agents, etc., though complainant asked that it be "broad enough to include all who knowingly do what the order of the court prohibits defendants from doing." Nor was

there in that case an attempt to secure an injunction for the benefit of all other railroad companies operating in the territory or district in question by averments such as we have in the present case.

[2, 3] Ordinary business callings may be attended by conditions, or may offer temptations that threaten the public welfare or the lives, health, morals, or property of those who come in contact with them. There is a stage at which the state will take cognizance and prescribe rules and regulations to prevent or lessen the evil. If the evil is deemed greater than the good, the calling may be wholly prohibited; if less, regulated. But, whatever course is taken, it is the exercise of the police power of the state, of which a multitude of illustrations may be found in the statute books, and its expression as a rule of conduct is a legislative function. Thus in many states the business of bucket shops and ticket scalpers is prohibited, and in Colorado there is a statute regulating the business of assayers and designed to prevent the very practices complained of here. Legislative regulations may be inadequate, but a court in a suit between private parties must act within much narrower lines and cannot make others. Its decree must conform more closely to the specific infringement of the property rights of the complainant.

The order of injunction is reversed. The cause is remitted to the trial court for amendment of the bill if desired, under its orders and conformably to the foregoing conclusions, or, failing amendment, for dismissal.

SANBORN, Circuit Judge (dissenting). Lord Chancellor Cottenham, presiding in the High Court of Chancery in England in 1841 said in *Wollworth v. Holt*, 4 Mylne & Craig, 619, 635:

"I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules established under different circumstances to decline to administer justice and to enforce rights for which there is no other remedy. This has always been the principle of this court, though not at all times sufficiently attended to. It is the ground upon which the court has in many cases dispensed with the presence of parties who would according to the general practice have been necessary parties."

He was accustomed to repeat and to act upon that declaration. *Taylor v. Salmon*, 4 Mylne & Craig, 134, 141; 7 Beav. 323, 327.

Mr. Justice Brewer in 1891, in answer to a challenge of the power of a court of equity to decree specific performance of a contract for 999 years, regarding the joint use by railroad companies of the Omaha bridge and certain railroad tracks of the Union Pacific Company, involving many details of operation, after citing *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843, in which the Supreme Court affirmed a decree which he had rendered in the court below against seemingly adverse precedents, and the proceedings of Judge Dillon, his predecessor as circuit judge of this circuit, in the seizure of the property of insolvent railroad companies and the creation of millions of dollars of obligations against them, said:

"I then watched those proceedings with something of amazement, but the more I studied the more I admired, till, thus having studied at the feet of

Gamaliel, I learned to believe that the powers and processes of a court of equity are equal to any and every emergency. They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of the public; to stop state or nation from spoliating or destroying private rights; to grasp with strong hand every corporation, and compel it to perform its contracts of every nature, and do justice to every individual." *Chicago, R. I. & P. Ry. Co. v. Union Pacific Ry. Co.* [C. C.] 47 Fed. 15, 26.

These views are rational and sound, sustained by the decisions of the courts of chancery and the history of equity jurisprudence, and it seems to me that a court of equity is neither without power nor without duty at the suit of owners otherwise remediless, to enjoin the continuing conscious purchasers of stolen property whose purchases cause the continuing theft of that property, from buying or using it until the owners have reasonable time and opportunity to inspect, identify, and recover it. And that is the proposition on which this suit is based. The complainants allege these facts in their bill: They are the owners of their mines and ores, and are mining the ores by the use of lessees and employes. The workmen in their mines continually steal their high-grade ores in small quantities which they conceal and carry away in their clothes and sell to the defendants. These high-grade ores are readily distinguishable from low-grade ores by sight. All the high-grade ores bought or sold in small quantities are stolen ores. Each of the defendants is engaged in the business of buying and selling this stolen ore, and in no other business. Each of them knows that the ores he buys have been stolen. The averment of the bill on this subject is in these words:

"Your orators further aver that the respondents herein, and each of them, are engaged in the business of conducting high-grade assay offices, or act as middlemen and agents of such offices, that none of them are in the legitimate business of assaying, although pretending so to be, but are engaged solely in the business of buying ores which they know have been stolen from one or the other of the mines of the Cripple Creek district, and, having bought the same, they reduce such ores to bullion, or sell and dispose of the same in its crude state."

The defendants encourage and induce the workmen to steal these high-grade ores, and, if they did not do so and did not purchase these ores, no high-grade ores would be stolen. The complainants have no adequate remedy at law, or in any other way than by the injunction sought. Actions at law for the stolen ore, or its value, against the defendants or the workmen would not stop the continuing thefts and sales and would be futile on account of their necessary number and expense. The damage from the continuing wrongful acts of the defendants reaches tens of thousands of dollars, and it is irreparable. It is secretly inflicted, and proof and recovery of it by actions at law are impossible.

I agree with Judge Farrington, whose learned opinion upon a similar state of facts may be found in *Goldfield Consolidated Mines Co. v. Richardson* (C. C.) 194 Fed. 198, 202, 206, and with Judge Lewis, who granted the injunction below, that these facts state a perfect cause of action in equity for an injunction against the continuing

causings by the defendants of the continuous thefts of the complainants' ores by their workmen.

The opinion of the majority, which assails the equity of the bill in this suit, seems to me to give too little effect to its dominant averment that the defendants are not engaged in the lawful business of assaying, or buying or selling ore, or in any other legitimate business, but are engaged solely in buying and selling stolen high-grade ore which they know to have been stolen and causing the workmen of the complainants to steal it. In determining the sufficiency of the bill to state an equitable cause of action, every averment which it contains must be taken as true. The result is that the defendants are engaged in the single occupation and business of knowingly maintaining a fence for stolen ore and inducing workmen to steal it from the complainants and others. All the ore they have handled and all they threaten to handle is high-grade stolen ore, and they know it. Therefore they have no legal right to assay any of this ore, to buy it, or to sell it. If they have mixed, or shall mix, the ore stolen from the three complainants with ore stolen from others, or if these ores have been so mixed by the thieves that the ore of the complainants cannot be identified, this mixing was or will be such a wrongful act that if it be necessary to protect the property of these complainants their equity is so strong that an injunction against the purchase, assay, and sale of any ore by the defendants may well be sustained because they purchase and threaten to purchase ore which they know to be stolen only, and the equity of these complainants in the protection of their property from theft is far superior to the equity or right of the defendants to carry on their nefarious business, because they have no right whatever to conduct their business and their protection in the conduct of that business, or in their claim to the stolen ore is abhorrent to equity. It is no defense to a suit by one of several persons against a thief who has stolen goods from all of them, or against a receiver of the goods who knew they were stolen, that the lawful proceedings necessary to a recovery of the plaintiff's goods, or their value, may somewhat embarrass or delay his escape with the stolen goods of the others, or diminish his profits from their taking and conversion.

Returning now to the right of the complainants to an injunction on the facts alleged in the bill, bearing in mind that the defendants are engaged exclusively in the unlawful business of buying and converting property which they know to have been stolen from the three complainants and others, and in thereby causing the stealing of these ores from the complainants here, why should they not be enjoined from continuing these wrongful acts? In *Illinois Central R. Co. v. Caffrey* (C. C.) 128 Fed. 770, 774, Judge Thayer laid down the general rule that, whenever defendants engage in an unlawful calling, productive of injury to others, they may be enjoined from pursuing that calling and from doing the wrongful injurious acts. In support of that proposition he cited *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 919, 28 C. C. A. 99, 106, and cases there cited; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; *Kinner v. Lake Shore & M. S. Ry. Co.*, 69 Ohio St. 339, 69 N. E. 614; *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452; *National*

Telegraphic News Co. v. Western Union Tel. Co., 56 C. C. A. 198, 119 Fed. 294, 60 L. R. A. 805; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, and he added, "Indeed, it would be a misfortune if courts of equity were powerless to redress grievances of that kind." In that case, in *Bitterman v. Louisville & Nashville R. R. Co.*, 207 U. S. 205, 223, 226, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693, and in many other cases of that class, ticket scalpers were enjoined from buying nontransferable railroad tickets, and from thereby causing breaches of the contracts between the railroad companies and the purchasers of the tickets from them.

In *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 251, 25 Sup. Ct. 637, 49 L. Ed. 1031, strangers to a trust in continuous quotations on the board of trade were enjoined from using those quotations, and thereby inducing a breach of trust by the trustees. In *Mills v. New Orleans Seed Co.*, 65 Miss. 391, 393, 394, 4 South. 298, 7 Am. St. Rep. 671, the defendant was enjoined from continuously taking and using bags sent by the complainant to purchasers of cotton to induce them to pack their cotton therein and send it to the complainant. The Supreme Court of Mississippi declared that an injunction was warranted by willful and continuous wrongs committed and threatened, and by the fact that the complainant's rights could not be protected and enforced by proceedings at law, except by numerous and expensive suits, and it said that:

"The ends of justice require, in such case, that the whole wrong shall be arrested and concluded in a single proceeding. And such relief equity affords, and thereby fulfills its appropriate mission of supplying the deficiencies of legal remedies."

In *Lembeck v. Nye*, 47 Ohio St. 336, 353, 355, 24 N. E. 686, 8 L. R. A. 578, the defendants were enjoined at the suit of the owner of a lake from letting boats for hire thereon, and thereby inducing third parties to trespass on the lake by rowing and fishing.

If parties may be lawfully enjoined from pursuing an unlawful calling, or doing unlawful injurious acts, which merely cause breaches of contracts, or of trusts between complainants and third parties, or mere trespasses upon the complainants' property, how much more should they be enjoined from pursuing an unlawful and criminal calling and from committing unlawful and criminal acts which induce third parties to commit crimes to the irreparable injury of the complainants! I am unable to divest my mind of the view that it is within the power and the duty of a court of equity, at the suit of owners otherwise remediless, to enjoin the defendants in this case from pursuing the unlawful and criminal calling of continually purchasing in small amounts high-grade ores which they know to have been stolen, and from purchasing, assaying, or selling such property, and thereby causing the theft of this property from the complainants and others to their irreparable injury, and that the bill in this suit presents a state of facts which warrants and entitles the plaintiff to such an injunction. *Goldfield Consolidated Mines Co. v. Richardson* (C. C.) 194 Fed. 198, 202, 206; *Bitterman v. Louisville & Nashville R. R. Co.*, 207 U. S. 205, 223, 226, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236,

251, 25 Sup. Ct. 637, 49 L. Ed. 1031; Illinois Central R. R. Co. v. Caffrey (C. C.) 128 Fed. 770, 772; Lembeck v. Nye, 47 Ohio St. 336, 353, 355, 24 N. E. 686, 8 L. R. A. 578; Warren Mills v. New Orleans Seed Co., 65 Miss. 391, 393, 394, 4 South. 298, 7 Am. St. Rep. 671; Dimick v. Shaw, 94 Fed. 266, 268, 36 C. C. A. 347; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 470, 89 Fed. 769.

To the objection that the issue of the injunction is the exercise of a legislative power, and hence not permissible to the judiciary, because it prohibits the pursuit of the unlawful calling until and unless an opportunity to inspect the stolen ore and to recover that stolen from the complainants, if such is found, is first given to one of their representatives named by the court, and thus regulates the future conduct of the defendants' illegal business, there seem to me to be two good answers. The first is that this is the same objection, phrased in words a little variant, which was made to the injunctions in the ticket scalpers cases and was well answered by the Supreme Court and by Judge Thayer in those suits. *Bitterman v. Louisville & Nashville R. R. Co.*, 207 U. S. 205, 223, 226, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; *Illinois Central R. R. Co. v. Caffrey (C. C.)* 128 Fed. 770, 773, 774. Judge Thayer said:

"It may be conceded that it is not the function of courts of equity to make laws or to command people not to do a given act, when they have not threatened to do it or given evidence of such an intention. But when one has manifested his purpose to commit a legal wrong, and the act is of such a nature that the injured party cannot obtain adequate redress in a court of law, then a court of equity may intervene."

The Supreme Court said:

"It is insisted that the Circuit Court of Appeals erred in awarding an injunction as to dealings 'in nontransferable tickets that may be hereafter issued * * * since it thereby undertook to promulgate' a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit 'the petitioners from dealing in tickets not in esse, * * * and is therefore violative of the most fundamental principles of our government.' But, when the broad nature of this proposition is considered, it but denies that there is power in a court of equity in any case to afford effective relief by injunction. Certain is it that every injunction in the nature of things contemplates the enforcement as against the party enjoined of a rule of conduct for the future as to the wrong to which the injunction relates. Take the case of trespasses upon land where the elements entitling to equitable relief exist. See *Slater v. Gunn*, 170 Mass. 509 [49 N. E. 1017, 41 L. R. A. 268], and cases cited. * * * The action of the Circuit Court of Appeals, therefore, in causing the injunction to apply, not only to the illegal dealings as to the then outstanding tickets, but to like dealings as to similar tickets which might be issued in the future, was but the exertion by the court of its power to restrain the continued commission against the rights of the complainant in the future of a definite character of acts adjudged to be wrongful."

The second answer is that because the defendants' sole business is unlawful and criminal, and there is neither law nor equity to sustain it or protect it, a court of equity may, and should, if necessary to give complete relief to the complainants, absolutely enjoin the conduct of that business by the defendants, including the purchase by it of ores stolen from others as well as from the complainants, and, as the whole is greater than any of its parts and includes them all, it may

lawfully enjoin the conduct of that business until and unless the defendants comply with such regulations respecting the inspection of the stolen ore by the complainants, or their representatives, as will give to the complainants full opportunity to select therefrom and recover the ores stolen from them.

The position that all the mineowners must be parties to the bill and the suit to entitle any of them to such an injunction rests on the assumption, which is not permissible in view of the averment of the bill that the sole business of the defendants is the purchase of these stolen ores, that some of them are engaged in the legitimate business of buying and assaying ore, and in my opinion, in view of this averment of the bill, any mineowner whose ores are stolen by reason of the conduct of the unlawful and criminal business of the defendants may alone, or with others similarly situated, maintain a bill for an injunction against the continuance of this nefarious business by the defendants, or for such less restrictions of it as will give him complete relief.

The objection that the inspection of the stolen ore was by the court delegated to representatives of the complainants does not appear to me to be either novel, unauthorized, or inequitable. It was but the application to this case of the common practice of ordering alleged trespassers upon mines, and other alleged wrongdoers, to permit a constant inspection of their doings by the complainants during the pendency of the suits, to the end that their acts might be known and just redress of the wrongs they were committing could be secured.

The criticism of the injunction that it undertook to establish a line of cleavage between honesty and dishonesty in the conduct of occupations intrinsically lawful and open to pursuit by all seems to me again to disregard the averment that the sole business of the defendants was the purchasing and assaying of ore they knew to be stolen. Mining ore is a legitimate business, but mining another's ore without his consent and converting it to one's use is wrongful, and will be enjoined. Buying and selling railroad tickets was a lawful business open to all, but the business of buying and selling nontransferable tickets was wrongful, and it was enjoined. Letting boats for hire is a lawful business open to all, but the business of letting boats for hire which caused trespasses upon another's property is unlawful, and may be enjoined. In all these cases it is the wrongs of the defendants, and not the injunctions, that cleave them, their acts, and business from legitimate business men, lawful occupations and business, and warrant the injunctions. And in the case at bar it was not in my opinion the injunction, but the defendants' wrongful and injurious acts, their conduct of the sole business of buying, selling, and assaying ore they knew to be stolen ore whereby the workmen of the complainants were caused to steal this ore, that cleft their business and their acts from all legitimate business and acts, and rendered the injunction against them just and equitable.

These complainants bring this suit for themselves and for other owners of mines similarly situated. The fact that some of the latter are citizens of the same state as the defendants is not fatal to the jurisdiction of the court (1) because where parties sue in a representative

character their citizenship alone conditions the jurisdiction of the court and that of the beneficiaries is immaterial (*Hotel Co. v. Wade*, 97 U. S. 13, 20, 24 L. Ed. 917; *Jackson & Sharp Co. v. Burlington & L. R. Co.* [C. C.] 29 Fed. 474, 475; *Putnam v. Timothy Dry Goods & Carpet Co.* [C. C.] 79 Fed. 454; *Stewart v. Dunham*, 115 U. S. 61, 64, 5 Sup. Ct. 1163, 29 L. Ed. 329; *International Trust Co. v. T. B. Townsend Brick & Contracting Co.*, 95 Fed. 850, 854, 37 C. C. A. 396), and (2) because the controversies between the three complainants and the defendants can be finally adjudicated between them without affecting the rights of the owners of mines similarly situated who are citizens of the same state as the defendants. The latter, therefore, are not indispensable parties to the suit, and, whenever the joinder of a dispensable party would oust the jurisdiction of the court over the parties before it, the suit may proceed without him. Indeed, when such a party has been joined, he may be dismissed, and the suit may still proceed between the other parties. And, after his dismissal, he may intervene and become a party to the suit again without ousting the jurisdiction of the court. *Sioux City Terminal R. & W. Co. v. Trust Co. of N. A.*, 82 Fed. 124, 126, 128, 27 C. C. A. 73, 75, 77; *Rogers v. Penobscot Mining Co.*, 154 Fed. 606, 615, 616, 83 C. C. A. 380, 389, 390; *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 658, 68 C. C. A. 288, 296. The bill was not multifarious either because there was a misjoinder of parties or of causes of action. *Bitterman v. Louisville & Nashville R. R. Co.*, 207 U. S. 205, 226, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; *Hale v. Allinson*, 188 U. S. 56, 77, 23 Sup. Ct. 244, 47 L. Ed. 380.

In the consideration and discussion of this case all the averments of the bill have been treated as true (1) because the conclusion of the majority is that the bill states no cause of action in equity, and must be dismissed unless amended, and in the determination of that, the main question in this case, all the allegations of the bill must be treated as admitted, and (2) because in granting the injunction the court below, upon conflicting evidence, decided that the averments of the bill were true and upon that theory granted the injunction, and in such cases appellate courts assume the finding of facts by the trial court to be correct, unless there is clear proof that it fell into a serious mistake in the consideration of the evidence, and no such mistake appears in this case.

For the reasons which have now been stated, perhaps at too much length, the bill seems to me to state a good cause of action for the injunction, and I think the order of the court below granting it should be affirmed.

FEDERAL INS. CO. et al. v. DETROIT FIRE & MARINE INS. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1913.)

No. 2,226.

1. INSURANCE (§ 606*)—SUBROGATION OF INSURER—MARINE POLICIES.

The right of an insurer of a vessel which has paid a loss resulting from collision to subrogation to the rights of the owner in any damages recovered from the other vessel in collision arises in equity from the nature of the insurance contract as a contract of indemnity, and no provision therefor in the policy is necessary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.*]

Subrogation of insurer under assignment of rights insured, see note to *The Livingstone*, 65 C. C. A. 615.]

2. INSURANCE (§ 606*)—SUBROGATION OF MARINE INSURER—SUIT FOR COLLISION—RIGHTS OF NONJOINING INSURERS.

Certain of the insurers of a vessel sunk in collision, after paying their share of the loss, refused to join with others in authorizing a suit against the other vessel in collision or to share in the expense of such suit. A number of those so refusing were insurers also of the libeled vessel, while others were not, and those who were contributed to the defense of the suit. *Held*, that they did not thereby lose their right to their share of the damages recovered, which was at least equal to that of the nonassenting insurers, who were interested only in the sunken vessel.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.*]

3. INSURANCE (§ 606*)—SUBROGATION OF MARINE INSURER—SUIT FOR DAMAGES—DISTRIBUTION OF RECOVERY.

Where the libel in such suit was filed by the owner of the vessel, in its own behalf and as representing the insurers, for an amount exceeding the insurance, but, owing to a division of damages, the recovery was less than the insured value, the suit with respect to the amount recovered was wholly of a representative character, and libelant holds the entire sum as trustee.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.*]

4. INSURANCE (§ 606*)—SUBROGATION OF MARINE INSURER—SUIT BY OWNER FOR BENEFIT OF INSURERS—RIGHT OF NONASSENTING INSURERS TO SHARE IN RECOVERY.

A steamship sunk in collision, her cargo and freight, were underwritten by 16 insurance companies in varying amounts, and each paid its share of the loss. The owner, at the request of some of the insurers, addressed letters to the others, stating that it was about to libel the other vessel in the collision, and asking if they desired the suit brought and would share in the expense and risk. It further stated that the suit would be brought in its name for the entire damage; that, if unsuccessful, the interests not authorizing it would not be asked to contribute to the expense, but, in case of recovery of all or part of the damage, the interests authorizing it would claim the right to deduct the expense of the litigation before division of the sum recovered. Eight of the insurers assented to the suit, and 8 did not. Some of the latter were also insurers of the libeled vessel and contributed to the defense of the suit. The libel averred that it was filed by libelant as owner, and "for the benefit of its insurers," cargo owners, and crew. The loss proved largely exceeded the amount of the insurance; but the suit resulted in a decree finding both vessels in fault and dividing the damages, the amount recovered by libelant being less than the insurance. *Held*, that such recovery, which under the libel

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

covered all interests, insured to the benefit of all the insurers ratably, and not of those only who gave their assent to the suit, and that each, whether assenting or nonassenting, was entitled to its share thereof after deducting the costs and expenses of suit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504–1511, 1514–1516; Dec. Dig. § 606.*]

5. INSURANCE (§ 606*)—SUBROGATION OF MARINE INSURER—DISTRIBUTION OF FUND RECOVERED—INTERVENTION BY INSURERS.

A marine insurer, claiming by subrogation an interest in a fund recovered by the insured in a suit for collision, may intervene and assert such claim at any time before the fund is distributed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504–1511, 1514–1516; Dec. Dig. § 606.*]

Appeal from the District Court of the United States for the Eastern District of Michigan; Henry H. Swan, Judge.

Suit in admiralty for collision by the Hawgood Transit Company, owner of the steamer Etruria, against the Mesaba Steamship Company, owner of the steamer Amasa Stone. See 166 Fed. 697, 92 C. C. A. 369. From a decree of distribution, giving the Detroit Fire & Marine Insurance Company and others priority, the Federal Insurance Company and others appeal. Reversed.

Hermon A. Kelley, of Cleveland, Ohio (Hoyt, Dustin, Kelley, McKeenan & Andrews and I. L. Evans, all of Cleveland, Ohio, of counsel), for appellants.

F. S. Masten, of Cleveland, Ohio, F. H. & G. L. Canfield, of Detroit, Mich., and Harvey D. Goulder, of Cleveland, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The issues in this case concern the distribution of money recovered by reason of a collision between the steamer Etruria (owned by the Hawgood Transit Company) and the steamer Amasa Stone (owned by the Mesaba Steamship Company), which occurred on Lake Huron June 18, 1905. The question of liability was disposed of by this court in *Hawgood Transit Co. v. Mesaba S. S. Co.*, 166 Fed. 697, 92 C. C. A. 369, and the facts there involved appear in the report of the case. The collision resulted in the total loss of the Etruria, with her cargo and freight and the personal effects of her crew, and also in injury to the Stone. It was held that both vessels were in fault, and the damages were divided. Stated in a general way, the present controversy began when the one as to liability ended.

At the time of her loss, the Etruria was insured in 16 companies holding risks in varying sums amounting to an agreed valuation, and the shipowner was paid such value by the insurers. The cargo and pending freight were separately insured by 2 of these underwriters, and these losses were likewise paid. Thereupon, as it now appears, 7 of these insurers (including the insurers of cargo and freight) requested, and 8 of them declined to request, the owner of the Etruria to bring the suit, which resulted in settling the question of liability.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and, while the case was pending on appeal in this court, the remaining insurer gave its assent to the libel suit. The sums contributed by all the companies in payment of the losses, whether for hull, cargo, or freight, as also the amount of the fund for distribution, definitely appear in the record and are not in dispute.

The present issues were made up by intervening petitions of the nonconsenting insurers, answer of the original libelant, petitions of the requesting insurers, and a stipulation of facts, filed in the original cause after decree was entered below upon the mandates of this court. By the decree now in question, the fund was ordered to be distributed in substance as follows: (1) To libelant, the Hawgood Transit Company, its costs and expenses; (2) to such of the insurance underwriters as joined in the request to bring the suit, the amounts of insurance severally paid by them on account of cargo and hull, with interest; (3) to libelant, for the benefit of the crew, the amount of their losses; (4) after payment of such sums, which were declared to be "first claims and liens upon the damages," the balance proportionately to the non-requesting underwriters. By this distribution the first three classes would each be paid in full, with interest; but the fourth class would receive only a comparatively small percentage of the sums they respectively paid as losses on the *Etruria*. The nonrequesting insurers appealed to this court, and the requesting companies are here as appellees; and, for reasons appearing later, the names of all are given in the margin.¹

This controversy relates mainly to the second and fourth of the foregoing paragraphs. Of the appellants, the Firemen's Fund Insurance Company, the London Assurance, and the Union Insurance Society were insurers only of the *Etruria*. The other appellants were insurers of both vessels, but of the *Stone* in larger sums, respectively, than they were of the *Etruria*, except only the New Zealand Insurance Company, which had something over \$700 more on the *Etruria* than on the *Stone*. It should be noted, too, that of the appellees, the Western Assurance Company and the British America Assurance Company were insurers of the *Stone*, as well as the *Etruria*; both having less insurance on the *Etruria* than on the *Stone*, even though the insurance of the former upon the pending freight of the *Etruria* be included. The other appellees had underwritten the *Etruria* alone.

Before filing its libel against the *Stone*, the owner of the *Etruria* caused notice to be given to all of its insurers that, upon request of some of them, it was about to proceed against the *Stone*, and also caused request to be made of all of them to notify it whether they

¹Appellants are Federal Insurance Company, Firemen's Fund Insurance Company, London Assurance, Underwriters at Lloyds, Union Insurance Society of Canton, Limited, Indemnity Mutual Marine Assurance Company, Limited, Royal Exchange Assurance, and New Zealand Insurance Company. Appellees are Detroit Fire & Marine Insurance Company, Western Assurance Company, Aetna Insurance Company, British America Assurance Company, Providence Washington Insurance Company, Northwestern National Insurance Company, Commercial Union Assurance Company, and St. Paul Fire & Marine Insurance Company.

desired this to be done and were willing to share the risk and expense thereof, stating among other things:

"The claim will be made against the Stone in the name of the insured for the entire damage, whether all of the insurers of the Etruria authorize the litigation or not. In the event litigation shall result in the Etruria being held solely at fault, the Etruria interests not authorizing the proceedings will not be asked to contribute to the expense incurred in prosecuting the claim; if, however, the action shall result in the Stone being held solely at fault or in a division of damages, the Etruria interests authorizing the proceedings will claim, before returning any part of the recovery to the Stone, or accounting to the Etruria interests not authorizing the proceeding for the share of the recovery which would otherwise fall to them, the right to deduct the expense of the litigation."

To this an answer was made by one of appellants (the Federal Insurance Company) that it had insured $17\frac{1}{2}$ per cent. of the value of the Stone as against its insurance of 9 per cent. of the value of the Etruria, and that if the owner of the Etruria made claim for her entire value, and the Federal, as insurer of the Stone, were required to pay $17\frac{1}{2}$ per cent. of the Etruria's value, it "would expect to receive, as insurer of the Etruria, 9 per cent. of the recovery without deduction for expenses." It does not appear that the other appellants made specific answer to the request. Both the appellants and appellees having risks on the Stone contributed to the expense of her owner in the libel proceeding.

[1] It appears by stipulation that the "Etruria was an actual total loss, and that no abandonment was made or was necessary"; and so far as this involves a legal conclusion, it is rightly admitted in the argument for appellees. *Hall & Long v. Railroad Co.*, 13 Wall. 367, 371, 20 L. Ed. 594; *The St. Johns (D. C.)* 101 Fed. 472. Since the insurers of the Etruria admittedly paid her owner as for a total loss, it results that such insurers were, to the extent of the losses severally paid by them, subrogated to rights corresponding to those of the owner in any damages recoverable by it against the Stone. This is properly admitted. *The Potomac*, 105 U. S. 630, 634, 26 L. Ed. 1194; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 462, 9 Sup. Ct. 469, 32 L. Ed. 788; *Mason v. Marine Ins. Co.*, 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700 (C. C. A. 6th Cir.); *Travelers' Ins. Co. v. Great Lakes Engineering W. Co.*, 184 Fed. 429, 430, 107 C. C. A. 20, 36 L. R. A. (N. S.) 60 (C. C. A. 6th Cir.); *The St. Johns (D. C.)* 101 Fed. 472, 473.

Most of the insurers obtained subrogation receipts from the owner upon paying their shares of its loss, some of which in terms provided for full subrogation, and others "to the extent only and as provided in" the policies, although the policies do not appear to have contained any provision for subrogation. However, we do not regard this as important, nor do counsel for either side, because it is settled that such provisions are not necessary. The right of subrogation arises from the very nature of the contract of insurance as a contract of indemnity. *Phoenix Ins. Co. v. Erie Transportation Co.*, 117 U. S. 312, 321, 6 Sup. Ct. 1176, 29 L. Ed. 873; *Liverpool Steam Co. v. Phenix Ins. Co.*, *supra*, 129 U. S. 462, 9 Sup. Ct. 469, 32 L. Ed. 788; *North Eng-*

land Ins. Ass'n v. Armstrong, L. R. 5 Q. B. 244; *Comegys v. Vasse*, 1 Pet. 193, 212, 7 L. Ed. 108. It is true, as claimed, that such right is not founded on contract, but is a creature of equity (Memphis, etc., R. R. v. Dow, 120 U. S. 301, 302, 7 Sup. Ct. 482, 30 L. Ed. 595); still it is none the less a right that is entitled to protection, and, as Justice Harlan said in that case, is enforced for the purpose of "accomplishing the ends of substantial justice."

[2] Admittedly the subrogated rights of all the insurers of the Etruria were, when acquired, entitled to equal protection; but it is urged that the nonconsenting insurers destroyed this equality by waiver. Certainly the right of subrogation, like many other rights, may be waived. The theory of appellees is that the appellant insurers, when requested to authorize the libel suit and share in its expense, were put to an election either to prosecute the suit or to waive equality in their subrogated rights as to the Etruria. The intent to waive is said to be strengthened as to the five appellant insurers of the Stone, because they contributed to the expenses of her owner in the libel litigation. It is worthy of notice that no suggestion of this kind is made respecting the two appellee insurers of the Stone, who made like contribution, and yet were permitted to share ratably with the other appellees in the sum recovered of the Stone.

Was it necessary that these two appellees should place themselves on both sides of the libel proceeding, in effect sue themselves, in order to avoid waiver of their subrogated rights respecting the Etruria? To say the least, it would be more consonant with well-known rules of procedure to defend one interest, with either a declared or an undeclared, though actual, purpose to hold the other, than to resort to the method adopted by these two appellees. After all, it is *the existence of the interest* in the vessel proposed to be libeled, rather than the declaration of purpose, that would seem to be the true basis of any right to defend the one interest and hold the other. Besides, the owner of the Etruria stated in its request that it knew the insurers of the Etruria were "in part at least also interested as insurers on the Stone," and plainly both the owner and the consenting insurers knew that the suit could not benefit the insurers of the Stone, and that no opportunity to render services of any value to them through such a suit existed.

In view of the form of the request, can it be that waiver of vested subrogated rights like these is predicable either of the act of refusal or of defending such rights? Apparently more reason might be found to justify the course taken by the insurers of both vessels, than is observable in respect of the refusal of the insurers of the Etruria only; for recovery would have to be met by the former, and simply received by the latter. However, this case does not require us to pass upon the relative rights of these two classes of appellants further than to hold, as we now do, that the rights of the appellant insurers of the Stone are at least equal to those of the appellant insurers of the Etruria alone. *Brown v. Merchants' Marine Ins. Co.*, 152 Fed. 411, 413, 81 C. C. A. 553. True, the case of *The Livingstone*, 130 Fed. 746, 65 C. C. A. 610, there relied on, reversed the decision below, where a claim of waiver under circumstances kindred to those involved here was dis-

allowed. 122 Fed. 278, 285. But we think the reversal was not intended to affect the principle announced in the decision below and approved by Judge Gilbert in *Brown v. Merchants' Marine Ins. Co.*, *supra*.

The facts attending the libel proceeding in question show that the subrogated rights of all the insurers of the *Etruria* were intended to be enforced and preserved without exacting a surrender of any. It will be recalled that the request of the insurers of the *Etruria* was made by her owner, and was in terms to authorize the suit against the *Stone* and to share in "the expense of the litigation." In the libel filed in the cause, and under which the question of liability was settled, it was averred, among other things, that:

"* * * Libellant proceeds as owner of the steamer and for the benefit of its insurers, and as bailee of the cargo laden on board said steamer at the time and lost with said steamer, and trustee for the owner and insurers thereof, and for the crew for their lost personal effects. * * *

Further, after stating the total amount of damages alleged to have been suffered, libellant says:

"Which [amount], in its own behalf and as bailee of the cargo and trustee of the owners thereof, and the insurers thereon, and as trustee for her officers and crew, it claims from the said steamer *Amasa Stone*."

[3] The amount sued for was in excess of the total insurance paid; but, since the damages resulting from the collision were divided, the total recovery on account of the loss of the *Etruria* was materially less than her agreed valuation for insurance. So far as the libel is applicable to the amount recovered, the suit was wholly of a representative character, and the owner of the *Etruria*, the *Transit Company*, was, under well-settled principles, trustee for the beneficiaries of such recovery. *United States v. American Tobacco Co.*, 166 U. S. 468, 474, 17 Sup. Ct. 619, 41 L. Ed. 1081; *Fairgrieve v. Marine Ins. Co.*, 94 Fed. 686, 688, 37 C. C. A. 190 (C. C. A. 8th Cir.); *The St. Johns* (D. C.) 101 Fed. 469, 473, and decisions there cited; *Arnould on Marine Ins.* § 1226, at page 1388. In view of one feature of the argument, we pause to say that the representative character of the libel suit and the trust relations existing between libellant and the insurance beneficiaries would, as regards the present issues, have been the same, even if the recovery against the *Stone* had exceeded the agreed insurance valuation of the *Etruria*.

Learned counsel concur in the proposition that, where the value of destroyed property exceeds the insurance, the insurance company, on payment of the loss, cannot in its own name sue the wrongdoer, but that the suit must be in the name of the owner of the destroyed property; the theory being that the "wrongful act was single, and indivisible, and gives rise to but one liability." *Ætna Ins. Co. v. Hannibal & St. Joseph R. R. Co.*, 3 Dill. 2, Fed. Cas. No. 96. Upon this it is urged for appellants that it was *necessary* for the *Transit Company* to sue upon the entire cause of action, and so, as trustee, to protect the rights, not merely of part, but all, of the insurers holding subrogated interests.

This gives rise to several questions touching the remedies open to a large number of holders of kindred subrogated interests to enforce

their rights, which we need not consider, because (1) as stated, the owner in fact brought the suit in its own name for the benefit and as trustee of the insurers quite as distinctly as it in terms brought the suit in part for its own use and benefit; and (2) apart from this express assumption of a trust, the law itself, as a general rule, fastens upon an owner similar trust obligations in favor of insurers to the extent of their subrogated interests, where the suit is in fact brought, as here, in the name of the owner and upon a loss exceeding the total insurance. *Norwich Union Fire Ins. Soc. v. Standard Oil Co.*, 59 Fed. 984, 987, 8 C. C. A. 433 (C. C. A. 8th Cir.); *Fairgrieve v. Marine Ins. Co.*, supra, 94 Fed. 688, 37 C. C. A. 190; *Insurance Co. v. Cosgrove*, 85 Kan. 296, 299, 116 Pac. 819; *Southern Ry. Co. v. Blunt & Ward* (C. C.) 165 Fed. 258, 261; *Ins. Co. v. R. R. Co.*, 41 S. C. 411, 412, 19 S. E. 858, 44 Am. St. Rep. 725; *Hall & Long v. Railroad Co.*, 13 Wall. 371, 20 L. Ed. 594, approving *Gales v. Hailman*, 11 Pa. 515.

[4] Learned counsel for appellees insist in effect that this general rule is not applicable because of the refusal of appellants to sanction the libel against the Stone, and consequently that the suit was representative only as respects the consenting insurers. We think this is to overlook, not alone the very comprehensive language of the libel, but also the terms of the request itself. We have seen that one averment of the libel is that "libelant proceeds as owner of the steamer and for the benefit of its insurers," which plainly signifies, not merely the consenting insurers, but all the insurers. And it is to be observed that one provision of the request seems to have been designed in anticipation of precisely what happened in the libel proceeding. We refer to the portion stating that, if the action should result in a division of damages—

"the Etruria interests authorizing the proceeding will claim, before * * * accounting to the Etruria interests not authorizing the proceeding for the share of the recovery which would otherwise fall to them, *the right to deduct the expense of the litigation.*"

The owner sought to recover and did recover (to the extent allowed) the proportionate shares alike of all the insurers. True, it did so in its name as owner, but at last in virtue of its trusteeship respecting such shares. And it was not until after the libel proceeding was concluded in the court below and affirmed in this court that any claim was made by either the trustee or the consenting insurers that, besides deduction for "the expense of the litigation," the subrogated rights of the non-consenting insurers of the Etruria should be subordinated to the corresponding rights of the consenting insurers. With what consistency, then, can either the trustee or the consenting insurers insist that this should be done? They, in effect, agreed that nothing more should be claimed than "the expense of the litigation." True, it is suggested that, if no recovery had been made, the owner itself would, so far as the nonconsenting insurers were concerned, have been required to pay the expense of the litigation; but we have seen that the request provided that in such event—

"the Etruria interests not authorizing the proceedings will not be asked to contribute to the expense incurred in prosecuting the claim."

One reason for this may be found in the claim made by the owner (and, in truth, proved) in the libel suit that the value of the vessel largely exceeded her insurance; and it might be added that under well-settled rules the duty of the trustee to its *cestuis que trustent* was to adhere impartially to the terms and conditions of its request.

We think the decisions relied on by appellees are distinguishable. It is enough to say of *Woodworth v. Insurance Co.*, 5 Wall. 87, 18 L. Ed. 517, that it was not a representative suit. The unreported decision in the matter of the petition of the *Ætna Insurance Company* in the case of *Hanna v. Steamer Manitoba* differs in several material respects from the present case. While the suit brought by *Hanna* and *Chapin*, owners of the propeller *Comet*, was in form representative, the *Ætna*, as insurer only on a portion of the *Comet's* cargo, declined to permit the owners of the *Comet* to represent the *Ætna's* interest, and, on the contrary, intervened in its own behalf to secure its proportionate share of the recovery in the libel proceeding. It was entitled to pursue this course to enforce its subrogated right respecting the cargo (*The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; *The Beaconsfield*, 158 U. S. 309, 310, 15 Sup. Ct. 860, 39 L. Ed. 993; *The Atlas*, 93 U. S. 302, 316, 23 L. Ed. 863; *In re Lakeland Transp. Co.* [D. C.] 103 Fed. 328, 330); but by bringing its own suit the *Ætna* destroyed the representative character of the libel suit as to itself and all possibility of a trust relation with the owners. It then failed to present its proofs seasonably, and Judge *Baxter* stated as one of his conclusions of law that:

"Whatever rights it [order of June 3, 1878] conferred on petitioner were waived by petitioner's application of July 18, 1878, and the order of the District Court made thereon."

It is true that the *Ætna* was repeatedly requested to contribute to the expenses of the libel proceeding, and it was specially found that it "repeatedly and persistently refused to have anything to do with said suit or contribute thereto"; and the learned Circuit Judge further concluded that by reason of such neglect and refusal and of the insufficiency of the damages recoverable to pay in full the damages due those who had contributed to the expense of the libel suit—

"petitioner ought not to be permitted to share in the moneys which may be realized by the libelants and said contributors."

Whatever else may be said of this latter ground of the denial of the *Ætna's* intervention, apart from the other grounds stated, it should be noticed that the *Ætna's* refusals were but in accord with its right to maintain a separate suit, and it is hard to see how they could have any other effect than to emphasize its purpose to seek recovery only in that way.

It is not necessary to dwell longer on the cases relied on by appellees. They are all lacking in the controlling features of the instant case. The distribution of the present fund must be governed by the representative character of the libel suit and the terms of the request under which it was commenced and maintained. It was not open to the consenting appellees, after the decree in that case was entered and on

appeal affirmed, to object to a ratable division among all the insurers of the Etruria. Whatever rights of priority the owner or the consenting insurers might have secured, either by limiting the recovery sought to the sum of their respective interests, or by suing for the benefit only of such of the insurers as should sanction the libel and join in its expense, no such course was pursued. No distinction is perceived between the principle that should be applied here and that which prevails in equitable proceedings brought to enforce judgments against interests of debtors that cannot be reached by ordinary legal process. If priority is sought in such proceedings, the suit must be limited to that object, and not in terms extended to all creditors of the same class or creditors generally. This principle is applied in a variety of cases. For instance, in *George v. St. Louis Cable & W. Ry. Co.* (C. C.) 44 Fed. 122, 123, the late Circuit Judge Thayer, when speaking upon rehearing of a proceeding by judgment creditors to subject property that could not be effectively reached by execution at law, said:

"I have no doubt that the three complainants by whom the bill in this case was filed might have secured a priority by filing the same for their own benefit; but they did not do so. By the very terms of the bill, they professed to be acting, not only for themselves, but 'in behalf of, all and singular, the other judgment creditors of the respondent.' The effect was to waive the advantage they might have obtained by moving in their own behalf. The result is that the suit, in contemplation of law, has from the beginning been prosecuted by the original complainants in behalf of all judgment creditors who might elect to come in and take advantage of what had been done in their behalf."

The same principle was recognized by Justice Bradley in *Johnson v. Waters*, 111 U. S. 640, 674, 4 Sup. Ct. 619, 637 (28 L. Ed. 547), and by Justice Matthews in *Freedman's Savings & Trust Co. v. Earle*, 110 U. S. 710, 716, 4 Sup. Ct. 226, 229 (28 L. Ed. 301), where he stated the rule thus:

"It is to be noted, therefore, that the proceeding is one instituted by the judgment creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause."

In *Jones v. Fayerweather*, 46 N. J. Eq. 235, 256, 19 Atl. 22, 25, when speaking of three creditors of an insolvent firm who had each brought a suit to subject property of the debtor in his own behalf alone, Chief Justice Beasley said:

"Such procedures have no affinity with bills exhibited by complainants, not only for the benefit of themselves, but equally for that of all other creditors who may be made parties: for the very form of such bills excludes the idea that any creditor, or any class of creditors, is to obtain any preference over the others."

See, also, *Talcott v. Grant Wire & Spring Co.*, 131 Ill. 253, 254, 23 N. E. 403.

[5] It is settled in this court that so far as time is concerned it is competent to intervene before final distribution of such a fund is made, for the purpose of presenting claims to an interest therein and for their establishment by decree (*Mason v. Marine Ins. Co.*, 110 Fed. 452, 454, 49 C. C. A. 106, 54 L. R. A. 700; *Continental Trust Co. v.*

Toledo, St. L. & K. C. R. R. Co. [C. C.] 82 Fed. 642, 646; Central Trust Co. v. Richmond, N., I. & B. R. Co., 105 Fed. 803, 808, 45 C. C. A. 60; see *The Propeller Monticello v. Mollison*, 17 How. [58 U. S.] 152, 155, 15 L. Ed. 68; *The Nonpareil* [D. C.] 149 Fed. 521, 525, and cases there cited); but the priority given by the decree below to the expense of the libel litigation should be preserved as against appellants as well as appellees (*Trustees v. Greenough*, 105 U. S. 527, 532, 26 L. Ed. 1157; *Central Railroad v. Pettus*, 113 U. S. 124, 126, 5 Sup. Ct. 387, 28 L. Ed. 915).

Appellants properly admit that the cargo underwriter should be paid in full, less cargo's proportion of legal expenses. *The George W. Roby*, 111 Fed. 601, 616, 49 C. C. A. 481 (C. C. A. 6th Cir.); s. c. (D. C.) 103 Fed. 332, 333. The remaining items pertain to freight and crew, the former item having been included below with the claim for insurance paid on hull by the Western Assurance Company as insurer also of the freight. The contention is that the claims for freight and crew shall be placed on a parity with the claims of the insurers of the hull, subject to ratable apportionment of the legal expenses allowed. This method was pursued in the decree below, so far as the appellee insurers of the hull were concerned. The assignments respecting the former items have, therefore, been practically disposed of by the effect of our conclusion: That the claims of all the insurers of the hull (of the *Etruria*), appellees and appellants alike, must be placed on an equality; and the claims for freight and crew will be placed on a parity with them.

The decree below is reversed, with costs, and the cause is remanded, with instructions to enter a decree not inconsistent with this opinion.

MOSS v. GULF COMPRESS CO.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1913.)

No. 2,371.

1. COURTS (§ 405*)—FEDERAL COURTS—APPELLATE PROCEDURE—DISMISSAL— FORMAL DEFECT IN RECORD.

That a petition for a writ of error, the order and writ, and assignment of errors are all entitled in the Circuit Court, although that court had been abolished, is not ground for dismissal in the appellate court, where the record in the cause is properly authenticated by the clerk and under the seal of the District Court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1097-1103; Dec. Dig. § 405.*]

2. APPEAL AND ERROR (§ 668*)—IMPEACHMENT—BILL OF EXCEPTIONS—CERTIFICATE OF JUDGE.

A bill of exceptions properly authenticated by the signature of the judge cannot be impeached by evidence outside the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2861; Dec. Dig. § 668.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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3. COURTS (§ 372*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS.

In the absence of statutory regulation, the fellow-servant rule and its interpretation become a matter of general law as to which the federal courts apply their own rules of decision.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. § 372.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

4. MASTER AND SERVANT (§ 189*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—VICE PRINCIPAL.

Under the federal decisions, neither mere superiority in rank nor the right of one servant to exercise control over another will constitute the former a vice principal of the corporation master with respect to the latter, but it must be shown that he is intrusted by the master with departmental control.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427-435, 437-448; Dec. Dig. § 189.*]

5. MASTER AND SERVANT (§ 189*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—NEGLIGENCE OF "VICE PRINCIPAL."

Where defendant, a compress company, sent an agent alone to a place at a distance from its principal place of business to dismantle a compress, giving him absolute and exclusive direction of the means and method of doing the work with full discretion in the selection and use of appliances and men, such agent, as to the men employed by him, was a "vice principal," standing in the place of defendant, and for his negligence while acting in that capacity, causing an injury to an employé, defendant is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427-435, 437-448; Dec. Dig. § 189.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7313-7316.]

6. MASTER AND SERVANT (§ 226*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMED RISKS.

An employé does not assume the risk of injury from negligence on the part of the master or his vice principal while acting in matters of supervision and direction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

7. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Evidence considered, in an action by an employé for a personal injury, and held to require the submission to the jury of the question of the negligence of defendant's vice principal in directing plaintiff to work in a dangerous place, in view of plaintiff's inexperience.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Mississippi; Henry C. Niles, Judge.

Action at law by Ben C. Moss against the Gulf Compress Company; C. C. Hanson, receiver. Judgment for defendant, and plaintiff brings error. Reversed.

Thomas Gaines Fewell, of Meridian, Miss. (C. B. Cameron, of Meridian, Miss., on the brief), for plaintiff in error.

Marcellus Green, of Jackson, Miss. (G. Q. Hall, G. W. Green, and Marcellus Green, Jr., all of Jackson, Miss., on the brief), for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This is a writ of error to review a judgment for the defendant below and the defendant in error in this court on a verdict directed by the court below at the conclusion of the plaintiff's testimony.

[1] There is submitted, also, a motion to dismiss or affirm. The motion to dismiss is based upon the ground that the petition to obtain the writ of error, the order allowing it, the writ itself, the assignment of errors, the bond, and the citation are all entitled as of the Circuit Court of the United States, when, in fact, the Circuit Court had been abolished before the writ of error was sued out and allowed by the trial court. The original printed record in the cause comes to this court under the hand and seal of the clerk of the District Court of the proper district, and properly authenticates these proceedings as having occurred in the District Court, and this controls the recital in the captions of the various proceedings mentioned.

[2] The defendant in error supports its motion to affirm upon the ground that, as is alleged, the bill of exceptions contained in the record and purporting to be signed by the district judge is a false one, and presents the certificate of the judge in support of its contention. It is sufficient answer to this contention that it is conceded that the district judge signed the bill of exceptions which is contained in the record, and that we cannot look beyond the record upon the question of its verity.

The motion to dismiss or affirm is denied.

Coming to the merits: The plaintiff in error, who was the plaintiff in the court below, sued the defendant in error for damages for personal injuries alleged to have been received by him while in the employment of the defendant, and while engaged in dismantling for it a compress at Meridian, Miss., on July 28, 1908. The declaration is contained in three counts, but the first only was relied upon by the plaintiff for recovery. The defendant had intrusted the management of the work of dismantling the compress to one of its agents, who was called a traveling engineer, named M. W. Wallace, and who had sole charge of the work for the defendant; the defendant being represented by no other officer or agent of superior grade to Wallace on the premises. All the work was under Wallace's exclusive direction and control. At the time of the accident to the plaintiff, Wallace, with the assistance of two negroes, was engaged in passing a coiled rope through a winch. Wallace was on the other side of the winch from where the rope was coiled; handling the rope after it had passed through the winch. The two negroes were on the opposite side of the winch from Wallace, uncoiling the rope so it could be fed into the winch. Wallace was able to handle the rope, after it passed through the winch, faster than the

two negroes could uncoil it and feed it into the winch. Wallace was anxious to finish the job quickly, and the negroes could not keep up with his work. It was in this situation that he directed the plaintiff to get in behind the winch and between it and where the negroes were uncoiling the rope, to guide the rope so it could be handled by the negroes on their side fast enough to keep up with Wallace's pace on the other side. The plaintiff obeyed the instruction of Wallace and took his position between the place where the negroes were uncoiling the rope and the winch, for the purpose of guiding the rope as it was uncoiled. It was while in this position that the plaintiff was injured. There were revolving cogs in the winch to the side of plaintiff as he stood guiding the rope. Wallace was still able to handle the rope faster than the negroes could uncoil it, and the slack thus being taken out of the rope on the side of the winch on which the plaintiff was standing, the taut rope struck plaintiff's body and threw him off his balance. In his endeavor to recover his balance his hand was caught in the cogs, causing the injury complained of.

This was the substance of plaintiff's own testimony, and he was the only witness examined. The defendant offered no testimony, but relied upon the insufficiency of plaintiff's evidence to establish his case. The court below was of the opinion that the plaintiff's evidence failed, as a matter of law, to show any negligence on the part of the defendant, and directed the verdict. The only question presented by the writ of error is the correctness of the court's action in so directing the verdict.

The record does not disclose any evidence tending to show that the defendant was guilty of negligence in failing to provide or maintain a reasonably safe place for plaintiff to perform his work. The general character of the work in which the plaintiff was engaged when injured was the dismantling of a compress. The increased hazard due to the general character of the work of demolition was a risk assumed by plaintiff, though it does not appear that his injury was due to any such hazard. Nor is there any evidence that the winch was either defective or unsuitable for the purpose for which it was being used at the time of the accident. Nor does it appear that the cogs in which plaintiff's hand was caught should have been better protected. Nor is there anything in the record to show that the location of the winch, with reference to its surroundings, was in any way improper, or that the plaintiff's fellow servants were incompetent. If liability on the part of the defendant exists, it must be predicated upon the breach of some other duty than those mentioned.

The plaintiff relies also upon the alleged negligence of Wallace, who was in charge of the work of dismantling the compress, asserting that he was a vice principal of the defendant and not a fellow servant of the plaintiff. To entitle the plaintiff to recover on this theory, it was essential that the evidence tend to show that Wallace was a vice principal, and that, as such, he was guilty of negligence which was the cause of plaintiff's injury.

There is no statute in Mississippi changing the fellow-servant rule as it exists at common law, except as applies to railroad employes. The attempt of the Mississippi Legislature to enlarge the favored class of employes so as to include the employes of all corporations proved

abortive by reason of the decision of the Supreme Court of Mississippi that the act, so intended, was unconstitutional, because unjustly discriminating against the class of corporation employers. Chapter 87, Laws 1896; chapter 66, Laws 1898; *Ballard v. Oil Co.*, 81 Miss. 507, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476.

[3] In the absence of statutory regulation, the fellow-servant rule and its interpretation becomes a matter of general law, as to which the federal courts apply their own rules of decision; and the status of Wallace as to being a vice principal or a mere fellow servant is to be determined in this case by the decisions of the federal courts rather than those of Mississippi. *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.

[4] According to the federal decisions, it is well settled that neither mere superiority in rank nor the right to exercise control by the delinquent servant over the injured servant will avail to constitute the delinquent servant a vice principal of the master. It is necessary that it be shown that he is intrusted by the master with departmental control, as defined by the courts.

In the case of *B. & O. R. R. Co. v. Baugh*, *supra*, the court said:

"Where the master is a corporation, there can be no negligence on the part of the master except it also be that of some agent or servant, for a corporation only acts through agents. The directors are the managing agents; their negligence must be adjudged the negligence of the corporation, although they are simply agents. So, when they place the entire management of the corporation in the hands of a general superintendent, such general superintendent, though himself only an agent, is almost universally recognized as the representative of the corporation—the master—and his negligence as that of the master. And it is only carrying the same principle a little further and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly considered, with respect to employes under them, vice principals—representatives of the master—as fully and as completely as if the entire business of the master was by him placed under the charge of one superintendent."

In the case of *Northern Pacific R. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994, the court stated the rule as follows:

"The rule is that in order to form an exception to the general law of non-liability the person whose neglect caused the injury must be 'one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department.' This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case.

"When the business of the master or employer is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service, and given entire and absolute control therein, may be properly considered, with respect to employes under them, vice principals and representatives of the master as fully and as completely as if the entire business of the master were placed by him under one superintendent."

In the case of *Northern Pacific Ry. Co. v. Dixon*, 194 U. S. 338-344, 24 Sup. Ct. 683, 685 (48 L. Ed. 1006), the court said:

"Another qualification suggested is where the one guilty of the negligence has such general control and occupies such relation to the work that he in effect takes the place of the employer—becomes a vice principal, or alter ego, as he is sometimes called. If an employer, whether an individual or a corporation, giving no personal attention to the work, places it in the entire control of another, such person may be not improperly regarded as the principal and his negligence that of the principal. That thought has in some cases been carried further, and, when it appeared that the work in which the employer was engaged was divided into separate and distinct departments, the one in charge of each of those departments has been regarded as also a vice principal."

In the case of *Klauder-Weldon Dyeing Machine Co. v. Gagnon*, 183 Fed. 962, 106 C. C. A. 302, the rule was applied by the Circuit Court of Appeals for the Second Circuit to the situation described as follows by the court:

"Evenden, the foreman, had full authority in the blacksmith shop and represented the defendant in the work being carried on there. If he were negligent in the discharge of his duty, while directing the work, his negligence, as matter of law, must be imputed to the defendant. He was not a fellow servant."

In the case of *Alaska United Gold Mining Co. v. Muset*, 114 Fed. 66, 52 C. C. A. 14, the Circuit Court of Appeals for the Ninth Circuit, said:

"The plaintiff in error was a corporation whose home office was at a distance from the place where its properties were situated. Being a corporation, it could act only by means of officers and agents. It placed all of its properties and business on Douglas Island in charge of a general superintendent. It placed its four distinct and separate departments of business each under the charge of a foreman or superintendent, who was subject to the general superintendent, but who was given substantially the entire control of that department. The general superintendent had no personal relation with either of the four departments. He had no office or place of business at either of the mines or the mills. It is not shown that he was ever present at the Seven Hundred mine, or inspected it, or had personal knowledge of its operation or its appliances. The only officer or agent of the corporation who had such knowledge of that mine was Pope. He it was who stood in the place of the master to the men. His duty it was to see that the men were supplied with the necessary appliances for their safety. Before he cut off the supply of compressed air which operated the hoist in the shaft, on the morning of the accident, it was his duty to see that the men therein working were furnished other safe means of escape therefrom. In relation to that duty, he stood in the place of the corporation, and for his neglect to discharge it, the corporation is liable. He was not a mere foreman of a gang of men, as was the case of the negligent foreman in *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994, and *Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390. He was the representative of the corporation placed in charge of its servants in a separate department of its business, and as such he was the vice principal, within the definition furnished in the *Baugh Case*. The plaintiff in error could not meet the full measure of its duty as a master to its servants by placing its various properties under the charge of a general superintendent, who was not a superintendent in fact as to any particular branch of its service, and say that, because the general superintendent who had no knowledge of the want of proper appliances or defects in machinery or apparatus was not negligent, the master shall not

be held for damages for the negligence in those respects of the foreman, who had the particular supervision and control over its property and its servants."

In *Labatt on Master & Servant*, vol. 2, § 534, p. 1517, the exception and its limits are thus stated:

"The rationale of the doctrine which declares the master to be responsible for the negligence of a departmental manager indicates that no employé can properly be placed in this category unless he is exercising all the functions which the master himself would exercise, if he were personally supervising the same section of his business. That is to say, his representative character is not established by any evidence which fails to show that there has been that complete transfer of the master's characteristic functions which implies that the transferee is invested with the right and duty, not of merely seeing that his subordinates perform some definite routine work in the manner prescribed, and with the appliances furnished, but of providing the appliances themselves, and of making such a disposition of the workmen in regard to those appliances as will most effectually secure the general results for the attainment of which the branch of the business under his control has been organized."

[5] Does the record show Wallace to have been a "vice principal" within the definition of that term, to be derived from the authorities cited? It is clear that his superiority in rank to the plaintiff and the other workmen engaged in the work of dismantling the compress, and his control over them, is not alone sufficient to establish that relationship to the master. If it exists, it must be derived from the fact that he may be said to have been in control of a department of the master's business. The doing of a single, though separate, piece of work on the master's premises would not suffice. In this case Wallace was sent by the defendant to a place distant from the defendant's principal place of business to dismantle a compress. He had the absolute and exclusive direction of the means and method of accomplishing this work, with full discretion as to the selection and use of appliances and men. All the other agents of defendant who were engaged with him were under his direction and control. The defendant had no other representative on the premises upon which the work was being done. If the defendant was not legally represented at the place of work by Wallace, then it must be said to have been without representation there, though it was there in fact engaged in doing the work, and owed its servants the nondelegable duty of supplying proper supervision over the work in which they were engaged.

This case differs from the one in which a foreman is engaged in supervising a separate piece of work, but one that is being done on the master's premises and under the immediate supervision of the foreman's superior, who in that case represents the master as vice principal. In this case the work being done by Wallace was not only separate and distinct, but was being done apart from the defendant's other managing agents and officers, who could not, for that reason, supervise and direct Wallace in the conduct of it, and could not, therefore, be vice principals. As in the nature of the case from the way in which the work was being done, the defendant could be represented in the management and doing of it only by Wallace, and necessarily intrusted the direction and discretion necessary to its conduct to him alone, we

think he must be considered, in the doing of it under these circumstances, to have been the vice principal of the defendant.

The negligence of Wallace, which would entitle the plaintiff to recover, would be with respect only to matters in which he was acting as the defendant's vice principal. As his scope as vice principal is confined to matters of supervision and direction, as distinguished from manual labor, so negligence, to be recoverable, must have occurred with relation to matters of supervision and direction, which are in the nature of nondelegable duties of the master. If the only negligence on Wallace's part consisted in the handling of the rope at a rapid speed, the plaintiff's case would necessarily fail, since Wallace, though a vice principal in some respects, could not be said to be one when engaging in work of this kind. The evidence of the plaintiff tends to show, however, that Wallace directed him to take a position behind the winch and in front of the position occupied by the negroes who were uncoiling the rope, and from it to guide the rope, and that the plaintiff took the position he was directed to take, and was injured while occupying it. This action of Wallace, in so placing the plaintiff, was an action of direction and supervision over the work and those engaged in it, and in giving this direction and in placing the men who were doing the work, Wallace acted in his capacity as vice principal, and bound the defendant by his acts of this character.

[6] Nor did the plaintiff assume the risk of injury from any negligence on the part of Wallace in respect to matters in which he acted as vice principal. He assumed the risk of injury caused by negligence of his fellow servants and all such other risks as were incident to his employment, but not such extra hazards as were the results of negligence on the part of the master himself or of his vice principal. In the case of *Hough v. Railway Co.*, 100 U. S. 213-217 (25 L. Ed. 612), the Supreme Court, speaking of exceptions to the risks assumed by an employé, said:

"One, and perhaps the most important, of those exceptions, arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence on the part of the master."

The question then is whether there is any evidence in the record from which the jury could have legitimately inferred that Wallace negligently caused the plaintiff's injury. The plaintiff complains that he was not warned by Wallace, when directed to assume the position behind the winch, of the presence of the unprotected cogs or of the fact that the rope was being handled by Wallace faster than the negro helpers could uncoil it, but as the plaintiff admits that he knew of the presence and condition of the cogs, and must have known the danger of coming in contact with them, before he assumed the position at which injury befell him, it is difficult to see how any failure to warn him of what he already knew could have contributed to his injury.

He admits that he knew that Wallace was handling the rope faster than the negroes could uncoil it. The record is not very clear as to whether he knew, or should have known, the attendant danger and

how to avoid it, and whether, if ignorant, he could have been instructed by Wallace so as to enable him better to avoid it in the position he was to assume. If he was ignorant of the danger and could have escaped the resulting injury by proper warning or instruction, then it was for the jury to say whether it was negligence on Wallace's part to put him there without some warning or instruction. If he was aware of the danger, or if warning or instruction, if given, would have not availed to enable him to avoid injury, then no negligence could be predicated on the failure of Wallace to give him warning. The negligence of Wallace, in that event, if any, would be in the placing of the plaintiff in too dangerous a position. If Wallace was negligent in failing to warn him, his negligence would be that of the defendant, regardless of his grade of service, since the duty to warn of danger is a nondelegable duty, and a breach of it, even through the agency of a fellow servant, is the master's negligence. The second paragraph of the syllabus in the case of *Peters v. George*, 154 Fed. 634, 83 C. C. A. 408, asserts this principle of law in the following language:

"The duty to warn and instruct an employé who is set to perform a dangerous work with which he is unacquainted is a primary and absolute duty of the master to the servant, and he cannot relieve himself of liability for its nonperformance by delegating or intrusting it to a subordinate or to a fellow servant of such workman. Nothing short of actual notice of the danger to the workman who is to encounter it, with such cautionary explanation as may enable him to avoid it, will satisfy the requirement of the law, and the default of an intermediary, whether he be the highest officer in control or merely a fellow workman of the one exposed to the danger, is the default of the master."

In view of the unsatisfactory condition of the record as to whether the plaintiff knew of the likelihood of his being thrown off his balance and against the revolving cogs by the too rapid handling of the rope by Wallace, and as to whether any specific instructions could have been given him by Wallace when he placed him there, which would have enabled him to avoid injury in this way, we forbear from passing on the question as to whether the issue of Wallace's negligence in failing to warn the plaintiff should have been submitted to the jury. Upon a retrial of this case the evidence then adduced may remove the uncertainty in the present record in that respect.

[7] If Wallace was free from negligence in respect to warning, but negligent in respect to ordering the plaintiff to assume a dangerous position, in view of his inexperience and the rapid movement of the rope, then such negligence would possibly be defendant's negligence, only in the event Wallace is to be considered as a vice principal in doing the act complained of, as we have held him to be. Does the record supply evidence from which the jury could infer that Wallace negligently placed plaintiff in a dangerous position? It was open to inference that Wallace intended, when he directed plaintiff to take his place behind the winch and guide the rope, to continue to handle the rope, after plaintiff had assumed the position, as fast as he had been doing—which was too fast for the negroes to uncoil it and keep it slack. Indeed, that was his reason for so placing the plaintiff. If so, we think it was for the jury to say whether or not such a position,

in view of the way the rope was being handled by Wallace, and the incapacity of the negroes to properly pay it out so as to keep it slack when it was handled so rapidly, and in view of the danger to one in that position when the rope became taut, was too dangerous for one of plaintiff's experience to assume, even though the danger was decreased to some extent by the presence of the plaintiff and the assistance he was able to give the negroes in handling the rope. If it was, then it would be for the jury to say whether or not Wallace was negligent in directing him to assume it, regardless of whether the plaintiff was entitled to complain of a failure to properly warn him.

It is said, however, that there was no direction to assume the specific position he was occupying when injured. In response to the direction, plaintiff did in fact take that position, and there is enough in the record for the jury to have inferred, if they saw fit, that he assumed and occupied it with the acquiescence of Wallace, and to so have inferred also that it was the position Wallace intended he should take when he gave the order.

It is also said that his injury resulted, not from the position of danger that he was occupying, but from his admitted inattention to the movement of the rope. This applies to the issue of his contributory negligence. The question of his contributory negligence, first, in assuming the position of danger, in view of the order given him by his superior to do so, and, second, in not attending to the movement of the rope with greater diligence, was a question of fact, and not for the determination of the court.

For these reasons, we are of the opinion that the court below erred in directing a verdict for the defendant, and the judgment is reversed, and the cause remanded for further proceedings in conformity with this opinion.

PARDEE, Circuit Judge (dissenting). I think this case ought to be affirmed. The plaintiff was the only witness, so that the only dispute about the facts arises in his own evidence. Assuming that Wallace was the vice principal, the evidence does not show that the compress company was guilty of any negligence warranting a recovery by the plaintiff. The place was not dangerous, being in the open with no machinery about or in operation save a so-called drum, probably winch, which was being operated solely by running a rope through it by hand. The only order given was: "Get in there and do something. Guide that rope!" The plaintiff selected his own position, which was safe; and the only caution that could have been given, if any were necessary, would have been, "Be careful and do not stick your fingers in the cogs of the drum." Negligence can hardly be predicated on an order to an employé to go to work in a safe place.

Whether Wallace was the vice principal because he was superintending the dismantling of the compress at the time the plaintiff claims he was injured, Wallace and the plaintiff, both servants of the compress company, were jointly engaged in manual labor at the same time in a safe place, and if at that time and under those circumstances Wallace could be charged with any negligence, which he is not, it was

certainly the negligence of a fellow servant, for both Wallace and the plaintiff stood upon an equal footing, and no question of master's authority supervening.

WILDER v. DENNIS et al.

(Circuit Court of Appeals, Fourth Circuit. November 7, 1912.)

No. 1,096.

1. TAXATION (§ 760*)—TAX DEEDS—RECITALS—VIRGINIA STATUTE.

Act Va. Feb. 11, 1898 (Acts 1897-98, c. 306), amending Code 1887, § 666, relating to sales of land for taxes, was intended to effect a radical change of policy in the collection of taxes on land, and to make the law in that respect more efficient by giving to a purchaser from the state a good title which can be defeated only by proof that the taxes were not properly chargeable on the land or that they had been paid. The provision that the deed of the clerk to lands sold by the state shall "set forth all the circumstances appearing in the clerk's office in relation to the sale" has reference to the sale made by the clerk, and not to the previous sale to the state, and does not require the circumstances to be set out with technical nicety; but a substantial compliance with the provision is sufficient.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1509; Dec. Dig. § 760.*]

2. TAXATION (§§ 674, 746*)—TAX SALES—VALIDITY—PURCHASE BY OFFICER.

The purchase of land sold by the state for taxes by the clerk who makes the sale, or in his interest, is not contrary to the public policy of Virginia, and while Code Va. 1887, § 656 (Code 1904, p. 320), provides that where the clerk is purchaser the deed shall be made by a commissioner, the clerk may lawfully execute a deed to a third person, although he is himself interested in the purchase.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1357-1360, 1491, 1492; Dec. Dig. §§ 674, 746.*]

3. TAXATION (§ 734*)—TAX SALES—VALIDITY—VIRGINIA STATUTE.

A tax deed made by the clerk for land sold by the state under Act Va. Feb. 11, 1898 (Acts 1897-98, c. 306), is not invalidated by the fact that the preceding order of publication does not state the amount for which the land was sold to the state, which is not required by the statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

4. TAXATION (§ 734*)—TAX SALES—VALIDITY—VIRGINIA STATUTE.

Notice of an application to purchase the land is required by the statute to be given to the person in whose name the land stood on the commissioner's book at the time it was sold to the state and to others only in case of a subsequent transfer shown by such book, and where there was no such transfer, and the record owner had parted with his interest, a clerical error in the application in describing the land as in three tracts, instead of two, does not invalidate the deed which contains a correct description.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

5. TAXATION (§ 734*)—TAX SALES—VALIDITY—VIRGINIA STATUTE.

A sale and deed are not invalidated by a clerical error in the clerk's order for publication of the notice in giving the name of the newspaper

*For other cases see same topic & § NUMBER in Dec. & Am.Digs. 1907 to date, & Rep'r Indexes

designated incorrectly, where there was but one paper in which it could lawfully be published.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

6. TAXATION (§ 734*)—TAX SALES—VALIDITY—VIRGINIA STATUTE.

An erroneous statement of fact in such published notice is immaterial where it did not affect any one who was entitled to notice.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

7. TAXATION (§ 734*)—TAX SALES—VALIDITY—VIRGINIA STATUTE.

Such act provides that Code Va. 1887, § 661 (Code 1904, p. 321), shall apply to tax deeds made thereunder, and under such section a deed cannot be defeated for a mere irregularity in the prior proceedings, but only by proof that the land was not subject to the tax, or that the tax had been paid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

8. TAXATION (§ 679*)—TAX SALES—VALIDITY—VIRGINIA STATUTE.

Under such statute, where two tracts of land stand on the commissioner's book in the name of the same person, both at the date of sale to the state and at the date of an application to purchase, both may be included in and purchased on the same application.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

9. TAXATION (§ 791*)—TAX TITLES—EJECTMENT AGAINST CLAIMANT UNDER TAX DEED—LIMITATION—VIRGINIA STATUTE.

The provision of Act Va. March 7, 1900 (Acts 1899-1900, c. 1132) that "no suit shall be brought to set aside, cancel or amend" a tax deed, except for fraud, etc., unless within two years after it is recorded, construed under the Virginia rule that a statute of limitations is a statute of repose, applies to an action of ejectment as well as a suit in equity, but does not apply in favor of a tax deed which was executed and recorded prior to its passage.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1571; Dec. Dig. § 791.*]

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry C. McDowell, Judge.

Action at law by Victor A. Wilder against William L. Dennis, John C. McCoy, George H. Stone, Joshua Baisden, and L. C. Bell. Judgment for defendants, and plaintiff brings error. Affirmed.

Maynard F. Stiles, of Charleston, W. Va., and M. O. Litz, of Welch, W. Va., for plaintiff in error.

William H. Werth, of Tazewell, Va., and S. M. B. Coulling, of Tazewell, Va., for defendants in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD District Judge.

GOFF, Circuit Judge. This writ of error is prosecuted to a judgment of the court below, entered in an action of ejectment instituted by Victor A. Wilder against William L. Dennis, John C. McCoy, George H. Stone, Joshua Baisden, and L. C. Bell. In due time the case was tried before a jury, which, by direction of the court below, returned a verdict for the defendants. Pending the proceedings in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the court below, a motion was made to set aside the verdict, as having been improvidently directed, which motion the court overruled, filing an opinion relating to the points raised and argued by counsel as involved in said motion. The court, yielding to the insistence of counsel for the plaintiff below, then granted a reargument, which was duly had, when the court, adhering to the conclusion originally reached, filed an additional opinion and entered the judgment referred to. The assignments of error are many, the specifications under them are multitudinous, and the argument to sustain them, if not convincing, is interesting and plausible. We can safely say that each and every of the points presented by counsel for plaintiff in error have been either directly or indirectly met, answered, and effectually disposed of by the clear reasoning of the trial judge in comprehensive and admirable opinions filed by him during the progress of this litigation in his court. In fact, said opinions relating as they do to many of the most important questions involved in the Virginia statutes concerning real estate, the proper construction of said legislation, and the method of procedure in case of forfeiture and sale for delinquent taxes thereunder, as also the rules bearing on the admission and rejection of testimony pending the trial of an action of ejectment, are most valuable contributions to our court decisions on those intricate and important matters, and deserve the concurrence they impel and have.

The opinion directing the verdict reads as follows:

"The plaintiff to show title to the 2,093-acre tract in controversy introduced: (1) A patent from the commonwealth of August 2, 1875, to Wm. Collins granting the said tract. (2) A deed from Wm. Collins to J. D. Sargeant of May 7, 1883, conveying the said 2,093-acre tract. (3) A deed dated December 27, 1887, from J. D. Sargeant et al. to J. D. Sargeant, Lewis Rodman, and Thos. Graham, trustees, conveying inter alia (tract 14) the 2,093-acre tract and (tract 16) another tract on Tug river, acreage not stated, recited to have been conveyed by Wm. Collins and wife (by deed dated October 10, 1886) to J. D. Sargeant and recorded in Buchanan county deed book B, p. 254, etc. (4) Sundry appointments of successors to the trustees named in the deed of December 27, 1887, vesting the title in Torpin, Lambert, and Pepper as trustees. (5) Deed of December 13, 1901, from the foregoing trustees to V. A. Wilder. After introducing some parol evidence, now of no interest, the plaintiff rested.

[1] "The defendant, after having offered and withdrawn some other papers, offered in evidence a tax deed of March 2, 1900, from W. L. Dennis, clerk, to R. Walter Dotson. It was objected by the plaintiff that the deed does not contain the recitals required by the Act of February 11, 1898 (Acts 1897-98, pp. 343, 345), and that consequently the deed does not fall under the protection of section 661, Code 1887 [Code 1904, p. 321]. It is required by the act of 1898 that the deed shall 'set forth all the circumstances appearing in the clerk's office in relation to the sale,' and the gist of the dispute is as to the intention of the Legislature in using the above-quoted language. The deed offered in evidence does recite, in a manner at least, all of the essential circumstances which should appear in the clerk's office in relation to the sale made by the clerk to Dotson, and I am satisfied that this is the sale intended by the Legislature and not the sale made to the commonwealth in 1897. *Flanagan v. Grimmet*, 51 Va. 421, 436. The contention of the plaintiff in effect is that the Legislature by the language quoted above intended that the circumstances should be set forth with the particularity and nicety required by the strictest rules of pleading; that is to say, that the facts should be stated and that conclusions should not be substitut-

ed therefor. Quite aside from the persuasive opinion of the Court of Appeals in *Flanagan v. Grimmer*, supra, it seems to me that the probabilities are great that the Legislature did not intend to require the impracticable particularity contended for by the plaintiff. Under the decision in *Building & Loan Association v. Glenn*, 99 Va. 460 [39 S. E. 136], a tax deed is by force of section 661 of the Code not conclusive in certain respects, and consequently any real injustice done the true owner of the land by a tax deed can be shown notwithstanding the deed. Prior to the act of 1898 the method provided by law for enforcing collection of delinquent taxes on real estate had proven highly inefficient. A 'tax title' was regarded as valueless; practically no one would purchase delinquent lands at the sales held by the county treasurers, and in consequence there were hundreds of thousands of acres standing on the commissioners' books as sold to the commonwealth, but the state was unable to collect the taxes thereon. In amending section 666, Code 1887, by the act of February 11, 1898, the intent of the Legislature to adopt a radical change of policy is made most manifest. The intention was to make easy the acquirement of valid tax titles and thus to encourage the purchase by individuals of lands previously sold to the commonwealth. In enacting, therefore (Acts 1897-98, p. 345), that the deed made by the clerk to the purchaser 'shall set forth all the circumstances appearing in the clerk's office in relation to the sale,' it seems very clear that there was not an intent to require that such circumstances be set forth with the accuracy or with the technical nicety required for instance in common-law pleadings. This conclusion is fortified by the fact that in the act of 1898 (pages 345, 346) it is provided: 'The provisions of section 661 of the Code of Virginia [of 1887] shall apply to deeds made under authority of this section.' Section 661 of the Code of 1887 provides that when a deed has been obtained and recorded by a purchaser at a tax sale the title thereby conveyed shall be defeated only by proof that the taxes or levies for which said real estate was sold were not properly chargeable thereon; or that the taxes and levies properly chargeable thereon have been paid. It is true (Va. B. & L. Ass'n v. Glenn, supra, 99 Va. 460 [39 S. E. 136]) that in making section 661 applicable to the tax deeds provided for by act of 1898 the Legislature did not intend that the requirements of the act of 1898 should be disregarded. But the fact remains that by referring to and making section 661 applicable the Legislature clearly indicated an intent that substantial compliance with the act of 1898 was sufficient. The tax deed under discussion does set forth all the circumstances, not with the greatest possible technical nicety, but in a manner such as I must regard as within the meaning and intent of the act of 1898.

[2] "In connection with the foregoing tax deed another matter may be here mentioned. The plaintiff attempted to introduce evidence tending to show that the application to purchase made by Dotson was in fact made by him as the secret agent (as to two-thirds interest) of Dennis, the clerk, and McCoy, the deputy clerk, of the Buchanan county court. Assuming the fact to be as stated, objection to this offer was sustained. The argument for plaintiff is based chiefly on a supposed violation of public policy in treating as valid a tax deed made under such circumstances. Independent of any other reason, the case of *Yancey v. Hopkins*, 15 Va. 419, 433, 434, tends strongly to overturn the argument founded on a supposed public policy. However, even a more conclusive answer to the argument is found in the fact that the Legislature which, on March 5, 1894 (Acts 1893-94, p. 738), first authorized the clerk to sell lands previously sold to the commonwealth, had only seven days prior thereto (Acts 1893-94, p. 473; Act of February 26, 1894) re-enacted section 656 of the Code of 1887 [Code 1904, p. 320]. This section read originally and as re-enacted: 'When the clerk is a purchaser, the deed for the land purchased by him shall be executed by a commissioner appointed by the circuit court of the county * * * wherein the land is situated.' Even if the act of 1898 had been the first that authorized clerks to sell delinquent lands, the mere fact that the Legislature in 1898 left in force section 656 of the Code would be a sufficient reason for holding that it is not contrary to the policy of the law that clerks should become pur-

chasers. Even under such circumstances there would be no warrant for assuming that the Legislature in 1898 was ignorant of the existence of section 656; and it would be the duty of the court to assume the contrary. Sutherland, Statutory Construction, § 333; *School Board v. Patterson* [111 Va. 482] 69 S. E. 337-339. But as the prototype of the act of 1898 was enacted by the same Legislature that had only a few days previously reenacted section 656, it is clear that we cannot assume ignorance of section 656 on the part of the Legislature which enacted the act of March 5, 1894. And it is highly improbable that in amplifying in 1898 the act of March 5, 1894, the Legislature of 1898 intended an unexpressed change in the policy of the law. The only permissible assumption therefore is that in 1898 the Legislature knew of and intentionally left in force section 656. If this assumption be proper, it is manifest that the Legislature in 1898 intended that the clerk might himself be the purchaser at a tax sale and purposely left in force a provision by which the deed to him could be executed by a commissioner appointed for the purpose. And if so, it is very clear that we cannot assert that a tax deed from the clerk to Dotson, the clerk being an interested party and intending to later take a conveyance from Dotson, is in violation of the policy of the law. It is said that the law may permit the clerk to be purchaser when he acts 'openly and above board' and has a commissioner make the deed to him, but that it does not sanction 'secret proceedings' such as are here sought to be shown. If the land was delinquent for 1895 taxes, and if it had been bid in by the commonwealth, I can perceive no reason in morals or in law why the arrangement between Dotson and the defendants was improper. If the notice required by law was thereafter duly given and if the state and county received the amounts due them, it could be of no interest to any one whether the clerk and his deputy appeared on record to be the purchasers, or whether some one else appeared to be the sole purchaser.

"Another argument for plaintiff is based on the theory that where the clerk is the real purchaser, although the sale is made to a trustee for the clerk, the deed must be made (under section 656) by a commissioner. In enacting section 656 and its prototypes (originally act of March 8, 1846; Acts 1845-46, p. 14, § 4; see, also, Acts 1872-73, p. 379; chapter 37, § 18. Code 1860), the intent was, I think, first, to allow clerks to purchase delinquent lands, and, second, *in the interest of the clerk*, to avoid the incongruity of a deed from the clerk in his official capacity to himself in his personal right. If therefore the clerk procures a trustee to take the tax title, there is no reason found in the language of the statute why a commissioner should make the deed. In fact, a deed made by a commissioner to John Smith, avowedly or secretly, trustee for the clerk, would be unauthorized and of highly doubtful validity. It follows that this objection after all can be founded only on a supposed violation of the policy of the law—which has been sufficiently discussed.

"After having heard much testimony concerning the possession of the land, none of which is now of interest, the plaintiff moved that the tax deed be stricken out. The grounds of this motion, in addition to the ground that the recitals in the deed are insufficient, are:

"(1) The order of publication falsely states the amount of taxes for which the lands were sold to the commonwealth.

"(2) The land proceeded against, as shown by the order of publication, consists of three tracts, and the land conveyed consists of two tracts, which are necessarily distinct and different tracts.

"(3) The order of publication shows that it was directed by the clerk to be published in one newspaper and it appears to have been published in a different newspaper.

"(4) The order of publication does not name the proper parties in interest to whom notice is required under the statute.

"(5) The order of publication also falsely states that there are no trustees, mortgagees, or beneficiaries under any deed of trust or mortgage on record, or at least it fails to state that there are any trustees, mortgagees, or beneficiaries shown by the records of Buchanan county at the time of the alleged application to purchase the land conveyed by the deed or any other land.

"(6) The order of publication, which includes the application, does not state in whose name the land stood at the time of filing the application.

"(7) The misrecitals or false recitals in the deed as to the amount of taxes for which the land was sold to the commonwealth, the number of tracts included in the land proceeded against, and the misrecitals or failure to recite that any trustees, beneficiaries, or mortgagees appear of record in Buchanan county at the date of the application, was misleading to the owner or persons beneficially interested in the land or holding the legal title.

"(8) It is shown on the face of the proceedings, particularly the order of publication, that the land charged with taxes in separate tracts was sold to the commonwealth in bulk at a bulk sale and therefore shows on the face of the order of publication a void sale to the commonwealth, and no prejudice to the rights of the landowner could arise from any proceeding under the order of publication. And if the lands were sold to the commonwealth in separate tracts the proceeding was without jurisdiction to sell more than one tract, and therefore the deed and the whole proceeding is void."

"It was after the foregoing motion had been made and overruled that plaintiff introduced in evidence (plaintiff's Exhibit 015) an extract copy from the Buchanan county commissioner's Book (Land Book) for the year 1895 and (plaintiff's Exhibit 016) an extract copy from the auditor's office, being the treasurer's report of sale to the commonwealth in 1897.

"I shall consider the foregoing grounds in the above order.

[3] "(1) The order of publication does not undertake to state the amount for which the land was sold to the commonwealth. It does contain the application to purchase wherein Dotson agrees 'to pay for said real estate the amount for which the sale to the commonwealth was made, together with' certain other sums required to be paid. The statute does not require (Acts 1897-98, pp. 343, 344) that the amount for which the land was sold to the commonwealth be stated. It only requires an offer to pay a sum total, which includes the aforesaid sum.

"It is true that there is a discrepancy between the total offered in the application and the amount recited in the tax deed, if the sum of \$152.06 was intended as a statement of the total amount offered. But the application is not necessarily so to be read. The sum of \$152.06 is probably the total of the amount for which the land was sold to the commonwealth plus the taxes and levies that would have accrued since if the land had not been sold to the commonwealth, on which interest, not calculated and not set out in the application, was also offered to be paid. The sum total stated in the deed (\$205.07) presumably consists of \$152.06 plus interest, calculated according to the act of 1898, and the costs and expenses of the application.

"But even if we should without warrant assume that the amount offered in the application was less than should have been offered, so long as the amount actually paid was the proper amount, I do not perceive that the tax deed is thereby rendered invalid. Only the commonwealth and the county of Buchanan were interested in the *amount* of the offer. They presumably received all that was due them and they are not complaining. The amount offered by the applicant had not the slightest effect on the trustees' right to redeem, or on the amount they must have paid to redeem.

[4] "(2) Inasmuch as the *three* tracts mentioned in the application, as reproduced in the order of publication, aggregate 2,749 acres, and as the *two* tracts conveyed by the tax deeds also aggregate 2,749 acres, there is good reason for the conclusion that the recital in the application is a mere clerical misprision. For the deed is a more formal instrument than the application, and therefore more apt to contain the correct description.

"The defendants, by force of section 661, Code 1887, had a right to stand on the tax deed alone. The attack on it had to come from the plaintiff, on whom the burden of showing the invalidity of the tax deed rested. As both the application and the tax deed referred to the commissioner's land book of 1895 as identifying the land, it seems to me that the court could not, in the absence of said land book, assume that it showed three tracts assessed to J. D. Sargeant and therefore conclude that the application was for different land from that conveyed by the tax deed. Where the party having the burden

of proof does not offer evidence referred to in the papers attacked which would demonstrate whether the difference between the application and the deed was a clerical error or not, the court should assume that such evidence would not be favorable to the attacking party. As the evidence stood when the motion to strike out the tax deed was made, the variance between the application and tax deed was only in a part of the description and should have been treated as a clerical error falling under the doctrine, '*Falsa demonstratio non nocet.*' Having in view the legislative intent shown in the act of 1898, I know of no reason why an innocuous partial discrepancy between the application and the tax deed should invalidate the latter. But, in addition, the notice required by the act of 1898 is only to be given: (1) To the person in whose name the land stood at the date of the sale to the commonwealth; (2) and, under certain circumstances only, to the person in whose name the land stands at the date of the application on the commissioner's book; and (3) to certain trustees, mortgagees, and beneficiaries under deeds of trust recorded less than 10 years prior to the application. The meaning of the language, 'the person in whose name the real estate stood at the date of the sale thereof to the commonwealth,' is the person in whose name the real estate stood on the commissioner's book. The context and a reference to section 469, Code 1887, makes this quite plain. By that section, when land is sold to the commonwealth the commissioner shall continue the land '*upon his land book in the name of the former owner.*' And in the act of 1898 notice is to be given the person in whose name the land stands on the commissioner's book at the time of the application only in the event the land has been transferred contrary to the provisions of section 469. 'Transferred' on what book? Of course, on the commissioner's book. As the land stood on the commissioner's book in the name of J. D. Sargeant at the time of the sale to the commonwealth (March 23, 1897), as it had not been transferred on the commissioner's book (so far as the evidence shows) to any one else, and as the trust deed of December 28, 1887 (even if any trust deeds except those to secure the payment of money were intended) was recorded April 16, 1888, and more than ten years prior to the application (August 24, 1899), it is clear that the act of 1898 did not require notice to any one except J. D. Sargeant. The trustees under the deed of 1887 apparently not having paid the commissioner of revenue (section 524, Code 1887), his fee therefor did not secure a transfer of the land to themselves on the commissioner's land book (sections 459, 461, 470, Code 1887), when they were authorized so to do, and therefore cut themselves off from any right to notice of Dotson's application under the terms of the act of 1898. As only J. D. Sargeant had a right to notice, the error in the application, or in the order of publication, in misdescribing the land as *three* tracts was wholly immaterial.

"For J. D. Sargeant, of all people, would be the last to be misled by such error, as he had years before wholly parted with every vestige of interest in the land.

"However, if it be admitted that the court erred in refusing to strike out the tax deed at the time the motion was made, still the question now is whether or not the verdict should be set aside and a new trial granted. Immediately after the motion to strike out the tax deed was overruled, the plaintiff put in evidence (015) an extract copy of the commissioner's book for the year 1895. This paper shows that the land assessed to J. D. Sargeant for 1895 consisted of *two* tracts on Tug river, aggregating 2,749 acres. This evidence makes it certain that the recital in the application that the land consisted of *three* tracts is a mere error, which cannot overcome and obliterate the remainder of the description. To grant a new trial under such circumstances would be unjustifiable. The ruling on the motion to strike out the tax deed, even if regarded as erroneous when made, in view of the evidence then before the court, has become right in view of the evidence subsequently introduced. To grant a new trial on such ground would be to sanction the theory that a party may knowingly hold back material evidence in his possession, and would be to order a retrial which would of necessity lead to no change in result. However, too much is conceded in assuming that the refusal to strike out the tax deed may have been er-

ronéous when made. The application describes the land applied for by reference to the land books of 1895, 1897, and 1900. 'That is certain which may be made certain.' The court would have been in error had it sustained the motion without requiring the plaintiff to produce these land books. It would have been deciding that the land applied for was not the same as that conveyed by the tax deed without considering the entire description of the land applied for as contained, by reference, in the application.

[5] "(3) The third ground of the motion to strike out the tax deed is largely, if not wholly, deprived of force by the admission made in open court by counsel for plaintiff: 'It is admitted that at the time of the publication of the order of publication there was but one paper published in Buchanan county.' The record reads: 'And it is ordered that a copy of the said application be published once a week for four successive weeks in the Grundy Messenger, a weekly newspaper published in Buchanan county, Virginia. * * * And 'I hereby certify that the subjoined order of publication was duly published in the Buchanan Messenger, a weekly newspaper published in the town of Grundy, in Buchanan county, Virginia, for four successive weeks,' etc. If there was at that period only one paper published in Buchanan county, it follows that the application was published in the paper in which it was intended by the clerk that it should be published. Evidently we have here again a mere clerical error of no moment whatever, which could have done no harm to any one, and which could by no possibility have harmed J. D. Sargeant—the only person in all the world to whom notice had to be given—for he had long since ceased to have the slightest interest in the matter.

"(4) The fourth ground of the motion has already been sufficiently discussed. If the trustees under the deed of 1887, or their successors in office, had complied with the law, the land would have stood on the land book (commissioner's book) at the time of Dotson's application in the name of the trustees, and in such event, but only in such event, the trustees would have been persons entitled to notice. As the act of 1898 reads, however, and as the land never was transferred on the commissioner's books, Sargeant, and he alone, was entitled to notice. The order of publication does name J. D. Sargeant, and this ground of objection appears to be without merit.

[6] "(5) The application does state that there are no trustees, mortgagees, or beneficiaries shown by the records of Buchanan county. As the act of 1898 only required certain trustees, mortgagees, and beneficiaries to be set out on the application, and as in fact there were no such trustees, etc., I am unable to say that there was even an irregularity in the application in this respect. It is argued that the statement might have misled the trustees. As the trustees were not entitled to notice, I do not perceive the right to assert that they could have been misled. Only the person entitled to a notice can claim to have been misled by an error in the publication of such notice. Moreover, there was evidence, which was not contradicted, and which quite satisfactorily showed that the trustees and several of their agents had actual notice of the sale to the commonwealth having been made and of Dotson's application to purchase, and that the trustees intentionally declined to redeem the land on the ground that they had previously stripped it of all value. In this connection, see *Stevenson v. Henkle*, 100 Va. 591 [42 S. E. 672]; 23 Cyc. 914-916, 994, 995; 15 Ency. Pl. & Pr. 269; *McQuiddy v. Ware*, 20 Wall. 14 [22 L. Ed. 311]; *Corn Ex. Bank v. Applegate* [97 Iowa, 67], 65 N. W. 1007; *Irions v. Keystone* [61 Iowa, 406], 16 N. W. 349; *Turner v. Case* [133 N. C. 381], 45 S. E. 781; *Satterlee v. Grubb* [38 Kan. 234], 16 Pac. 475; *Bogart v. Klene* [85 Minn. 261], 88 N. W. 748; *Stover v. Hough* [47 Neb. 789], 66 N. W. 825; *Reed v. Thompson* [19 Neb. 397], 27 N. W. 391; *Clark v. Tull* [113 Iowa, 143], 84 N. W. 1030; *McBride v. Harn* [52 Iowa, 79], 2 N. W. 962; *Zobel v. Zobel* [151 Cal. 98], 90 Pac. 191.

"(6) The sixth ground of objection seems to be based only on a misapprehension of the facts. In the application, as reproduced in the order of publication, it is said: 'Said real estate is described as 2,749 acres of land and now stands on said commissioner's book in the name of said J. D. Sargeant.'

"(7) The seventh ground has been sufficiently discussed. If the trustees and their beneficiaries had been entitled to notice, and if the trustees had not had actual notice, this objection might be of importance.

[7] "(8) The assumption that the two tracts were sold en masse to the commonwealth in 1897 in violation of section 639, Code 1887 (Code 1904, p. 313), does not seem to me to be justified by the facts in evidence. If, as by law should have been the case, the two tracts were assessed separately, there is a presumption that the treasurer obeyed the law and sold them to the commonwealth separately. And the mere fact that the report of the sale is ambiguous and may (or may not) indicate a sale en masse is not sufficient to overcome this presumption. Again, the ambiguous report did not in the least prevent redemption of either or both tracts, and did the owners of the land no harm. Moreover, the obvious intent of the Legislature in the act of 1898 forbids that the plaintiff be allowed to avail himself of the supposed irregularity. In *Va. B. & L. Ass'n v. Glenn*, supra, 99 Va. 460, 468 [39 S. E. 136, 139], it is said: 'When he [the grantee in the tax deed] has in fact complied with all the provisions of the statute [act of 1898], and gotten rightly his deed, he comes within the protection of section 661, and no question can be raised as to the regularity of the proceedings by which the commonwealth acquired title to land conveyed to him by his deed, except as therein provided.'

[8] "The alternative ground of objection stated in the eighth paragraph of the grounds for the motion to strike out the tax deed seems to be based on the theory that, if the two tracts were separately sold to the commonwealth, the proceeding by Dotson is fatally defective in that he acquired title to two tracts in one proceeding. The act of 1898 does not seem to me to authorize such contention. Where two tracts stand on the commissioner's book in the name of one and the same person, both at the date of the sale to the commonwealth and at the date of the application, nothing in the language of the act of 1898 indicates that the applicant must make two separate applications, have two orders of publication, and obtain two deeds. The intent of the act being to facilitate tax sales, to encourage tax purchasers, and to make tax titles more secure, any ambiguity in the statute in the respect in question should be solved in favor of the tax title. And, further, the owners at any time during the four months allowed them for redemption could undoubtedly have redeemed both or either of the tracts. If, for instance, the trustees had desired to redeem the 2,093-acre tract alone, it would have been an easy task to ascertain from the commissioner's book for 1895 (a record in the clerk's office) the taxes for the year 1895 on the 2,093-acre tract, and it was a mere matter of computation to then ascertain the amount necessary to be paid to the clerk to redeem only the 2,093-acre tract. Again, the evidence, showing actual notice of Dotson's application to the trustees and their intentional refusal to redeem, disposes of any argument founded on a supposed inconvenience or hardship to the trustees. In the face of such evidence it is manifest that this objection to the tax deed, like several others already mentioned, is founded on an imaginary injustice having no existence in fact.

"All of the objections to the tax deed being considered, it remains to be said that the validity or invalidity of the deed depends largely on the doctrine of law to be applied. In many of the states tax titles, even when derived as a result of a sale of land already validly vested in the state, are so regarded that very slight irregularities are fatal. And such was at one time the Virginia doctrine. *Wilson v. Bull*, 34 Va. 22; *Boon v. Simmons*, 88 Va. 259 [13 S. E. 439]; *Bond v. Pettit*, 89 Va. 474 [16 S. E. 666]. But since 1898 in Virginia this doctrine does not prevail and is clearly contrary to the legislative intent. *Thomas v. Jones*, 98 Va. 323 [36 S. E. 382]; *Va. Co. v. Thomas*, 97 Va. 527 [34 S. E. 486]; *Va. Ass'n v. Glenn*, 99 Va. 460 [39 S. E. 136]; *Stevenson v. Henkle*, 100 Va. 591 [42 S. E. 672]. While the act of March 7, 1900 (Acts 1899-1900, p. 1234) is not retroactive and does not apply to the case at bar, still it is of persuasive force in arriving at the intent shown by the act of 1898. The act of 1900 clearly indicates that harmless irregularities in the application and proceedings in the clerk's of-

fice are not to invalidate the tax deed, and it seems reasonably clear that such was the intent of the act of 1898.

"The trial was concluded by a peremptory instruction to the jury to bring in a verdict for the defendants. A motion to set aside this verdict was made. As there was no disputed question of fact essential to the validity of the tax deed, it follows that, if my reasoning hereinabove set out be sound, the peremptory instruction was proper.

"The motion to set aside the verdict will be overruled, and judgment in accordance with the verdict will be entered."

The court below in disposing of the questions raised on the reargument, said:

[9] "(1) Under the act of March 7, 1900 (Acts 1899-1900, p. 1234), the first question is as to the propriety of construing the language, '*no suit shall be brought to set aside, cancel or annul* such deed, except for fraud as herein provided, unless within two years,' etc., as applicable to an attack made on a tax deed in the trial of an ejectment suit. On superficial consideration of the question it may seem proper enough to accept as conclusive the text of 37 Cyc. p. 1500, and the considerable array of decisions from sundry other states cited in support thereof, and to hold that the language used by the Legislature does not apply to the case at bar. However, the statute is a Virginia statute and should be construed according to the settled doctrines of the Virginia Court of Appeals.

"Beyond any question the proviso in question is a statute of limitation. In Virginia statutes of limitation are statutes of *repose*. In *Taylor v. Burnside*, 42 Va. 166, 187, it is said: 'The statutes of limitation are *emphatically statutes of repose*; * * * they attribute a wrongful inception to the possession and enjoyment which they protect.' In *Va. Co. v. Hoover*, 82 Va. 449, 454 [4 S. E. 689, 692], it is said: 'The statutes of limitation are to be enforced by the courts like any other statute. It has been often said by this court that they are *statutes of repose*. * * *' In *Templeman v. Pugh*, 102 Va. 441-445 [46 S. E. 474, 475], it is said: 'Statutes of limitation are *statutes of repose*, and especially is this true as to the estates of the dead. They are founded on a sound public policy, and should be *so construed as to advance the policy they were designed to promote*.' See, also, 4 Minor's Inst. (3d Ed.) p. 607.

"If the proviso in the act of March 7, 1900, is to be so construed as to effectuate the intention of the Legislature, and so 'as to advance the policy' it was 'designed to promote,' we cannot give it the strict, literal interpretation insisted upon by counsel for plaintiff. If construed literally, the statute fails to accomplish in large part the purpose manifestly intended. It protects invalid tax titles (which have been recorded over two years) only against suits in equity but does not protect them against suits at law. Thus construed the average tax title is merely an *unremovable cloud* on the delinquent taxpayer's title. The delinquent landowner remaining in possession cannot maintain ejectment (*Steinman v. Vicars*, 90 Va. 595, 599 [39 S. E. 227]) and he cannot in equity maintain a suit to annul the tax deed. Thus construed, the statute is an absurdity and defeats very largely the clear purpose of the Legislature. The statute must, in order to carry out its purpose, be construed as applicable to any attack, made in any form of suit or action, if the period of limitation has run before the suit or action is instituted. This present action was brought against persons in possession who claimed under a tax title. If the plaintiff succeeds in this action, his objections to the validity of the tax title will have to be sustained. In other words, this present suit is, and had to be, in effect, a suit to annul the defendant's tax title.

"(2) The next question is as to the propriety of construing the proviso as applicable to a tax deed which was recorded prior to the passage of the act. In construing statutes of limitation, where the intent of the Legislature is not made entirely clear, the courts generally adopt one of the three following constructions: (1) Read the statute as applying only to causes of action arising after the passage of the statute. (2) Construe the statute as applying

to such existing actions only as have already run out a portion of the statutory time, but which still have a reasonable time left for prosecution before that statutory time expires. (3) Begin the period of limitation as to existing causes of action with the date of the statute. See 25 Cyc. 995; *Sohn v. Waterson*, 17 Wall. 596 [21 L. Ed. 737]. See, also, *Terry v. Anderson*, 95 U. S. 628 [24 L. Ed. 365]; *Koshkonong v. Burton*, 104 U. S. 668 [26 L. Ed. 886]; *Vance v. Vance*, 108 U. S. 514 [2 Sup. Ct. 854, 27 L. Ed. 808]; *McGahey v. Virginia*, 135 U. S. 705 [10 Sup. Ct. 972, 34 L. Ed. 304]; *Wilson v. Iseminger*, 185 U. S. 55 [22 Sup. Ct. 573, 46 L. Ed. 804]; *Sayre v. Wisner*, 8 Wend. (N. Y.) 661; 19 Am. & Eng. Ency. (2d Ed.) 176. We are here construing a Virginia statute. If there be room for choice among the three constructions, the one adopted by the Virginia courts should, of course, be followed. It is at least quite probable that the Virginia doctrine is that the proviso should be construed only as applying to tax deeds made after the passage of the act. See *Elliott v. Lyell*, 7 Va. 269, 279; *Com. v. Hewitt*, 12 Va. 181, 187; *Day v. Pickett*, 18 Va. 104, 109; *Shepherd v. Larue*, 20 Va. 529, 531; *Mercer v. Beale*, 31 Va. 189, 208; *Duval v. Malone*, 55 Va. 24, 28; *Phillips v. Com.*, 60 Va. 485, 523; *Price v. Harrison*, 72 Va. 114, 120.

"*Bickle v. Chrisman*, 76 Va. 678, is not in point. The statute of limitation there in question was in force years before the conveyance had been made. See 2 Code 1849, p. 593, § 13. *Town v. Pace*, 66 Va. 1 [18 Am. Rep. 663], is also not quite in point, as the statute there was not a statute of limitation.

"But there exists a still more satisfactory reason for declining to read this proviso as applying to any tax deeds except those made after the passage of the act. We cannot with any sort of propriety assume that the Legislature either intended to enact unconstitutional legislation or that the Legislature was grossly ignorant of constitutional provisions. In adding the two new grounds for attacking tax deeds, the Legislature must have had in mind only tax deeds thereafter to be made. And, if so, I can find no reason for assuming a sudden change of intent to make the immediately following proviso applicable to both future and prior tax deeds. Reading the statute and its title as a whole, it seems reasonably clear that the minds of the law makers were fixed on tax deeds *thereafter* to be made. To construe the proviso as applying to tax deeds recorded before the passage of the act, we must add to the words, 'within two years after the same is duly admitted to record,' the words, 'or within two years after the passage of this act.' It is only where there is real doubt as to the legislative intent that the courts are authorized to thus construe into a statute words not put there by the Legislature. If the proviso was an act of Legislature standing alone and uncoupled with what precedes it, the doctrine of *Sohn v. Waterson*, *supra*, might possibly be applied. But the act here so clearly indicates that tax deeds to be made in the future are alone in contemplation, that I do not feel at liberty to construe the statute as applying to a tax deed which had been recorded before the statute was enacted. In *Sohn v. Waterson*, *supra*, it is said: 'A statute of limitations may undoubtedly have effect upon actions which have already accrued as well as upon actions which accrue after its passage. Whether it does so or not *depends upon the language of the act, and the apparent intent of the Legislature to be gathered therefrom.*' Page 599 of 17 Wall. As gathered from the language of the act of 1900, the intent to make the limitation apply only in favor of tax deeds to be thereafter made seems to me to be rather clear. It should also be said that two *nisi prius* Virginia courts have *seemingly* adopted this view (*Mathews v. Glenn*, 9 Va. Law Register, 546; *Glenn v. Murphy*, 11 Va. Law Reg. 37, 39), and an appeal was refused in the former case. That suit was necessarily instituted after June 12, 1902 (the date of the decree in the Court of Appeals in *Mathews v. Glenn*, 100 Va. 352 [41 S. E. 735]), and hence more than two years after the date of the act of March 7, 1900. It is true that we do not know that the present contention of the defendants at bar was considered by either Judge Grinnan, Judge Ingram, or by the Court of Appeals. But such contention *may* have been considered, especially by the Court of Appeals. The only conclusion I can reach that is satisfactory

to myself is that the two-year limitation in the act of 1900 does not apply in the case at bar.

"(3) The very recent case of *Coles v. Jamerson* [112 Va. 311], 71 S. E. 618, does not seem to afford reason for holding that the tax deed at bar does not sufficiently set forth all the circumstances relating to the sale. In that case the tax title was acquired at a *treasurer's sale* held under section 638, Code 1904. In such cases it is perfectly clear that the treasurer's report and the order of confirmation are circumstances in relation to *the sale*. But where, as in the case at bar, *'the sale'* was made *by the clerk*, years after the treasurer's sale to the commonwealth, I find in *Coles v. Jamerson* nothing which overrules *Flanagan v. Grimmet*, 51 Va. 421, 436. In the act of 1898 the intent is manifest, and it would pervert the meaning of the statute to require in the tax deed any circumstances not relating to the clerk's sale.

"(4) *School Board v. Patterson*, 111 Va. 482 [69 S. E. 337]. In view of the conclusion reached it is unnecessary to consider whether or not this decision should be followed. I shall for present purposes assume that it should be followed in like cases. But the question remains as to its application to the case at bar.

"The resignation of Sargeant in 1891 and the appointment of Torpin as his successor were certainly not such 'conveyances' as are contemplated by section 459, Code 1887. A resignation of a trustee is in no possible sense a 'conveyance,' and an appointment is no more a conveyance than would be a decree substituting one trustee in lieu of another. The deed of trust of 1887 was from J. D. Sargeant and others to J. D. Sargeant, Lewis Rodman and Thomas Graham, Trustees. If this conveyance had been listed by the clerk and the land transferred on the land book, the assessment would, unquestionably, following the universal practice of the commissioners of the revenue, have been in the name of 'J. D. Sargeant et al., Trustees.' We have therefore no difference between the assessment that was made and the assessment that should have been made except that between 'J. D. Sargeant' and 'J. D. Sargeant et al., Trustees.' To hold therefore that the case at bar falls under *School Board v. Patterson*, I must overrule *Stevenson v. Henkle*, 100 Va. 591 [42 S. E. 671]. This last-named case is so identical in principle with the case at bar that I think it is controlling. And in the case at bar the trustees had actual notice of the sale to the commonwealth and of Dotson's application to purchase, and *declined to redeem*.

"The only conclusion I can satisfactorily reach is to enter judgment in accordance with the verdict."

We find no error.

Affirmed.

TOWN OF GLENWOOD SPRINGS v. GLENWOOD LIGHT & WATER CO.†

(Circuit Court of Appeals, Eighth Circuit. December 18, 1912.)

No. 3,705.

(Syllabus by the Court.)

1. WATERS AND WATER COURSES (§ 183*)—MUNICIPAL SUPPLY—FRANCHISES—GRANT—MUNICIPAL COMPETITION—INJUNCTION.

The exclusion of the grantor in a municipal or quasi municipal grant or contract from the right to compete with the grantee does not inhere in the grant or contract unless such exclusion is clearly stipulated therein, or is necessarily implied therefrom.

A town granted to a water company the right to construct and operate waterworks for a term of years to supply the town and its inhabitants with water for fire, domestic, and other purposes, the right to lay and maintain its pipes in the streets and alleys of the town for this purpose, and the exclusive right to furnish the town with water for public pur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied February 26, 1913.

poses, such as the extinguishment of fires, the flushing of sewers and the sprinkling of the streets, and the town agreed to pay stipulated prices for the water for public purposes, to protect the company in its use of the streets, in the construction and use of its waterworks and in the collection of its water rates. The water company accepted this grant, executed the contract, and constructed and operated its waterworks.

Held, the grant and contract did not exclude the town from the right to construct and operate waterworks to supply its inhabitants with water for domestic and other purposes in competition with the company, and an injunction restraining it from so doing could not be sustained.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 277, 278; Dec. Dig. § 183.*]

2. SPECIFIC PERFORMANCE (§ 94*)—WATERS AND WATER COURSES (§ 183*)—RIGHT TO RELIEF—COMPLAINANT IN POSSESSION.

Courts of equity will not ordinarily compel the specific performance of a contract either by decree or by an injunction against its violation at the suit of a party who is guilty of a substantial breach of it.

In a contract for an extension of the foregoing grant and agreement the town and the company agreed that the town might elect to purchase the waterworks of the company at any time during the extension, that in case of such election each party should appoint two arbitrators, and the four should, if they agreed, fix the reasonable value of the waterworks, which should be the price to be paid therefor by the town, and that, if the arbitrators failed to agree, they should appoint an umpire, whose award of the value of the waterworks should be final. The town elected to purchase, appointed two arbitrators, and requested the company to appoint two and to proceed to fix the valuation. The company failed to appoint arbitrators or to take any action for 11 months. Thereupon the town repealed the resolution signifying its election, and was about to issue bonds to purchase the waterworks at a price it specified, and, if the company failed to accept that price, to construct waterworks of its own, when the company filed its bill and applied for an injunction.

Held, these facts present no equity entitling the company to an injunction against the purchase of the waterworks by negotiation, or other lawful means dehors the contract, or against the construction or operation of waterworks by the town.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 249-256; Dec. Dig. § 94;* *Waters and Water Courses*, Cent. Dig. §§ 277, 278; Dec. Dig. § 183.*]

Appeal from the Circuit Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit by the Glenwood Light & Water Company against the Town of Glenwood Springs. Decree for complainant and defendant appeals. Reversed and remanded, with directions to dismiss.

John A. Rush, of Denver, Colo., for appellant.

George L. Nye, of Denver, Colo., and C. W. Darrow, of Glenwood Springs, Colo. (C. S. Thomas, W. H. Bryant, and W. P. Malburn, all of Denver, Colo., on the brief), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. The decree which is challenged by this appeal enjoins the town of Glenwood Springs from incurring indebtedness, or issuing bonds to raise money to construct waterworks to supply its inhabitants with water, and from seeking to acquire or ac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quiring any part of the water system of the Glenwood Light & Water Company, except by paying a reasonable value for its waterworks system fixed by arbitrators in the way prescribed in the contract evidenced by an ordinance of the board of trustees of the town passed on February 14, 1905. The controlling question in the case is: May the town lawfully build and operate a waterworks system in competition with that of the company? The court below answered this question in the negative, and in effect enjoined the town from so doing. Counsel for the company contend that this conclusion was correct, and that this result was just and equitable, because, although the town had not granted to the company an exclusive franchise to furnish itself and its inhabitants with water, it had, by its contracts with the company, precluded itself from entering into competition with the company in that business, and because it had contracted with the company to purchase its waterworks at a reasonable valuation to be fixed by appraisers.

The company owns and operates a system of waterworks in the town under a contract evidenced by Ordinance No. 87 of September 28, 1887, whereby, until September 27, 1907, the right was granted by the town to the predecessors in interest of the company who accepted the ordinance to construct, maintain, and operate waterworks and to lay its pipes in the streets and avenues of the town, and under an ordinance adopted February 14, 1905, and accepted by the company, whereby the town extended until September 27, 1927, all the rights and privileges granted by the ordinance of September 28, 1887, and the company gave to the town the right to purchase its waterworks at any time during this extension at a reasonable valuation to be fixed by arbitrators. The facts upon which counsel for the company base their claim that the city is precluded from constructing and operating a system of waterworks to supply its inhabitants with water in competition with the system of the company are these: The contract of 1887 contained a grant by the city of a legal franchise to furnish water in the town for all purposes, for the purpose of supplying the town of Glenwood Springs and its inhabitants with water for fire, domestic and other purposes, a grant of the right to lay its mains and pipes in the streets and alleys of the town, a grant of an exclusive right to furnish the town with water from fire hydrants for fire purposes, flushing sewers and supplying water for sprinkling streets from sprinkling carts, an agreement that the town would not take water from hydrants or water for any public purpose furnished by any person or persons other than the grantees of the franchise, an agreement by the town to pay the grantees specified prices for the use of a certain number of fire hydrants and to protect by proper ordinances the grantees in their use of the streets, alleys, and public places of the town in the construction and use of their buildings, mains, pipes, and waterworks and in the collection of their water rates.

The argument is that by virtue of the provisions of the contract of 1887 which have been recited, and which by the extension agreement of 1905 remain in force until 1927, the city cannot, without the impairment of the obligation of its agreement, construct and operate waterworks of its own, and thereby compete with the company, that

its competition would be more effective than that of private parties and might be destructive, and that, as it has the power of taxation, it may compel the company to contribute toward the expense of the construction and operation of a town plant that might destroy its property. When, however, all is said and considered, the real question is, What is the contract between these parties? If the contract is that during its continuance the town will not construct and operate a system of waterworks in competition with that of the company then the construction and operation of such a system would work an impairment of the obligation of its agreement. If, on the other hand, the contract is limited to a grant of the franchise to construct and operate a system of waterworks to supply the town and its inhabitants with water, to a grant of the use of the streets and alleys for this purpose, and to an exclusive right to furnish to the town at fixed rates all the water it shall use during the life of the contract for public purposes, such as the extinguishment of fires, the flushing of sewers and the sprinkling of the streets, the construction and operation of waterworks by the town to supply its inhabitants with water would be neither a violation of its agreement nor an impairment of the obligation thereof. Counsel for the company concede that the contract is not exclusive; that notwithstanding its provisions the town may lawfully grant to third persons the right to build and operate waterworks to supply the inhabitants with water in competition with the system of the company. In the absence of an express and clear stipulation to that effect, and the contract contains none, it is difficult to conceive that the parties to this agreement intended to exclude the town when they did not exclude others. They inserted in the agreement a plain provision that the town would take and pay for water from the hydrants of the grantees and that it would not take water for public purposes from any other party. But they inserted no stipulation that the town would not construct and operate a system of waterworks to supply its inhabitants with water in competition with the system of the grantees and the logical inference is that they intended to make no such agreement.

[1] The exclusion of the grantor from the right to compete with the grantee does not inhere in a quasi municipal grant or contract unless it is clearly stipulated therein or necessarily implied therefrom, and in this grant it is neither and the town is not precluded thereby from constructing and operating a system of waterworks in competition with the company for the purpose of supplying its inhabitants with water. *Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150, 156, 158, 24 Sup. Ct. 43, 48 L. Ed. 127; *Bienville Water Supply Co. v. Mobile*, 175 U. S. 109, 112, 114, 20 Sup. Ct. 40, 44 L. Ed. 92; *Id.*, 186 U. S. 212, 22 Sup. Ct. 820, 46 L. Ed. 1132; *Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, 363, 22 Sup. Ct. 400, 46 L. Ed. 585; *Mayor, etc., of City of Meridian v. Farmers' Loan & Trust Co.*, 143 Fed. 67, 69, 71, 74 C. C. A. 221, 6 Ann. Cas. 599; *Thomas v. Grand Junction*, 13 Colo. App. 80, 56 Pac. 665.

Is the town precluded from constructing and operating waterworks because it has made a contract to purchase the system of waterworks

of the company? The extension agreement of February 14, 1905, contained this stipulation:

"The town shall have the right to purchase the waterworks of the company at any time during the term of the extension or renewal herein provided for and at a valuation to be fixed by four arbitrators, two to be selected by the owners of said waterworks and two by the authorities of said town; but, should they fail to agree, such arbitrators to select an umpire whose decision shall be final as to the value of such waterworks, such value to be the reasonable value of said waterworks system at the time of the arbitration."

On August 3, 1908, the town adopted a resolution which recited the ordinances of September 28, 1887, and of February 14, 1905, and resolved that "believing it is for the general welfare, as well as the will of the people, that the town should purchase, own, operate and control the waterworks and water supply of the town, that immediate steps be taken for the fulfillment of such purpose by the appointment of two arbitrators who shall have full power to enter into negotiations with two arbitrators to be selected by the Glenwood Light & Water Company, for the purpose of determining and agreeing upon a value to be placed upon said waterworks, but should they fail to agree, such arbitrators to select an umpire whose decision shall be final as to the value of said waterworks, subject to the limitations prescribed by statute and the extension ordinance aforesaid," that a copy of the resolution be delivered to the company and a formal request made of it that the resolution be speedily complied with. On the same day the town appointed two arbitrators. On August 10, 1908, notice of the appointment of these arbitrators and a request that the company appoint its arbitrators was served upon the company, but the company neither protested the appointment of either of the arbitrators named by the town, nor appointed any on its own behalf, nor took any action toward the determination of the value of its waterworks or the performance of its part of the contract of sale thereof to the town. The excuses it now offers for its inaction are that one of the arbitrators appointed by the town had litigated with the company its right to the source of its water supply, that the action of the town in making the election should have been by ordinance, and not by resolution, and that the resolution was not passed for the purpose of effecting, and did not effect, an election by the town to purchase, but was enacted to ascertain what the town could purchase the waterworks for and to reserve its right to elect after that determination. On January 4, 1909, the town adopted a resolution which recited that the company had failed to select arbitrators, that immediate action be taken to determine in a legal way the valuation of the waterworks, and that the mayor be directed to employ counsel to commence the necessary legal proceeding and do the necessary acts to protect and enforce the rights of the town to the valuation and title of the waterworks of the company. Nine months more passed. But the company still failed to appoint arbitrators or to take any other action to perform its part of the contract of sale. Thereupon, on October 6, 1909, and more than 11 months after the town appointed its arbitrators and required the company to perform the contract of sale, the town by resolution in

terms repealed and rescinded the resolution notice and election to purchase of August, 1908, and on October 18, 1909, the town adopted an ordinance which in terms repealed the extension ordinance of February 14, 1905. In December, 1909, the town adopted an ordinance to create an indebtedness of the town and to issue its bonds for \$125,000 to raise money to purchase or to construct waterworks, to offer the company \$60,000 in par value of the bonds for its waterworks, and, if it refused to sell for that sum, then to sell the bonds, and to use the money to construct a new system of waterworks of its own. The decree in this case enjoins the town from carrying into effect the provisions of this ordinance, or the provisions of the repealing ordinance of October 18, 1909. But, in view of the conclusion already reached that the original contract of the town and its extension did not preclude it from constructing and operating a system of waterworks in competition with that of the company, no equity entitling the company to this injunction is perceived in the facts which have been recited, whether or not the town elected and bound itself to purchase the waterworks of the company pursuant to the provisions of the extension ordinance of February 14, 1905.

Suppose that that ordinance is valid and that the town legally elected, and thereby irrevocably bound itself to purchase thereunder, the company has failed ever since August, 1908, when the notice and request were served upon it, to perform its part of this contract. It failed to do so for more than 11 months after the demand was made before the town attempted to withdraw from and to rescind the agreement of purchase. Nor has it yet offered or commenced to perform that contract. Its excuses for its failure are unsatisfactory. That an arbitrator was appointed by the town who had conducted a litigation against it did not relieve it from a performance of the contract on its part. A protest against his appointment or a suit might have removed him, and, if not, it was not he or any of the four arbitrators, but the umpire who was the final judge of the valuation of its property, and the company could undoubtedly have named two arbitrators who would not have consented to an unjust valuation or to the appointment of an unfair umpire. The other excuses it presents are that the resolution of election was illegal and ineffective because it was not an ordinance and because it was intended to and did not effect an election to purchase, and these excuses are excluded from consideration here by the supposition that there was a valid election. Under this supposition, before the election, the town had the right to elect to purchase the company's waterworks and the right to elect not to purchase them and to build waterworks of its own. In August, 1908, it elected to purchase the waterworks of the company, and demanded that the company should perform its part of the contract. The mutual agreements of the parties that upon the election each party should appoint two arbitrators who should, either themselves or through an umpire they should select, determine the value of the waterworks, were material covenants of the contract. The town performed its covenant in this regard. It appointed two arbitrators. The company failed to perform its covenant in this respect, though requested. It

did not appoint arbitrators and by this continuing failure it became guilty of the first breach of the contract. And courts of equity will not ordinarily compel the specific performance of a contract, either by decree or by an injunction against its violation, at the suit of a party who is guilty of a substantial breach of it. *Shubert v. Woodward*, 167 Fed. 47, 57, 92 C. C. A. 509, 519; *Marble Co. v. Ripley*, 10 Wall. 339, 358, 19 L. Ed. 955; *Taussig v. Corbin*, 142 Fed. 660, 667, 73 C. C. A. 656, 663.

[2] There is no equity here which entitles the complainant to an injunction against the acquisition of its waterworks by the town, by negotiation and purchase dehors the contract made by the election, or against its construction and operation of its own waterworks. Suppose, on the other hand, that the resolution of election was void or ineffective, then the town has the right to construct and operate its own waterworks without let or hindrance by the company, and there is no logical escape from the conclusion that there was no equitable ground for the injunction.

If it be said that in so far as the resolution of October 6, 1909, attempted to repeal the election resolution of August, 1908, and in so far as the ordinance of October 18, 1909, attempted to repeal the extension ordinance of 1909, they are void and the complainant is entitled to an injunction against their enforcement, the answer is that the evidence does not establish any restriction of or interference with the right of the company to furnish the inhabitants of the town with water, to use the streets, alleys, and public places for that purpose, to supply the town with all the water it may use for public purposes, and to be paid therefor by the town. Nor does it disclose any threat of any such restriction or interference, except that which may arise from the lawful construction and operation of waterworks by the town. If, in the future, any such unlawful restriction or interference, or the threat of it, shall arise, the powers of the courts of equity will be ample to enjoin it and to grant other just relief, and no estoppel of the company by this opinion or decision from securing all the relief to which subsequent events may entitle it can arise. The equity of the complainant, as the case now stands, however, does not support the injunction. The decree below must therefore be reversed, and the case must be remanded to the court below, with directions to dismiss the bill without prejudice to the right of the complainant to enforce, by suits in equity or actions at law, its right to furnish water to the inhabitants of the town, to use the streets and alleys of the town for that purpose, to supply the town itself with all the water it may use for public purposes, and to collect from it its rates therefor under the contract of 1887, and the extension of February 14, 1905.

It is so ordered.

GRIDER et al. v. GROFF et al.

GROFF et al. v. GRIDER et al.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1912. Rehearing Denied January 10, 1913.)

Nos. 3,725, 3,726.

*(Syllabus by the Court.)***1. PARTITION (§ 83*)—ACTION FOR PARTITION—RELIEF GRANTED.**

When, after a portion of common property has been partitioned, either voluntarily or by a decree, a court of chancery is prayed to find and adjudge the interests in the remainder, and, if necessary, to partition it, the court may, and it should, consider the respective shares of the value of the entire property which each party has received under the former partition, and so adjudge their interests in the remainder that each party shall receive from both proceedings, as near as may be, that just share of the value of all the property which in equity and good conscience he ought to receive.

Under a decree which fixed the proportionate shares of the parties in the value of 250 acres, 200 acres thereof were partitioned by a subsequent final decree. In a subsequent suit to adjudicate the interests of the parties in 36.5 acres of the 250 acres which had not been divided, it appeared that 13.5 of the 250 acres had been lost, and that by the former decree of partition of the 200 acres some of the parties had received their full shares of the 236.5 acres.

Held, these parties were entitled to no share or interest in the 36.5 acres, and the title thereto should be quieted in the other parties.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 228, 229; Dec. Dig. § 83.*]

2. JUDGMENT (§ 713*)—CONCLUSIVENESS—MATTERS CONCLUDED.

In a second suit upon a different cause of action between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action; but it is not conclusive relative to other matters which might have been, but were not, litigated and decided.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1234-1241; Dec. Dig. § 713.*]

Conclusiveness of judgment as dependent on theory of action or recovery, see note to *Millie Iron Mining Co. v. McKinney*, 96 C. C. A. 163.]

Smith, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Action by Minnie C. Groff and others against Warner U. Grider and another. From the judgment, both parties appeal. Reversed and remanded, with instructions.

Charles Blood Smith, of Topeka, Kan. (Clifford Histed, of Kansas City, Mo., and J. O. Fife and W. L. Wood, both of Kansas City, Kan., on the brief), for plaintiffs.

Frank Doster, of Topeka, Kan. (Hunter M. Meriwether, of Kansas City, Mo., on the briefs), for defendants.

Before SANBORN, HOOK, and SMITH, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SANBORN, Circuit Judge. On April 13, 1867, a decree was rendered in a suit in partition in a court of the state of Kansas, whereby the ownership of 250 acres of land at the confluence of the Missouri and Kansas rivers, known as the Armstrong tract, was adjudged to be as follows: Thomas Ewing, Jr., 19.42 acres, of average value thereof; Lawrence P. Graham, 8.63 acres; Thomas H. Swope, 10 acres of average value; Union Pacific Railway Company, Eastern Division, 12.07 acres, of average value; the Calhoun heirs, $\frac{1}{8}$ thereof, less 8.63 acres; the Armstrong heirs, $\frac{3}{8}$ thereof, less 42.50 acres; David E. James $\frac{13}{48}$ thereof; George B. Wood, $\frac{5}{48}$ thereof; Mary J. Wise, $\frac{1}{8}$ thereof. Commissioners were appointed by that decree to set apart in severalty to these parties their respective shares of the land. In September, 1867, they reported that 50 acres of the tract had been washed away by the rivers, that they had allotted the remainder of the 250 acres to the respective parties as described in their report, whereby 48.09 acres, of average value, were allotted to the first four parties named above, and 151.91 acres to the last five parties there mentioned. This report and allotment was confirmed and decreed by the court in October, 1867. The first four parties named had acquired their titles by conveyances of specified numbers of undivided acres of the tract and for convenience they will be called the "acre owners." These conveyances created a tenancy in common between them and parties who owned fractional parts of the land, who will be termed "fractional owners," and the effect of their deeds and of the decree was to vest in each of them title to such a portion of the value of the 250 acres as the number of acres decreed to each bore to the whole number of acres in the tract. For example, the Union Pacific Railway Company, Eastern Division, which was adjudged to be the owner of 12.07 acres, of average value, was thereby in reality decreed to be the owner of $12.07/250$ of the value of the 250 acres. *Grider v. Wood*, 178 Fed. 908, 910, 102 C. C. A. 109, 111.

By an avulsion in the spring of 1867, 50 acres of this tract was swept away by the rivers, and the commissioners and the court in the fall of 1867 partitioned only 200 acres, then above water, in the mistaken belief that the other 50 acres were irrevocably lost. After the decree of apportionment, however, 36.5 acres of the submerged 50 acres were restored, and the controversy in this suit involves the equities of the parties in this undivided remnant of the 250-acre tract.

The complainants in this suit, Minnie C. Groff and others, are the successors in interest of the parties who were adjudged by the decree of April 13, 1867, to have fractional interests in the 250 acres, and they are in possession of the 36.5 acres. The defendants, Warner U. Grider and the Missouri Land Company, have succeeded to the interests of the parties who were adjudged by that decree to be the owners of undivided acres of average value. Grider had brought, and was prosecuting, an action of ejectment against the complainants for these 36.5 acres, a dismissal of which had been reversed by this court, with directions to try it again, when the complainants exhibited this bill to enjoin the prosecution of that action and of a similar action for the same purpose, instituted by the Missouri Land Company, to

quiet the title to the 36.5 acres in the complainants, and, if the defendants were found to have any interest therein, to partition the 36.5 acres among its owners. These fractional owners alleged in their bill that the predecessors in interest of the defendants, who were parties to the partition suit of 1867, had received under the decrees in that suit more than their entire shares of the 200 acres then partitioned and of the 36.5 acres now in controversy, so that they had no equitable right to or interest in the latter tract of land, and ought to be enjoined from claiming any title to or possession thereof. The defendants answered the bill, and filed cross-bills, wherein they prayed that the 36.5 acres be partitioned between them and the complainants, and that they receive in value the same proportion of this remnant of the Armstrong tract which they were adjudged to receive of the 200 acres by the allotment decree of October, 1867. Testimony was taken, a final hearing had, and the court below held (1) that the decree of April 13, 1867, which adjudged the proportionate rights of the parties in the 250 acres, was conclusive upon all the parties and their predecessors, and that their subsequent rights and equities must be measured thereby; (2) that the subsequent decree of allotment of October, 1867, which confirmed the report of the commissioners, setting apart the specific tracts of the 200 acres pursuant to the April decree, rendered the respective rights of the parties to those allotments *res adjudicata*; and (3) that, where any of the parties subsequently prayed a court of equity to partition the remaining 36.5 acres, the chancellor might and should take the adjudications of the specific interests of the parties in the 250 acres as his basis and measure, and, taking into consideration what part of the value of the 250 acres adjudged to the respective parties by the decree of April 13, 1867, they had respectively received under the decree of allotment of the 200 acres in October, 1867, should so partition and decree the title to the 36.5 acres that each party should receive, out of the entire 236.5 acres adjudged by all the decrees, his just and equitable share as nearly as possible. All parties concede the soundness of the first two propositions, but the third is questioned by counsel.

The court below found that each acre of the 236.5 was of the same average value as every other acre; that by the decree of April 13, 1867, the acre owners were adjudged to be the owners of 50.12 acres of average value of the 250 acres, and that the fractional owners were adjudged to be the owners of the remainder; that pursuant to that decree, and under the allotment decree of October, 1867, which followed it, the acre owners received 48.09 acres of average value, so that they were still entitled to receive only 2.03 acres more out of the remaining 50 acres, but that, as only 36.5 acres had been restored, they were entitled to only $36.5/50$ of the 2.03 acres, or 1.482 acres. A decree was entered to that effect, and all the parties appealed.

The finding of the court below that each acre of the original tract, of the 200-acre tract partitioned, and of the 36.5-acre tract restored, was of like average value with all the other acres, is questioned; but it is sustained by the evidence, and the proof is conclusive that the

48.09 acres allotted to the acre owners by the decree of October, 1867, was of the same average value as the 151.91 acres allotted to the fractional owners by that decree, so that the fact is indisputable that under the decree of April 13, 1867, the acre owners were entitled to $50.12/250$ of the value of the original tract, and the fractional owners to $199.88/250$ of that value, that under the allotment decree the acre owners received out of the 200 acres, $48.09/250$ of the value of the 250-acre tract and the fractional owners $151.91/250$ thereof. The question for determination now is what, if any, share of the 36.5 acres restored are the acre owners justly entitled to receive in view of these facts?

[1] Counsel for the fractional owners contend that the acre owners are entitled to no share whatever in this tract, because they are entitled to nothing on account of the 13.5 acres irrevocably lost, and they have already received out of the 200 acres more than their full adjudged share of the entire 236.5 acres. The mathematical basis of this contention is unanswerable. The acre owners were entitled to $50.12/250$ of the 236.5 acres by virtue of the decree of April 13, 1867, which is 47.41 acres, and they had received 48.09 acres of average value under the allotment decree of October, 1867, or .68 of an acre more than their full share of the entire 236.5 acres. The Union Pacific Railway Company, Eastern Division, one of these acre owners, now represented by the defendant Warner U. Grider, was entitled under the decree of April 13, 1867, to $12.07/250$ of the 236.5 acres, which is 11.41 acres. It has received under the allotment decree of October, 1867, 11.58 acres, or .17 of an acre more than its just share. The other acre owners, represented in this suit by the Missouri Land Company, have received under the allotment decree .51 of an acre more than their full share of the 236.5 acres adjudged to belong to them by the decree of April 13, 1867. The fractional owners, on the other hand, by the decree of April 13, 1867, were adjudged to be entitled to $199.88/250$ of the 236.5 acres, which is 189.08 acres of average value, and they have received under the allotment decree of October, 1867, 151.91 acres, 37.17 acres less than the share adjudged to them by the April decree. Upon this state of the mathematics of the case, counsel for the fractional owners argue that, because they will receive no more than their just and adjudged share of the 36.5 acres if they retain that entire tract, while the acre owners will still have more than their adjudged share of the 236.5 acres, the latter should receive no part of the 36.5 acres, and the title thereto should be quieted in the fractional owners.

Counsel for the acre owners, on the other hand, insist that they are entitled to receive the same proportionate share of the value of the 36.5 acres that they received of the 200 acres, or $48.09/200$ thereof, which amounts to about 8.79 acres. Their argument is founded on several grounds, but chiefly on the proposition that the decree of allotment has rendered *res adjudicata* the question what was the acre owners' just share of the 200 acres, and the question what is their just share of the 36.5 acres. That it conclusively determined the first question must be conceded. But did it adjudicate the second?

The argument is that it adjudged the proportionate share of the acre owners in the 200 acres and thereby adjudged their proportionate share in the 36.5 acres. But the adjudication of their share in the 200 acres expressly excluded by the very terms of the allotment and decree, and left undetermined, their share in the 36.5 acres.

Their next contention is that the adjudication that 48.09 acres was the acre owners' just share of the 200 acres conclusively estops the fractional owners from claiming or proving in this controversy concerning the 36.5 acres that the acre owners received out of the 200 acres their full share of the entire 236.5 acres. It is clear that the decree estopped all parties thereto from denying that their respective shares in the 200 acres were rightly adjudicated. But it did not, in this new suit for the partition of this new subject-matter, the 36.5 acres, estop any party from availing himself of the facts which the decrees in the partition suit of 1867 established, that the acre owners were entitled to but $50.12/250$ of the value of the 250 acres, that they received $48.09/250$ of that value under the decree of partition of the 200 acres, and that this was more than $50.12/250$ of the entire 236.5 acres, for the purpose of showing the shares of the remaining 36.5 acres which in justice and equity the parties to the new suit should receive. The proof and consideration of these facts in the adjudication of this new subject-matter neither collaterally nor directly assails, modifies, or avoids the decrees of 1867. Nor does it in any way infringe the rule of law here invoked, that where a second suit is brought between the same parties upon a different cause of action, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action; but it is not conclusive relative to other matters which might have been, but were not, litigated or decided. *Harrison v. Remington Paper Co.*, 140 Fed. 385, 400, 72 C. C. A. 405, 420, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; *Linton v. Ins. Co.*, 104 Fed. 584, 587, 44 C. C. A. 54, 57; *Commissioners v. Platt*, 79 Fed. 567, 571, 25 C. C. A. 87, 91; *Board v. Sutliff*, 97 Fed. 270, 274, 38 C. C. A. 167, 171; *Southern Pac. Co. v. United States*, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355; *Southern Minn. Ry. Extension Co. v. St. Paul & S. C. R. Co.*, 55 Fed. 690, 5 C. C. A. 249.

[2] Conceding the conclusiveness of the adjudication that the just shares of the 200 acres were as set forth in the decree of October, 1867, the question there litigated, the issue what shares the respective parties are entitled to receive in the 36.5 acres, in view of the shares of the 250 acres to which they were conclusively adjudged to be entitled by the decree of April 13, 1867, and of the shares they actually received under the decree of October, 1867, an issue not litigated in the former suit and here first in question, is not concluded by those decrees, but is open to litigation and to such a decision as in the light of all the facts and circumstances equity and good conscience demand. The cases cited by counsel for the acre owners in support of their argument here, *Stewart v. Mizell*, 8 Ired. Eq. (43 N. C.) 242, *Witham v. Cutts*, 4 Greenl. (Me.) 31, and *Torrey v. Pond*, 102 Mass. 355, concern collateral attacks upon former adjudications, and are condi-

tioned by facts so radically different from those which govern this case that they do not rule the question here under consideration, and they fail to persuade that the answer that has been given to it is not right.

Another contention of counsel for the acre owners is that their deeds and the adjudication that they were the owners of 50.12/250 of the value of the 250 acres created a cotenancy between them and the other owners, and title to their proportionate interest in every acre of the tract, and therefore in every acre of the 36.5 acres, and that this interest was neither diminished nor affected by the subsequent allotment to and receipt by them of the 48.09/250 of the value of the entire 250 acres. It is undoubtedly true that, laying aside all equities, the deeds and decree created such a cotenancy. But every cotenant holds his title in trust to yield to each of his cotenants the latter's just share of the common property, in view of all the equities that have arisen, or may arise, between them. This is a suit in equity. All parties have prayed the court to ascertain and adjudge their respective interests in this land according to the rules and principles of equity jurisprudence. Like an ordinary suit in partition, the purpose and effect of this suit are to ascertain and adjust the equitable rights of the parties in these 36.5 acres, and, if necessary, to set off in severalty and adjudge to each that share of the value of this land to which he is equitably entitled. 21 Amer. & Eng. Encyc. of Law (2d Ed.) 1171, 1172, 1174; *Piper v. Farr*, 47 Vt. 721.

In such a suit a cotenant is entitled to an allowance for payments he has made of taxes, assessments, and liens upon the common property. *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315. When he has received more than his share of the rents of the common property, the excess may be charged to his account, and the amount of his share in the partition diminished thereby. *Barnes v. Rodgers*, 54 S. C. 115, 31 S. E. 885. If he has placed improvements on the property, he may be allowed their value, and his share may be increased thereby. *Parcoe v. Swan*, 25 L. J. Ch. 159; *Cochran v. Shoenberger* (C. C.) 33 Fed. 397. Advancements made by a decedent to some of those who become cotenants may be brought into hotchpotch, and such an adjustment and partition may be made that, taking these advancements into consideration, each heir shall receive his just equitable share of the value of the property. *White v. White*, 41 Kan. 556, 21 Pac. 604. And where, after a part of common property has been partitioned by a decree, and a court of chancery is prayed to find and adjust the interests of the parties in the remainder, and, if necessary, to partition it, the court may, and it should, consider the respective shares of the value of the entire property which each party has already received under the former partition, and so adjudge the disposition of the remainder that each party shall receive from both proceedings, as near as may be, that just share of the value of all the property to which in justice and good conscience he is entitled.

The suggestion is repeatedly made in the brief for the acre owners that the decrees of 1867 fail to show that they received more than their share of the 200 acres, although they disclose the fact that they

received a larger number of acres than their share, because they are partitions of the value of the 200 acres, and the receipt of an excessive number of acres is not evidence of the receipt of an excess of value. But, as has been already stated, the evidence is conclusive, and without conflict, that the commissioners so apportioned and the court so partitioned the 200 acres that the acres adjudged to each party were of the same average value as those adjudged to every other party. The result is unavoidable that the number of acres allotted was conclusive evidence of the proportion of the value allotted to each party.

It is earnestly contended that the computation, on which the conclusions which have been stated are based, are erroneous in this: That the share adjudged to the acre owners by the decree of April 13, 1867, was $50.12/_{208}$ of the value of the land, and not $50.12/_{250}$ thereof. In support of this contention they cite these facts: On April 11, 1867, the Kansas court ordered John Runk to survey the land within the boundaries mentioned in the petition in the suit of 1867, and to report by the following Saturday. The decree of April 13, 1867, was entered on the following Saturday. There is a statement in the report of the commissioners made on September 26, 1867, which was subsequently confirmed by the court, that by a survey made during the April, 1867, term of the court there were found to be 208 acres in the tract then in controversy, that a division of these 208 acres based on that survey was made, whereby the acre owners were given the number of acres specified as their respective shares in the April decree, that a subsequent survey in July disclosed the fact that there were only 200 acres remaining in the tract, and that the allotments which the commissioners finally made, and their report, were proportioned in quantity to that fact. But the conclusion that the proportionate interests of the parties fixed by the decree of April 13, 1867, were in the 208 acres, and not in the 250 acres, is demonstrated to be a mistake by the decree itself and the pleadings on which it rests. The petitioners in that suit describe in their petition and pray the partition of "all that parcel of land lying in the forks of the Missouri and Kansas rivers and between the Missouri state line and the Kansas river as lies north of Turkey creek, containing about 250 acres, more or less." The decree of April 13, 1867, describes the tract in the same words, and adjudges the ownership in that tract of 250 acres, excepting about 8 acres described by metes and bounds, as stated in the opening of this opinion. And the fact which concludes this issue is that if a reduction of the fractional shares adjudged by the April decree to acres on the basis of an adjudication of the 250 acres be made, the aggregate of all the acres adjudged by that decree becomes 250 acres, while if those shares are reduced to acres on the basis of an adjudication of the 208 acres the aggregate number so adjudicated becomes about 216 acres. There can, therefore, be no mistake in the conclusion of the court below, and of this court, that the decree of April 13, 1867, adjudicated the respective shares of the parties in the 250 acres, and not in the 208 acres.

The arguments and suggestions of the parties regarding their rights

to the property here in controversy have now been considered and discussed. The result is that the record in this suit proves that the acre owners received out of the 200 acres that was partitioned in 1867 their full proportionate and adjudged share of the value of the 200 acres then partitioned and of the 36.5 acres now in controversy, that if the fractional owners retain all of this 36.5 acres they will not receive more than their proportionate adjudged share of the 236.5 acres, that there is consequently no equity in the cross-bill of the acre owners, and the fractional owners are entitled to a decree quieting in them the title to the 36.5 acres and perpetually enjoining the farther prosecution of the actions of ejectment brought by the defendants, Grider and the Missouri Land Company.

This conclusion renders immaterial specifications of error relating to the transfer of the title of the Union Pacific Railway Company, Eastern Division, to Grider, and to some of the terms of the decree below, and they are dismissed without discussion.

Let the decree below be reversed, with costs of each appeal against the acre owners, and let the case be remanded to the court below, with instructions to render a decree in accordance with the views expressed in this opinion.

SMITH, Circuit Judge, dissents.

PLATTE VALLEY CATTLE CO. v. BOSSERMAN-GATES LIVE STOCK & LOAN CO.

(Circuit Court of Appeals, Eighth Circuit. December 16, 1912.)

No. 3,741.

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 205*)—RECEPTION OF EVIDENCE—OFFER OF PROOF—PROPOUNDING QUESTIONS—NECESSITY.

In the federal courts an assignment as error of a rejection of an offer to prove certain facts without propounding any questions to a witness properly raises the issue of the admissibility of competent proof of those facts which will be determined by the appellate courts on its merits and on the presumption that the offer was made in good faith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 205.*]

2. CHATTEL MORTGAGES (§ 267*)—FORECLOSURE SALE BY MORTGAGOR—INTERMEDIATE LIENS.

A sale by a mortgagor of chattels, in whom is the legal title, with the consent of the first mortgagee, without notice to intermediate lienholders, does not foreclose their liens, although the sale is made for the full value of the property, and the proceeds are applied to the payment of the debt secured by the first mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 550-552; Dec. Dig. § 267.*]

3. SUBROGATION (§ 27*)—PURCHASER OF FIRST LIEN.

A third person, not a volunteer, who pays and procures a release of a first lien upon property under an agreement with the owner that as pur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

chaser or first lienor he shall have the pecuniary benefit of such payment, becomes subrogated in equity, as against an inferior lienor whose burden is not increased by such subrogation, to the rights held by the first lienor before the payment was made.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 68; Dec. Dig. § 27.*]

4. COURTS (§ 342*)—FEDERAL COURTS—STATE PRACTICE—LAW AND EQUITY—DISTINCTION.

In the federal courts the general rule is that the difference between causes of action at law and in equity is sedulously preserved, that a legal cause of action cannot be maintained in equity nor can equitable causes of action or defenses avail in actions at law, and this although they are permissible in the state courts of the district, and the distinction between the forms of actions at law and suits in equity has been there abolished.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 912, 913; Dec. Dig. § 342.*]

5. ACTION (§ 24*)—EQUITABLE—DEFENSES.

One in actual possession of personal property holding the right to that possession and an interest in the property by subrogation to the rights of a superior lienor may prove, in an action at law in the federal courts in defense of his possession and interest against a claim of an inferior lienor, the facts which establish the subrogation.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 153-155; Dec. Dig. § 24.*]

In Error to the District Court of the United States for the District of Nebraska; W. H. Munger, Judge.

Action by the Bosserman-Gates Live Stock & Loan Company against the Platte Valley Cattle Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions to grant a new trial.

Louis Quarles, of Milwaukee, Wis. (George Lines, W. M. Spooner, and F. C. Ellis, all of Milwaukee, Wis., and E. A. Cook, of Lexington, Neb., on the brief), for plaintiff in error.

J. J. Halligan, of North Platte, Neb. (W. T. Wilcox and J. G. Mothersead, both of North Platte, Neb., on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judge, and McPHERSON, District Judge.

SANBORN, Circuit Judge. The Bosserman-Gates Live Stock & Loan Company, a corporation, brought an action of replevin against the Platte Valley Cattle Company, a corporation, for cattle in the latter's possession on the ground that the plaintiff had a special property therein of the value of \$12,000 by virtue of a chattel mortgage thereof made by R. D. Brown on December 7, 1909, wherein default in the payment of the debt had been made. The defendant denied the averments of the plaintiff's complaint. Two hundred and eighty cattle were taken from the defendant under the writ of replevin and delivered to the plaintiff at the commencement of the action, and the verdict and judgment were that the plaintiff recover 1 cent damages for the detention of these cattle and \$924, the value of certain cattle

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the possession of the defendant which the plaintiff did not obtain by virtue of its writ.

The defendant offered to prove these facts at the trial: All these cattle had been mortgaged by R. D. Brown to the Welpton Investment Company to secure his debt of \$10,000 to that corporation on May 25, 1909, more than six months before the mortgage to the plaintiff was given. This mortgage had been duly filed for record on May 26, 1909. About May 9, 1910, Brown sold these cattle for their full value to the defendant under an agreement between the Welpton Company, Brown, and the defendant that the purchase price realized by the sale should be applied first to the payment of Brown's mortgage debt to the Welpton Company, and that the remainder only should be paid to him. This agreement was performed. The sum of \$12,700 was due to the Welpton Company on its mortgage debt. This was paid out of the proceeds of the sale, and the remainder, \$400, was paid to Brown. Thereupon the Welpton Company released its mortgage, and Brown made a bill of sale to the defendant. The defendant was in possession of the cattle pursuant to this transaction when this action was commenced and they were taken from it under the writ of replevin. An objection to the defendant's offer to prove these facts was made on the ground that they were incompetent, irrelevant, and improper under the issues. That objection was sustained, and this ruling is the first error assigned.

[1] Counsel for the defendant argue that there was no error in the rejection of these facts, whatever their relevancy may have been, because there was no witness on the stand and no question calculated to elicit these facts was propounded before or when the offer was made. When an offer of proof is made, the trial court, if it suspects bad faith, may undoubtedly in its discretion require counsel to produce his witnesses and to propound pertinent questions to them, but such an offer is often the most convenient and satisfactory method of presenting decisive issues of law upon the trial. In the absence of evidence of bad faith, it is presumed to be made in good faith and in the federal courts an assignment as error of a rejection of an offer to prove certain facts without propounding any questions to a witness calculated to elicit them, properly raises the issue of the admissibility of competent proof thereof, and this issue will be determined by the appellate courts on its merits and on the presumption that the offer was made in good faith. *Scotland County v. Hill*, 112 U. S. 183, 186, 5 Sup. Ct. 93, 28 L. Ed. 692; *Missouri Pacific Ry. Co. v. Castle*, 172 Fed. 841, 844, 97 C. C. A. 124, 127; *Scotland County v. Hill*, 132 U. S. 107, 113, 10 Sup. Ct. 26, 33 L. Ed. 261; *Scotland County Court v. Hill*, 140 U. S. 41, 42, 11 Sup. Ct. 697, 35 L. Ed. 351. The real question in this case, therefore, is whether or not the facts offered present a defense in whole or in part to the plaintiff's claim in this action.

[2] There were two issues in the case—the right of possession of the cattle and the value of the plaintiff's special property therein by virtue of its mortgage. Before the sale to the defendant, Brown was in possession of the cattle and the Welpton Company had the right of possession because it held the first mortgage upon them and the

debt which that mortgage secured was due and unpaid. As it is conceded that the full value of the property was \$13,100 the value of the plaintiff's special property in the cattle was \$400, and the Welpton Company had the right by seizure and foreclosure to take and apply \$12,700 of the value of the cattle to the payment of the debt due to it. The plaintiff contends that the facts tendered were inadmissible in evidence because their legal effect was to increase its special property in the cattle \$12,700 and to leave the defendant, the purchaser, without right of possession to or interest in the cattle for which it had paid \$13,100. On the other hand, the defendant insists that the effect of the transaction portrayed by these facts was to vest in the purchaser all the rights of possession of the cattle and the property interests which, before that transaction, were held by both the Welpton Company and Brown. Counsel for the defendant claim that this effect is wrought by the defendant's actual and rightful possession of the cattle, the foreclosure of the first mortgage effected by Brown's sale and the subrogation of the defendant to the rights which the first mortgagee had before its mortgage was released. The actual possession of the cattle by the purchaser, the defendant, at the commencement of the action is conceded. The claim that the first mortgage was foreclosed is founded on the proposition that a sale of mortgaged chattels by the mortgagor for their full value and the application of the proceeds of the sale to the payment of the claim of the first mortgagee with his consent forecloses all right of redemption of the holders of inferior liens, and vests a complete title as well as the right of possession in the purchaser. There is respectable authority for this position (2 Cobbey on Chattel Mortgages, 1298; *Faeth v. Leary*, 23 Neb. 267, 36 N. W. 513), but it is illogical and unjust. It took its rise when and where the law was that a chattel mortgage vested the legal title in the mortgagee leaving naught but the right of redemption in the mortgagor, and that, upon default, the title of the mortgagee became absolute. When the case of *Faeth v. Leary* was decided, the law of Nebraska was that the legal title to mortgaged chattels was vested in the mortgagee subject only to the right of redemption in subordinate lienholders. *Adams v. Nebraska City National Bank*, 4 Neb. 370; *Gillilan v. Kendall & Smith*, 26 Neb. 82, 42 N. W. 281, 18 Am. St. Rep. 766. But, when the mortgages in this case were made, that rule had long been reversed, and the legal title to the cattle remained in the mortgagor, and the mortgages evidenced nothing but liens upon it in the mortgagees. *Musser & Co. v. King*, 40 Neb. 892, 59 N. W. 744, 42 Am. St. Rep. 700; *Drummond Carriage Co. v. Mills*, 54 Neb. 417, 74 N. W. 966, 40 L. R. A. 761, 69 Am. St. Rep. 719; *Midland State Bank v. Kilpatrick-Koch Dry Goods Co.*, 54 Neb. 410, 74 N. W. 837. Before the sale, therefore, Brown held the legal title, the Welpton Company had the first lien, and the plaintiff had the second lien upon these cattle. The plaintiff had the right to pay Brown's debt to the Welpton Company, and then to take and sell the property to pay that debt and its own original claim. The statutes of Nebraska prescribe a method of foreclosure by public sale after a public notice. 2 Cobbey's Ann. Statutes 1909, §§ 3901-3907. Under such a foreclosure notice to the second mortgagee and an op-

portunity to buy the property or to redeem from the lien of the first mortgagee before the sale is made are at least presumptively given. The contention that a sale of the property for its full value by the mortgagor and the first mortgagee without notice to subordinate lienholders and the application of the proceeds of the sale to the payment of the claim of the first mortgagee can inflict no injury upon the subordinate lienholders, and hence may well be held to be in effect a foreclosure of the first mortgage, is not convincing. What the full value of personal property is at a given time is frequently uncertain, and it often becomes difficult, and sometimes almost impossible, to prove its value, especially after the property has disappeared. It is not conducive to the security of subordinate liens to permit the mortgagor and first mortgagee or lienholder to foreclose and destroy the former by a mere private sale of the mortgaged property at a price they deem its full value without notice to the holders of the inferior liens. The only safe rule is to make the consent of all parties in interest, or a legally published or other sufficient notice, an indispensable requisite of a foreclosure of a chattel mortgage by sale or otherwise. And our conclusion is that a sale by a mortgagor of chattels, in whom is the legal title, with the consent of the first mortgagee without notice to intermediate lienholders, does not foreclose their liens, although the sale is made for the full value of the property, and the proceeds are applied to the payment of the debt secured by the first lien. *Lovejoy v. Merchants' State Bank*, 5 N. D. 623, 67 N. W. 956; *Backhaus v. Buells*, 43 Or. 558, 72 Pac. 976, 73 Pac. 342; *Swank v. Elwert*, 105 Or. 487, 105 Pac. 901, 905; *Templeton v. Lloyd*, 59 Or. 50, 115 Pac. 1068.

[3] But a third person, not a volunteer, who pays and procures a release of a first lien upon property under an agreement with the owner that as purchaser, or first lienor, he shall have the pecuniary benefit of such payment, becomes subrogated in equity, as against an inferior lienor whose burden is not increased by such subrogation, to the rights held by the first lienor before the payment was made. *Memphis & Little Rock R. R. Co. v. Dow*, 120 U. S. 287, 301, 7 Sup. Ct. 482, 30 L. Ed. 595; *Cumberland Building & Loan Ass'n v. Sparks*, 111 Fed. 647, 651, 652, 49 C. C. A. 510, 514, 515; *In re Lee*, 182 Fed. 579, 583, 105 C. C. A. 117, 121; *Miller v. Stark*, 61 Ohio St. 413, 56 N. E. 11, 12; *Hobgood v. Schuler*, 44 Ia. Ann. 537, 10 South. 812, 813; *Fowler v. Fowler*, 78 Mo. App. 330, 337; *Wilson's Guardian v. Wilson* (Ky.) 50 S. W. 260, 263; *Association v. Thompson*, 32 N. J. Eq. 133; *Tyrrell v. Ward*, 102 Ill. 29; *Bank v. Bierstadt*, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146; *Draper v. Ashley*, 104 Mich. 527, 62 N. W. 707; *Wilton v. Mayberry*, 75 Wis. 191, 43 N. W. 901, 6 L. R. A. 61, 17 Am. St. Rep. 193; *Levy v. Martin*, 48 Wis. 198, 4 N. W. 35; *Trust Co. v. Peters*, 72 Miss. 1058, 18 South. 497; *Dillon v. Kauffman*, 58 Tex. 696. This is a just and reasonable rule. It effects the intention of the parties, preserves to the payor the benefit of his payment, leaves the inferior lienor in his former position, inflicts no injury upon him, prevents injury to the payor through mistake or ignorance of the inferior lien, and works exact justice to all. The facts tendered in the offer bring the case at bar clearly within this rule. The defend-

ant was not a volunteer. It was a purchaser. It paid the first lien to obtain the pecuniary benefit of its payment as vendee in accordance with the terms of its contract of purchase with the owner. Its subrogation to the rights of the first mortgagee imposes no additional burden upon the second mortgagee, but leaves it in its former position. And the undoubted effect of the transaction was that, while between the first mortgagee and the debtor Brown the defendant's payment and the first mortgagee's release of its mortgage estopped the latter from thereafter enforcing its claim against Brown, it subrogated the defendant in equity as against the second mortgagee to all rights held by the first mortgagee before the sale.

[4] Counsel for the plaintiff, however, meet this situation with the contention that subrogation is an equitable defense which may not be successfully pleaded or proved in this action at law. The doctrine of subrogation is, indeed, the creature of equity, and it is true that in the federal courts the general rule is that the difference between causes of action at law and in equity is sedulously preserved, that a legal cause of action cannot be maintained in equity, nor may equitable causes of action or equitable defenses avail in actions at law, and this although they are permissible in the state courts of the district and the distinction between the forms of actions at law and suits in equity has been there abolished. *Bagnell v. Broderick*, 13 Pet. 436, 10 L. Ed. 235; *Bennett v. Butterworth*, 11 How. 669, 13 L. Ed. 859; *Thompson v. Railroad Co.*, 6 Wall. 134, 18 L. Ed. 765; *Foster v. Mora*, 98 U. S. 425, 25 L. Ed. 191; *Northern Pacific R. Co. v. Paine*, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; *Lindsay v. First National Bank*, 156 U. S. 485, 493, 15 Sup. Ct. 472, 39 L. Ed. 505. Under this rule the remedy of a defendant, who has an equitable defense in an action at law, is to bring a suit to enjoin the prosecution of that action until the validity of the defense can be heard and decided in equity. And, if this had been done in this case, this action would undoubtedly have been stayed by the court below until the validity of the defense indicated by the facts tendered could have been determined.

[5] Most general rules, however, have their exceptions, and this one is not unique in this respect. Ever since the establishment of jurisdiction in equity, equitable causes of action and equitable defenses have been creeping into and receiving recognition and approbation in actions at law. Recoupment was an equitable defense. It crept from courts of chancery to courts of law, and was there admitted to avoid the expense of suits in equity and to prevent circuity of action. *Reab v. McAlister*, 8 Wend. (N. Y.) 110; *Nashville Trust Co. v. Fourth National Bank*, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710; *Williams v. Neely*, 134 Fed. 1, 4, 67 C. C. A. 171, 69 L. R. A. 232.

Estoppel in pais is a creature of equity. But since the decision of the Supreme Court in *Dickerson v. Colgrove*, 100 U. S. 578, 583, 584, 25 L. Ed. 618, it is equally available in actions at law even in the federal courts. *Drexel v. Berney*, 122 U. S. 241, 253, 7 Sup. Ct. 1200, 30 L. Ed. 1219; *Wehrman v. Conklin*, 155 U. S. 314, 327, 15 Sup.

Ct. 129, 39 L. Ed. 167; *Cornwall v. Davis* (C. C.) 38 Fed. 878, 882, 4 L. R. A. 563; *City of Cleveland v. Cleveland, C. C. & St. L. R. Co.* (C. C.) 93 Fed. 113, 123.

In *Reagan v. Aiken*, 138 U. S. 109, 112, 113, 114, 11 Sup. Ct. 283, 284 (34 L. Ed. 892), several creditors who were mortgagees in a chattel mortgage brought an action at law against the marshal and his sureties for the value of the mortgaged property which the marshal had seized and converted under a writ against the mortgagor. The defendants answered that the debt secured by the chattel mortgage had been secured by a mortgage on real estate also, and that the real estate had been sold and the proceeds applied in part payment of the claims of the creditors secured by the chattel mortgage. This answer was met by the objection that an accounting was necessary under the defense pleaded to ascertain the respective amounts due to the various chattel mortgagees, and that an accounting could be had in a suit in equity only. But the Supreme Court held that the defense presented the question of partial payment of the indebtedness, that "how it was made was immaterial; the fact and the amount were the substantial matters and these were matters provable and determinable in an action at law." May it not be said in the case in hand that the values of the respective interests of the contestants here in the mortgaged property were substantial matters, that it was not material how these parties acquired their interests, so that they actually had them, and that these values were provable and determinable at law?

Dickerson v. Colgrove, 100 U. S. 578, 583, 584 (25 L. Ed. 618), was an action of ejectment, and the defense was an estoppel in pais. This defense was challenged on the ground that it was not available at law. But the court held that the right of possession and the title of the plaintiff's grantor inured by virtue of the estoppel to the defendant who was in actual possession of the land and that this defense of estoppel in pais could be pleaded and proved at law. Speaking of the action of ejectment the court said:

"This is a possessory action, and the plaintiff, to entitle himself to recover, must have the right of possession; and whatever takes away the right of possession will deprive him of the remedy of ejectment. * * * This is the rule laid down by Lord Mansfield in *Atkins v. Hoarde*, 1 Burr. 119. 'Ejectment,' says he, 'is a possessory remedy, and only competent where the lessor of the plaintiff may enter, and every plaintiff in ejectment must show a right of possession as well as of property.' If the plaintiff in the present case was not entitled to possession, how, according to this authority, could he recover? If he had recovered, and a court of equity would have enjoined him from executing the judgment by a writ of possession, we ask, again, how could he recover in this action? Is not the concession that relief could be had in equity fatal to the proposition we are considering? * * * The reason given for the rule of inurement and estoppel by virtue of conveyances is that it avoids circuity of action. Does not the same consideration apply with equal force in cases of estoppel in pais? Why is it necessary to go into equity in one case and not in the other? * * * The common law is reason dealing by the light of experience with human affairs. One of its merits is that it has the capacity to reach the ends of justice by the shortest paths. The passage of a title by inurement and estoppel is its work without the help of legislation. * * * Whether the title passed or not, the fact that the plaintiff was not entitled to possession of the premises was fatal to the action."

Why is not the reason of this opinion equally applicable to the case at bar? The action of *replevin* is a possessory remedy. If the plaintiff was not entitled to possession, it could not maintain the action. The defendant was in the actual possession of the cattle. By virtue of its subrogation as against the plaintiff, to the rights of the first mortgagor in the payment of whose claim default had been made before the sale, it had the right of possession until the plaintiff redeemed the cattle from the lien of that mortgage. If the defendant had brought its suit and set up its right by subrogation, a court of equity would have enjoined the prosecution of this action at law until the defendant's equitable claim was tried, and if found good, until the plaintiff redeemed the property from the first mortgage, and such a court may yet enjoin the execution of the judgment in this action in such a suit. Why should the defendant be driven to this circuitry of action? Why is it more necessary for it to go into equity to sustain the right to its possession of these cattle and its interest in this property which inured to it by subrogation than it would have been if they had inured to it by estoppel? No sound reason occurs to us. If the defendant was asking aid, if it was seeking affirmative relief from the court to enforce its subrogation in order to obtain possession of the mortgaged property, or to foreclose its lien and cut out the right of the plaintiff to redeem therefrom, it may be that a resort to equity would be necessary. But it is using its subrogation not as a sword, but as a shield. That subrogation furnishes a good reason why the plaintiff was not entitled to the possession of this property when it sued out its writ, why it was not entitled to that possession until it redeemed from the first mortgage lien. It furnishes a good reason why the plaintiff's special property in the goods was not of the value it alleged. The admission of proof of the facts which may establish this subrogation in this action tends to secure a just and speedy conclusion of this litigation. In the absence of some insuperable legal obstacle, it ought to be permitted. No such obstacle is perceived in the decisions of the courts or the reason of the case, while its admission is sustainable by the same arguments that induced the Supreme Court to establish the rule that the admission of proof of an estoppel in pais in defense of an action of ejectment was allowable. And our conclusion is that one in actual possession of personal property holding the right to that possession and an interest in the property by subrogation to the rights of a superior lienor may prove, in an action at law in the federal courts, in defense of his possession and interest against an inferior lienor, the facts which establish the subrogation. For the reasons which have now been presented, the facts set forth in the offer of the defendant appear to be relevant, material, and competent upon the main issues in the case, the issue of the right of possession and the issue of the value of the plaintiff's special interest therein, and the defendant should be permitted to prove them.

The judgment below will accordingly be reversed, and the case will be remanded to the court below, with instructions to grant a new trial. It is so ordered.

UNITED STATES v. ALAMOGORDO LUMBER CO.

(Circuit Court of Appeals, Eighth Circuit. December 21, 1912.)

Nos. 3,802, 3,831.

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 401*)—WRIT OF ERROR—"BROUGHT."

A writ of error is not brought, it does not remove the record from the lower court until it is filed or lodged in the court, or with the clerk of the court, which rendered the judgment, or which has succeeded to the jurisdiction of that court over the judgment to be reviewed and the files and records pertaining to it, and until the writ is so brought it presents no ruling for an appellate court to review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2113; Dec. Dig. § 401.*]

For other definitions, see Words and Phrases, vol. 1, p. 885.]

2. COURTS (§ 431*)—TERRITORIAL COURTS—JURISDICTION—TRANSFER—ENABLING ACT.

Under section 15 of the Enabling Act of New Mexico (Act June 20, 1910, c. 310, 36 Stat. 566), the jurisdiction of any case pending in any court of the territory of New Mexico other than the Supreme Court thereof at the time of its admission as a state, which was such that, if begun in a state, it would have fallen within the concurrent and not within the exclusive jurisdiction of a Circuit Court or a District Court of the United States, was transferred by operation of law to the proper state court.

In the absence of an application by any party to such a case made as nearly as might be in the manner provided for the removal of cases from state courts to federal courts not later than 60 days after the lodgment of the record of such case in the proper state court for its removal to the United States District Court in the state, the jurisdiction of that court over such case, its files and records, did not attach.

An order of the District Court of the United States in the state for such a removal, in the absence of any application by any party to the case therefor in the manner above specified, is, against timely objection, ineffectual to sustain the jurisdiction of that court over the case, its files, or records.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1143-1149; Dec. Dig. § 431.*]

3. COURTS (§ 431*)—WRIT OF ERROR—EFFECTIVENESS—SERVICE.

A decree was rendered in one of the district courts of the territory of New Mexico on December 22, 1911, a writ of error was issued to review it on January 5, 1912, the state of New Mexico was admitted to the Union on January 6, 1912, and the court which rendered the judgment then ceased to exist. The case was such that, if begun in a state, it would have fallen within the concurrent, and not within the exclusive, jurisdiction of a Circuit or District Court of the United States, and the jurisdiction of the court which rendered the decree over it was transferred to the proper state court by the enabling act. The writ of error was not filed or lodged with the latter court or its clerk, nor was it filed or lodged with the court which rendered the decree before it ceased to exist, no application to remove the case to the United States District Court in the state as prescribed by the enabling act was ever made, but the files and records in the case were taken to that court pursuant to its order.

Held, in so far as the order of the District Court of the United States in the state directed the transfer, or was intended to transfer, jurisdiction of the case, or of its files or records, to that court, it was ineffectual in the face of timely objection, and the jurisdiction of that court never at-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tached to it or them. The writ of error was never brought because it was never filed or lodged with the district court of the territory while it existed, nor with the proper court of the state to which the jurisdiction of the former over the case, its files and records, was transferred.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1143-1149; Dec. Dig. § 431.*]

4. APPEAL AND ERROR (§ 20*)—APPEAL FROM COURT WITHOUT JURISDICTION—DISMISSAL.

In the state of facts relative to the transfer of the case to the United States District Court in the state of New Mexico stated above an appeal was prayed of, and allowed by, that court on June 20, 1912, from the decree of the district court of the Sixth judicial district of the territory of New Mexico rendered on December 22, 1911.

Held, the allowance of the appeal by the United States District Court in the state was ultra vires, the application of the United States to it for the appeal was idle because its jurisdiction had not attached to the case, and the appeal must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 81-87; Dec. Dig. § 20.*]

5. STATUTES (§ 190*)—CONSTRUCTION—AMBIGUOUS STATUTE.

Construction and interpretation have no place or office where the language of a statute is unambiguous and its meaning evident. In such a case arguments from the history of legislation, from the possible or even probable effect of the statute and from the inconvenience of complying with its terms, serve only to create doubt and to confuse the judgment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 269; Dec. Dig. § 190.*]

6. STATUTES (§ 212*)—EXCEPTIONS—PRESUMPTIONS.

Where the legislative body has included in a statute by general language many subjects, persons, corporations, or cases, and made no exception, the legal presumption is that it intended to make none, and it is not the province of the courts to do so.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 289; Dec. Dig. § 212.*]

In Error from the Supreme Court of the Territory of New Mexico and on Transfer from the Supreme Court of the State of New Mexico. Appeal from the District Court of the United States for the District of New Mexico; E. R. Wright, Judge.

Action by the United States against the Alamogordo Lumber Company. Decree for defendant, and the United States brings error, and also appeals. Dismissed.

Stephen B. Davis, Jr., U. S. Atty., of Las Vegas, N. M. (Herbert W. Clark, Asst. U. S. Atty., of East Las Vegas, N. M., on the brief), for the United States.

Horace N. Hawkins, of Denver, Colo., and John Franklin, of El Paso, Tex. (W. A. Hawkins, of El Paso, Tex., on the brief), for defendant in error and appellee.

Before SANBORN and CARLAND, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. On December 22, 1911, the district court of the Sixth judicial district of the territory of New Mexico rendered a decree of dismissal of this case which had been brought

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against the Alamogordo Lumber Company, a corporation, to avoid certain sales and deeds of lands which had been made by the territory of New Mexico, an alleged trustee for the United States for certain purposes, and under which the Alamogordo Lumber Company claimed title to the lands. The United States seeks a reversal of this decree by a writ of error and by an appeal, and it is met in this court by motions to dismiss both.

The validity of the writ of error is conditioned by these facts: The decree of dismissal was rendered on December 22, 1911, and under the laws of the territory of New Mexico it was reviewable by a writ of error or by an appeal taken within one year from the date of its entry. Session Laws of New Mexico 1907, c. 57, § 1. On January 5, 1912, the clerk of the Supreme Court of the territory issued a writ of error to review this judgment, telegraphed to the clerk of the district court which rendered the judgment that the writ had been issued, and mailed it to him. On the next day, January 6, 1912, the territory, its Supreme Court and the district court which rendered the judgment, ceased to exist, and the state of New Mexico came into being. On that day the clerk of the court which rendered the judgment received the telegram, and on January 8, 1912, he first received the writ. As the court which rendered the judgment had then ceased to exist, he did not file it, but it subsequently came to the hands of the clerk of the United States District Court in the state of New Mexico pursuant to an order of the latter court made March 30, 1912, to the effect that all files, records, and proceedings relating to any cases or controversies pending on the United States side of the district courts of the territory of New Mexico at the date of the admission of the state should be forthwith delivered by the clerk of the court having custody of them to the United States marshal, to be by him transmitted to the clerk of the United States district court in the state, and the case to which they pertained to be docketed by him as a cause in that court, and that the order which was dated March 30, 1912, should take effect on March 1, 1912.

Section 15 of the act of June 20, 1910, enabling the people of New Mexico to form a constitution and a state government, provided that the United States Circuit Court, or the United States District Court, for the state of New Mexico—

"as the case may be, shall have jurisdiction to hear and determine all trials, proceedings and questions arising, or which may be raised, in any case or controversy pending in any of the courts other than the Supreme Court of the said territory at the date of its admission as a state, the case being such that, under the laws of the United States touching the jurisdictions of federal courts, it might properly have been begun in or (as a separable controversy or otherwise) removed to said circuit or said district court, had they been established when the litigation of such case or controversy was commenced. Should such case or controversy be such that, if begun within a state, it would have fallen within the exclusive original cognizance of a Circuit or District Court of the United States sitting therein, it shall be transferred to the one or the other of said courts sitting within said state of New Mexico, with due regard for the general provisions of law defining their respective jurisdictions; but should such case or controversy be by nature one of those which under such general jurisdictional provisions fall within the concurrent but not the exclusive jurisdiction of such courts, then

such transfer may be had upon application of any party to such case or controversy, to be made as nearly as may be in the manner now provided for removal of cases from state to federal courts, and not later than sixty days after the lodgment of the record of such case or controversy in the proper court of the state, as herein provided. All cases and controversies pending at the admission of the state, and not transferable to the said circuit or district court under the foregoing provision, shall be heard and determined by the proper court of the state. All files, records, and proceedings relating to any such pending cases or controversies shall be transferred to such circuit, district, and state courts, respectively, in such wise and so authenticated or proven as such courts shall respectively, by rule direct, and upon transfer of any case or controversy, as herein provided, the same shall be proceeded with in due course of law; and no writ, action, indictment, information, cause, or proceeding pending in any court of the said territory at the time of its admission as a state shall abate or be deemed ineffective by reason of such admission, but the same shall be transferred and proceeded with in the proper circuit or district court of the United States, or state court, as the case may be: Provided, however, that all cases pending in the Supreme Court of the said territory in which the United States is a party, shall, with the records appertaining thereto, be transferred to the Circuit Court of Appeals for the Eighth Circuit, to be there heard and decided." Act June 20, 1910, c. 310, § 15, 36 Stat. 566.

This is a suit in which the United States is a party. Jurisdiction to hear and determine all such suits that were pending in the territorial Supreme Court on January 6, 1912, when the state of New Mexico was admitted, was conferred upon this court by one of the provisos of section 15 which has been recited. Was this case pending in that court upon that day? This question has been exhaustively discussed by counsel and they have cited *Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665; *Credit Co. v. Arkansas Central Railway*, 128 U. S. 258, 261, 9 Sup. Ct. 107, 32 L. Ed. 448; *Kentucky Coal, Timber, Oil & Land Co. v. Howes*, 153 Fed. 163, 82 C. C. A. 337; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; *Insurance Company v. Phinney*, 76 Fed. 617, 618, 22 C. C. A. 425, and *Id.*, 178 U. S. 327, 336, 20 Sup. Ct. 906, 44 L. Ed. 1088—cases persuasive that if it were necessary to give any answer to this question it should be in the negative. In view, however, of the provision of the enabling act which has been quoted, that "no writ, action, indictment, information, cause, or proceeding pending in any court of the said territory at the time of its admission as a state, shall abate or be deemed ineffective by reason of such admission, but the same shall be transferred and proceeded with in the proper circuit or district court of the United States, or state court, as the case may be," let us concede, as counsel for the United States contends, that this case was pending in the Supreme Court of the territory and in the district court of the Sixth judicial district of the territory of New Mexico, another doubtful proposition (*Glaspell v. Northern Pacific Railroad Company*, 144 U. S. 211, 220, 12 Sup. Ct. 593 [36 L. Ed. 409]), when the state was admitted. What then? Then the case "shall be transferred and proceeded with in the proper circuit or district court of the United States, or state court, as the case may be."

[1] When the state was admitted, the writ of error had been issued, but it had not been served or lodged with any court below, or with the clerk of any court below. It had not been brought, and it

never could be brought, until it was filed or lodged with, and thereby served upon, the proper court to which the case pending at the time of admission in the district court which rendered the judgment was legally transferred.

[2] The case was such that, if commenced within a state, it would have fallen within the concurrent, and not within the exclusive, jurisdiction of a court of the United States, under the laws of the United States touching the jurisdiction of its courts, and it and all the files and records in it were therefore, by the provision of section 15, which has been recited, transferred, not to any of the United States courts, but to the proper state court of the state of New Mexico. The case might indeed have been removed to the United States court in that state within 60 days after the lodgment of the files and records in it in the proper state court by means of a petition, and "application, as nearly as may be, in the manner now provided for removal of causes from state to federal courts," but not otherwise.

[3] However, it never was so removed and under the enabling act the case which was pending in the United States District Court of the territory on January 6, 1912, its files and records, have ever since that date been, and still remain, within the jurisdiction of the proper state court. The next sentence after the removal provision in section 15 reads:

"All cases and controversies pending at the admission of the state, and not transferable to the said circuit or district court under the foregoing provision, shall be heard and determined by the proper court of the state." *Glaspell v. Northern Pacific Railroad Co.*, 144 U. S. 211, 214, 219, 220, 223, 12 Sup. Ct. 593, 36 L. Ed. 409.

[4] It goes without saying that in the face of timely objection, which has been made in this case, the United States District Court in the state was without power, in the absence of an "application of any party to such cause or controversy, to be made as nearly as may be in the manner now provided for removal of causes from state to federal courts, and not later than 60 days after the lodgment of the record of such case or controversy in the proper court of the state," to transfer this case, or any case of like character, or the files or records thereof, to that court, and in so far as the order of that court of March 30, 1912, has, or was intended to have, that effect, it is *ultra vires* and void, because it is contrary to the express provisions of the act of Congress which has been quoted. The unavoidable result is that no court but the proper state court to which the enabling act transferred the jurisdiction of the district court in the territory over this case, its files and records, has, since the admission of the state, ever had any jurisdiction over it or them.

There are therefore two reasons why the motion to dismiss this writ of error cannot be denied: First. The writ was never brought and a writ of error which is not brought presents no ruling for review. It was not served upon, or filed, or lodged with the court which rendered the judgment before that court ceased to exist; and it was not served upon, or filed, or lodged with the proper state court to which the enabling act transferred the jurisdiction of the case that the court

which rendered the judgment had at the time of the admission of the state. "The writ of error is not brought within the legal meaning of the term until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly." *Brooks v. Norris*, 11 How. 203, 207, 13 L. Ed. 665; *Credit Co. v. Arkansas Central Railway*, 128 U. S. 258, 260, 9 Sup. Ct. 107, 32 L. Ed. 448; *Farrar v. Churchill*, 135 U. S. 609, 613; ¹ *Kentucky Company, etc., v. Howes*, 153 Fed. 163, 164, 82 C. C. A. 337; *Insurance Company v. Phinney*, 178 U. S. 327, 338, 20 Sup. Ct. 906, 44 L. Ed. 1088. Second. The jurisdiction of the United States District Court in the state and of its clerk over this case and its files and records has never attached because the case has never been removed from the proper state court to which the enabling act transferred it. Hence the clerk of the United States District Court in the state had no power or authority to certify and return here a transcript of the files and records of the district court in the territory which rendered the judgment, files and records of which the proper state court and its clerk alone had jurisdiction, and, as the clerk of that state court has returned no transcript, there is no lawfully authenticated record of those files and proceedings in this court upon which it can act. The motion to dismiss the writ of error must be, and it is, granted, therefore, not because the cause was abated or deemed ineffective by reason of the admission of the state, but because it was not proceeded with according to law after the admission of the state so that either the court below or this court obtained jurisdiction to hear it.

The conclusion that the jurisdiction of this case and of its files and records, which was vested in the United States District Court of the Sixth Judicial District of the Territory of New Mexico at the time of the admission of the state of New Mexico was transferred to the proper state court, and that it could not be transferred against timely objection to the United States District Court in the state without the customary application for removal from state court to federal court, has not been reached without a thoughtful study and consideration of the exhaustive review of the history of the congressional and territorial legislation relating to the courts in the territory of New Mexico, with which counsel for the United States have favored us (Act Sept. 9, 1850, c. 49, 9 Stat. 449, § 10; Act June 14, 1858, c. 166, 11 Stat. 366; Revised Stat. § 1874; Session Laws of New Mexico 1859, chs. 6, 10), and of their argument that the provisions of section 15, relative to the distribution of cases pending in the courts of the territory other than the Supreme Court at the time of the admission of the state, should be so construed as to include within their effect only cases pending in the United States District Courts of the counties in the territory at that time, and so as to except from their operation and effect all cases pending in the United States District Courts of the judicial districts.

[5] But the act of Congress clearly and without any ambiguity expresses the intention of Congress that the jurisdiction of

¹ 10 Sup. Ct. 771, 34 L. Ed. 246.

all cases pending in all of the courts of the territory other than the Supreme Court which, if begun within a state, would have fallen within the concurrent jurisdiction of the state and the federal court, should be transferred to and vested in the proper state court, and that the jurisdiction of the United States District Court in the state should never attach to any of them unless some party thereto instituted and prosecuted an application and proceeded to remove it to that court in the way customarily employed to remove cases from the state courts to the federal courts. Construction and interpretation have no place or office when the language of a statute is unambiguous and its meaning evident. In such a case arguments from the history of legislation, from the possible, or even probable, evil effects of a statute and from the inconvenience of complying with it, and attempted judicial construction of its terms, serve only to create doubt and to confuse the judgment. They tend to obscure, rather than to elucidate, the meaning of the statute. *Knox County v. Morton*, 15 C. C. A. 671, 673, 68 Fed. 787, 789; *Shreve v. Cheesman*, 16 C. C. A. 413, 416, 69 Fed. 785, 788; *Armour Packing Co. v. United States*, 153 Fed. 1, 12, 82 C. C. A. 135, 146, 14 L. R. A. (N. S.) 400. There is in such a case a conclusive legal presumption that the legislative body intended what it declared, the statute must be held to mean what it clearly expresses, and no room is left for construction. *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 964, 72 C. C. A. 9, 12, 2 L. R. A. (N. S.) 185; *Brun v. Mann*, 151 Fed. 145, 157, 80 C. C. A. 513, 525, 12 L. R. A. (N. S.) 154.

[6] Again, this act of Congress expressly transfers the jurisdiction of all the courts of the territory other than the Supreme Court over all cases pending therein which, if begun in a state, would have fallen within the concurrent jurisdiction of the state courts and the federal courts to the proper state court. It contains no exception from this general transfer of cases of this nature pending in the United States District Courts of the judicial districts of the territory. And where a legislative body has included in a statute by general language many subjects, persons, corporations, or cases, and made no exception, the legal presumption is that it intended to make none, and it is not the province of the courts to do so. *Omaha Water Co. v. City of Omaha*, 147 Fed. 1, 13, 77 C. C. A. 267, 279, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614; *Madden v. Lancaster County*, 12 C. C. A. 566, 572, 65 Fed. 188, 194; *Union Central Life Ins. Co. v. Champlin*, 54 C. C. A. 208, 210, 116 Fed. 858, 860; *Cella Commission Co. v. Bohlinger*, 147 Fed. 419, 425, 78 C. C. A. 467, 473, 8 L. R. A. (N. S.) 537. In the light of these incontrovertible rules of law, the forceful argument of counsel for the government in favor of the insertion in the act of Congress of the exception they advocate has failed to convince that it is our duty to make it, and the court is constrained to leave the statute as the Congress enacted it.

We turn to the motion to dismiss the appeal. It was prayed of and allowed by the United States District Court in the state of New Mexico on June 20, 1912, and it was taken from the decree of the district court of the Sixth judicial district of the territory of New Mexico

rendered on December 22, 1911. The conclusions which have been reached in the consideration and decision of the motion to dismiss the writ of error leave but one disposition of the motion to dismiss the appeal possible. As the case pending in the United States District Court of the Sixth Judicial District of the Territory at the time of the admission of the state of New Mexico was one of which a federal court and a state court would have had concurrent jurisdiction if it had been commenced in a state, as the jurisdiction of the court which rendered the judgment over this case, its files and records, was transferred by the enabling act to the proper state court, as no proceedings to remove the case from that court to the United States District Court in the state analogous to the usual proceedings to remove cases of this nature from the state courts to the federal courts have ever been taken, the jurisdiction of the United States District Court in the state never attached to this case, its files, or records.

Its allowance of the appeal was ultra vires, the petition of the United States to it for the appeal was idle, and the appeal must be dismissed.

ALASKA FISHERMEN'S PACKING CO. v. CHIN QUONG.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,173.

1. TRIAL (§ 419*)—MOTION FOR NONSUIT—DENIAL—WAIVER.

Error in the denial of a nonsuit at the close of plaintiff's testimony is waived by defendant's introduction of testimony on its own behalf, without moving at the close of all the testimony for the direction of a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 982; Dec. Dig. § 419.*]

2. CONTRACTS (§ 202*)—CONSTRUCTION—PERFORMANCE—"FURNISH."

A contract by which plaintiff agreed to operate defendant's salmon cannery required plaintiff to provide a sufficient force to pack 2,700 cases per day, and bound him to "receive" the fish on the wharf at N., to clean and prepare them in the fishhouse for canning, and transport them to the cannery. *Held*, that plaintiff's obligation to pack 2,700 cases per day depended on defendant's undertaking to furnish the fish, and that the word "furnish" was used in the sense of "deliver," so that plaintiff was only required to pack such fish as was actually delivered by defendant at the wharf where plaintiff was bound to receive them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 918-928; Dec. Dig. § 202.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3010-3013.]

3. CONTRACTS (§ 202*)—PERFORMANCE—LOSS.

Where a contract for the operation of defendant's cannery only required plaintiff to pack such fish as was furnished by defendant on a particular wharf, defendant was not liable for loss sustained by the dumping of fish which were never brought to the wharf, in the absence of proof that plaintiff was ever informed that the fish were in the scows or lighters ready for delivery, or was given an opportunity to count and inspect them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 918-928; Dec. Dig. § 202.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. CONTRACTS (§ 353*)—PERFORMANCE—INSTRUCTIONS.

In an action on a contract for the operation of defendant's cannery, the court charged that it was claimed by defendant that by reason of insufficient and careless work 2,045 cases of salmon were totally spoiled, that if the jury found that any number of cases were so spoiled solely by reason of plaintiff's neglect, or want of diligence, and without defendant's fault, then defendant would be entitled under its counterclaim to damages suffered, etc. It then charged that the jury was entitled to consider evidence that in the canning industry a given number of cans or cases usually spoiled for one reason or another, and determine whether the fish lost was more than the usual loss in similar operations, and, if not, plaintiff had performed his contract with due diligence. *Held*, that such latter instruction had no reference to the measure of damages which defendant might recover for spoiled cans, but was proper as referring solely to the question whether plaintiff had substantially performed his contract to entitle him to recover thereon.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1829-1844; Dec. Dig. § 353.*]

5. CONTRACTS (§ 322*)—PERFORMANCE—EVIDENCE—MATERIALITY—SALES BY DEFENDANT.

In an action for services performed by plaintiff in carrying out a contract to operate defendant's salmon cannery for the season of 1910, defendant having pleaded breach of contract by plaintiff in not having sufficient help to take care of the work required, and that the same was improperly done, defendant's books of account, showing sales of salmon for that season, were admissible to show performance by plaintiff, that the salmon was packed in accordance with the contract, and that defendant had accepted plaintiff's work, and sold the product thereof.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1306, 1307, 1339, 1347, 1348, 1465, 1492, 1534-1542, 1754, 1768, 1772, 1801, 1802, 1804-1808, 1815, 1816; Dec. Dig. § 322.*]

6. APPEAL AND ERROR (§ 1053*)—RECEPTION OF EVIDENCE—SUBSEQUENT EXCLUSION—CURING ERROR.

Where, in an action on a contract to operate defendant's cannery, plaintiff introduced certain evidence of inadequacy of the canning implements and machinery which was not within the issues, and defendant offered testimony that plaintiff's failure to operate the cannery to the contract capacity resulted from insufficient skill in operating the machines, the court's subsequent striking of an unresponsive answer that the contract capacity was beyond the capacity of defendant's soldering machines cured the error involved in admitting it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

7. APPEAL AND ERROR (§ 1056*)—PREJUDICE—RULINGS ON EVIDENCE.

Where, in an action on a contract to operate defendant's cannery, defendant filed a counterclaim for plaintiff's alleged breach of the contract, but no damages were awarded thereon, defendant was not prejudiced by the sustaining of an objection to a question by which it was sought to prove the market price of Alaska red salmon in the year in question to show the extent of defendant's damage through the loss of salmon spoiled in packing by plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Chin Quong against the Alaska Fishermen's Packing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The parties will be designated plaintiff and defendant as they were in the court below. The plaintiff brought an action upon a contract which it had with the defendant to recover \$20,240.10. There were three counts in the complaint. The second was for the recovery of \$1,671.40 on account of work done and moneys paid and expended for the defendant at its request. The defendant in its answer admitted that sum to be due the plaintiff. The first and third counts were to recover the sum of \$18,568.70, the first count alleging that it was due for breach of contract, and the third count that it was due for labor and services performed by the plaintiff for the defendant at its request in executing and carrying out the contract. The defendant for a counterclaim alleged that between July 2 and July 13, 1910, it delivered at the cannery sufficient fish to have packed each day 2,700 cases in accordance with the contract; that the plaintiff failed to pack said quantity, and by reason thereof the defendant was compelled to and did dump and destroy 31,698 salmon which the defendant had caught and delivered at the cannery, and which the plaintiff was required under the terms of the contract to pack, and that said salmon were worth the sum of \$1,911.39, and that, by reason of the plaintiff's inability to handle the quantity of fish supplied by defendant, the defendant was compelled to limit its fishermen to a number of fish per day less than they could and would have caught, and defendant by reason thereof lost 36,600 salmon, which would have been caught and supplied to the plaintiff for the purpose of canning said 2,700 cases of salmon per day, and by reason of the failure of the plaintiff to perform its contract in packing that number of cases the defendant was damaged in the sum of \$2,206.98, which it was compelled to pay the fishermen for said 36,600 salmon which they would have caught had they not been put upon a limit. By the terms of the contract the plaintiff undertook to furnish all the skilled and unskilled labor required at the cannery of the defendant at Nushagak, Alaska, for the canning of salmon during the season of 1910, and for that purpose to place aboard the defendant's vessel at San Francisco on or about April 12, 1910, a sufficient force of competent men, not less than 140, to prepare and put up every working day during the term of the contract all the fish that could reasonably be expected to be had at the cannery, "say 2,700 cases or more, if possible." The plaintiff agreed to receive the fish on the wharf at Nushagak, to clean and prepare them in the fishhouse for canning, and to transport them to the cannery, to make all cans, etc., and to salt, fill, solder, label, and put in cases nailed up the entire pack of the season. The contract contained the following provisions: "The party of the second part guarantees the pack at this cannery to reach sixty-six (66,000) cases, and hereby agrees, if the amount should be less than that, to pay the party of the first part, the same as if the pack had been that amount. If over sixty-six (66,000) cases each case to be paid for at the price agreed upon in this contract. * * * And it is expressly understood that the party of the first part is to put up not less than twenty-seven hundred (2,700) cases of fish per working day, provided they are furnished with the necessary fish for that purpose, by the party of the second part. In default thereof they agree to forfeit to the party of the second part one (\$1.00) per case." In the first count of the complaint it was alleged that the plaintiff duly performed all the covenants, stipulations, and conditions of said agreement on his part to be performed, that the defendant had paid him \$14,000 as advance payments under the contract, and that there became due and payable under the terms of the contract the sum of \$36,000, and other items were set forth to show that the balance remaining due the plaintiff under the contract was \$18,568.70. In the third count the plaintiff alleged that the defendant was indebted to him in the sum of \$18,568.70 on account of work, labor, and services done and performed by him at its request in fulfilling and performing the same agreements and stipulations as are contained in the contract. Upon the trial the jury returned a verdict in favor of the plaintiff for the sum of \$20,192.10.

G. C. Fulton, of Astoria, Or., and Chickering & Gregory, of San Francisco, Cal., for plaintiff in error.

John T. Thornton, of San Francisco, Cal., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1] Error is assigned to the denial of the defendant's motion for a nonsuit as to the first cause of action, made at the close of the plaintiff's testimony. The assignment of error is of no avail to the defendant in this court for the reason that, after the motion for a nonsuit was overruled, the defendant proceeded to take testimony upon the issues involved in said cause of action, including evidence tending to show that the plaintiff had not performed the contract, and did not, at the close of all the testimony, request the court to instruct the jury to return a verdict in its favor. *Columbia & Puget Sound Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; *Runkle v. Burnham*, 153 U. S. 216, 14 Sup. Ct. 837, 38 L. Ed. 694; *Hansen v. Boyd*, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746; *Walton v. Wild Goose Mining & Trading Co.*, 123 Fed. 209, 60 C. C. A. 155. The case is unlike *Lydia Cotton Mills v. Prairie Cotton Co.*, 156 Fed. 225, 84 C. C. A. 129, in which the court held that error might be assigned to the overruling of a motion for a nonsuit made at the close of plaintiff's evidence on the ground that there was no issue of fact for submission to the jury, notwithstanding that the defendant thereafter took testimony, and did not renew the motion at the conclusion of all the evidence. In that case the motion was based solely upon a proposition of law and no issue or question of fact was involved, and the defendant's evidence had and could have no bearing upon it.

[2] Error is assigned to the construction given by the court below to the word "furnish" as used in the contract. The court in charging the jury on the contested issue, raised upon the counterclaim pleaded by the defendant, as to whether a sufficient number of fish had been supplied by the defendant to the plaintiff to enable the latter to pack the stipulated number of 2,700 cases per day, instructed them to view all of the evidence and determine therefrom whether or not it had been shown on the part of the defendant in its counterclaim that this contract had not been carried out, if it did furnish sufficient fish to enable the plaintiff to pack the number of cases required by the contract, etc., and in that connection instructed them that fish were only furnished under the contract by the defendant to the plaintiff when they were delivered in the manner and at the place designated in the contract. The contract provided:

"The party of the first part agrees to receive the fish on the wharf at Nushagak, to clean and prepare them in the fish-house for canning (it being understood that the scales are to be removed from the fish) and transport them to the cannery."

We think the court below committed no error in construing the contract to mean that the plaintiff's stipulation to pack 2,700 cases per diem depended upon the defendant's undertaking to furnish the fish,

and to furnish them at the place where the plaintiff was under obligation to receive them, which was on the wharf. The defendant in urging its counterclaim relies upon the fact that 31,698 salmon were thrown overboard near the wharf, and that 36,600 more fish might have been caught if the plaintiff had been able to pack them. But there was no allegation in the counterclaim of any fact or circumstance to excuse the delivery of fish at the wharf under the terms of the contract.

[3] The evidence is that the 31,698 fish were never brought to the wharf but were dumped from scows or lighters moored near the cannery. The defendant contends that its readiness and ability to furnish the fish constituted a compliance with its obligation as expressed in the contract, and that it was not required actually to deliver them on the wharf in order to support its counterclaim, and that the word "furnish" does not mean deliver. There can be no question that the word "furnish" as used in contracts often does not mean deliver. But its meaning must be determined in each case by its relation to other terms and provisions of the contract. In this case its meaning is determined by the stipulation of the plaintiff to "receive the fish on the wharf."

The defendant urges that, notwithstanding its failure to plead facts which would constitute an excuse for failure to deliver the salmon, proof of these facts was received in evidence without objection, and that thereby the variance between pleading and proof was waived. But the facts shown are not in themselves sufficient to constitute an excuse. They are that the defendant destroyed fish and limited its catch of fish for the reason that the plaintiff's force was inadequate to take care of them, and to pack the stipulated 2,700 cases. But to charge the plaintiff with liability for the loss or destruction of fish it was necessary to bring the facts to his attention. In the bill of exceptions which is before us there is nowhere any intimation that the plaintiff or his foreman or any of his workmen were ever informed that the fish were in the scows or lighters ready for delivery, or that the plaintiff or his foremen was given an opportunity to count or inspect them. Kep Yung, for the plaintiff, testified:

"All the salmon they furnished us to pack was canned. There were some fish that were no good, and they were thrown away."

Whatever may have been the legal liabilities of the parties, the real question here is whether the court erred in giving the instruction which was excepted to. That instruction submitted to the jury the question whether the defendant had shown that the contract had not been carried out, whether the defendant did furnish sufficient fish to enable the plaintiff to pack 2,700 cases per day, and informed the jury that fish were only furnished under the contract when they were delivered in the manner and at the place designated therein. We find no error in that instruction.

[4] Error is assigned to the instruction of the court to the jury that they might take into consideration the usual loss resulting from spoiled cans that occurs in operations of the kind in question. The court, in a lengthy instruction on that subject, among other things, said, referring to the evidence that in that class of work a given num-

ber of cans or cases will usually be spoiled or destroyed through one cause or another:

"You have a right to take that evidence into consideration and determine whether the loss of fish which has been testified to here—that is, I mean the loss in spoiled cans—was any more than the usual loss that occurs in operations of that kind. If there were not, then the plaintiff has performed the contract as it is contemplated by the law he should have performed it, with due diligence."

It is urged that the instruction so given was erroneous because it conflicts with the following provision of the contract:

"All swelled cans in excess of four (4) per hundred (100), all light cans, all cans collapsed, burst or deficient in seams (where any of said faults or defects are the result of want of skill of the party of the first part) are to be paid for by the said party of the first part at the rate of six (6) cents per can."

No such objection was made in the court below. Counsel for defendant said:

"If your honor please, at this time we would like to take an exception to that portion of the instructions which says that debris cans which have been referred to could be considered a portion of the 2,045 cases."

"Court: What is that?"

"Counsel: That the general loss of a cannery can be considered a part of the 2,045 cases."

"Court: That is for the jury to determine, whether they were a part of such loss or not."

Elsewhere in the charge the court said:

"It is further claimed by defendant in its counterclaim that by reason of the inefficient and careless work of the plaintiff's men 2,045 cases of salmon were totally spoiled, and left at the cannery and could not be marketed. * * * Should you find that this or any number of cases of salmon were so spoiled and rendered valueless solely by reason of the neglect, unskillfulness, or want of diligence of plaintiff's men, and without the fault of defendant, then defendant would be entitled under its counterclaim to the damages suffered thereby, and to be compensated for such loss in accordance with the terms of the contract. In that respect the contract provides" (quoting the terms of the contract).

It is clear that in the charge which is excepted to the court submitted to the jury the question whether or not there were spoiled in performing the contract cans in a quantity greater than is usual in operations of that kind, and that this question was submitted only with reference to its bearing upon the question whether or not the plaintiff had sufficiently performed the contract to entitle him to recover under the first count of the complaint. It had no reference whatever to the measure of damages which the defendant might recover for spoiled cans. There was no error, therefore, in the charge as given.

[5] It is contended that the court erred in permitting the plaintiff to produce in evidence the defendant's books of accounts showing sales of salmon for the season of 1910. The objection made was that the evidence was immaterial. If that was the only objection, the admission of the testimony was not reversible error, since it does not follow that it was injurious to the defendant. But the

evidence may have been admissible as material to show performance by the plaintiff of the contract, or to show that the salmon was packed in accordance therewith, and under the third count of the complaint it may have been material evidence to show that the defendant had accepted the work the plaintiff did in carrying out the contract. The defendant was not bound by the showing of the sales so made. It was competent for it to show, if it could, that the salmon so sold were not the salmon which were packed by the plaintiff under the contract in question.

[6] There was no error in overruling the motion of the defendant to strike out the testimony of Kep Yung concerning the defects of the machinery of the defendant. Kep Yung testified that enough fish were furnished to pack 2,700 cases a day, "but it was beyond the capacity of the soldering machines." A motion was made to strike out the clause of the answer so quoted as not responsive to the question. The motion was denied. Subsequently, however, the court stated that it had become satisfied that under the pleadings the evidence on behalf of plaintiff already introduced tending to show inadequacy or the improper condition of the implements and machinery that were furnished the plaintiff in carrying out the contract was inadmissible, and that the evidence put in by the plaintiff upon that subject should be eliminated. The evidence was stricken out. Counsel urged that, notwithstanding that the evidence was struck out, the prejudicial effect to the defendant of its admission in the first instance was so great as not to be cured by striking it out. There doubtless are cases in which the effect of the erroneous admission of testimony is not cured by subsequently striking it out, cases in which the impression produced by testimony upon the minds of the jury persists notwithstanding the instructions of the court to disregard it. But this does not seem to be such a case. The testimony on the part of plaintiff tending to show that the soldering machines were defective was contradicted by testimony of the defendant tending to show that they were in good condition and sufficient for the purpose of canning 2,700 cases per day, and that the trouble with the plaintiff's operation of the machines was their want of skill in managing and heating the same. In this view of the record, we cannot say that the defendant was prejudiced by the admission of the testimony, and, indeed, we might be justified in holding that the testimony was not impertinent to the issues, and would have been admissible if offered at the proper time in answer to the defendant's counterclaim.

[7] It is contended that the court erred in sustaining an objection to a question asked of a witness by the defendant, the purpose of which was to prove the market price of Alaska red salmon in the year 1910, and to show the extent of the defendant's damage through the loss of salmon spoiled in packing by the plaintiff, and it is argued that, notwithstanding that the measure of such damages was expressed in the contract, the agreement in that respect was not controlling, that, under section 1671 of the California Civil Code, such damages may not be liquidated by agreement of the

parties except in cases where it would be impracticable or extremely difficult to fix the actual damages, and it is said that in the present case there would have been no difficulty in fixing the damages by showing the market price of salmon. The whole contention becomes immaterial in view of the fact that the jury found no damages for the defendant. The error, if error there was, was thereby made immaterial. *Cunningham v. Springer*, 204 U. S. 647, 27 Sup. Ct. 301, 51 L. Ed. 662, 9 Ann. Cas. 897, and cases there cited.

We find no error. The judgment is affirmed.

HOUSTON OIL CO. OF TEXAS et al. v. DOWDEN et al.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1913.)

No. 2,322.

1. ADVERSE POSSESSION (§ 45*)—SUSPENSION OF STATUTE OF LIMITATIONS—EFFECT OF APPOINTMENT OF RECEIVER.

The appointment of a receiver for a corporation puts him in possession only of such property of the corporation as is at the time in its actual or constructive possession, and does not interrupt the running of the statute of limitations in favor of an adverse claimant and occupant of land, the legal title to which is in the corporation, or change his status or rights in any way, either as to the portion of the land in his actual occupancy or the remainder of the tract claimed, as to which his possession is constructive.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 232-254; Dec. Dig. § 45.*]

2. ADVERSE POSSESSION (§ 43*)—INTERRUPTION OF POSSESSION—SEVERANCE OF TITLE.

Where an adverse claimant of a tract of land in actual occupancy of a portion of it only, before his possession had ripened into title by prescription, sold and conveyed a part of that not so occupied, his subsequent possession of the remainder did not inure to the benefit of his grantee.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 213-225; Dec. Dig. § 43.*]

3. ADVERSE POSSESSION (§ 114*)—TEXAS STATUTE—ACQUISITION OF TITLE BY SQUATTER—INDEFINITENESS OF CLAIM.

A claim in an answer of title by prescription to a specific 160 acres of land described by metes and bounds, under Rev. St. Tex. 1895, arts. 3343, 3344, 3347-3349, which give a squatter an absolute title to not exceeding 160 acres by 10 years' undisturbed occupancy and cultivation of a part of such land, is not sustained by evidence which shows that for a part of the necessary 10 years during which defendant's predecessor in interest actually occupied but a small area he claimed only an undefined 160 acres out of a larger tract, and not the specific tract described in his answer.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

Shelby, C. J., dissenting in part.

Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Ancillary bill in equity by receiver of the Houston Oil Company of Texas against L. S. Duff and wife, C. J. Gerlach & Bro., and Frank

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Dowden and wife, to quiet title to land. Decree for defendants, and the receiver appeals. Reversed in part.

This proceeding was an ancillary bill filed by the receiver of the Houston Oil Company in the equity cause in which he was originally appointed, against three adverse claimants, L. S. Duff and wife, C. J. Gerlach & Bro., and Frank Dowden and wife, to lands claimed by the Houston Oil Company, of which claimants were or claimed to be in possession and which were a portion of what is designated the "Gunderman survey." The purpose of the ancillary bill was to have the title of the Houston Oil Company to the lands involved quieted as against the claims of the defendants to it and to be put in possession of them. The claimants Duff and Gerlach & Bro. answered the bill, setting up title to 160 acres of land in the Gunderman survey, described in their answers by metes and bounds, of which 160 acres Gerlach & Bro. claimed two forties by purchase from Duff's predecessor in possession. The claimant Dowden also answered, claiming a portion of the Gunderman survey, described by metes and bounds in his answer. All the claimants relied entirely upon adverse possession for 10 years to sustain their respective claims; the legal title, in the absence of title by adverse possession in claimants, being without dispute in the interveners. The only issue presented in the court below was the right of the claimants to the portions of the Gunderman survey claimed by them and specifically described by metes and bounds in their respective answers by adverse possession of 10 years, under claim to a specific 160 acres of that survey, with actual occupancy of a less portion for the requisite length of time.

H. O. Head, of Sherman, Tex., and T. M. Kennerly, of Houston, Tex., for appellants.

John B. Warren, of Houston, Tex., and V. A. Collins, of Beaumont, Tex., for appellees Frank Dowden and S. A. Dowden.

C. L. Carter, of Houston, Tex. (Baker, Botts, Parker & Garwood, of counsel), for appellee C. J. Gerlach & Bro.

Jacob C. Baldwin, of Houston, Tex., for appellees L. S. Duff and M. D. Duff.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge (after stating the facts as above). The facts bearing upon the Duff and Gerlach & Bro. claims make it appropriate to consider these two cases together.

Possession of part of the 160 acres, 80 of which was claimed by Duff and 80 of which was claimed by Gerlach & Bro., may be traced back as early as 1890 to those under whom both claimants deraign their claim of title. However, the record shows no claim on the part of those, who occupied such parts of the Gunderman survey and with whom the two claimants connect their possession and claim, to any specific 160 acres of that survey which, in the aggregate, consisted of 640 acres, until after November 19, 1895, when one C. K. Withers had the 160 acres surveyed. From that date the evidence tends to show a claim on the part of Withers and his successors to the specific 160 acres which he had caused to be run out and which is the same 160 acres which is specifically described by metes and bounds in the two answers of the claimants. The actual occupancy by inclosure and cultivation, as concerns all the previous occupants and claimants, was

restricted to a very small area of the 160 acres now claimed, though the evidence tends to show that during the whole period of occupancy from 1890 on an undefined 160 acres out of the 640 in the Gunderman survey was actually claimed by various occupants and that the present claimants' improvements were upon a part of it. From November 9, 1895, we think the evidence established that Withers and his successors in possession and claim, while occupying only a small part of the 160 acres, actually claimed that entire quantity, and according to the specific boundaries of the survey which Withers caused to be made at that time. The possession of Withers, whether adverse to the land before November, 1895, or a claim to the improvements on the land only, as is contended by appellants, evidently became adverse both to the land and improvements after the survey. The intervention was not filed until the year 1907, so that, if Withers and his successors remained in continuous possession from November, 1895, until the suit was brought, the necessary 10 years has elapsed, and the character of Withers' prior possession, so far as Duff's claim is concerned, becomes immaterial. The possession of J. E. Duff, who claimed the land from June 9, 1900, to December 8, 1902, is also attacked by appellants. During this period J. E. Duff did not occupy the land in person, but, living remote from it, left it in charge of one Mrs. Sumrall, who cultivated a patch upon it each of the two years, lived adjoining it, and exercised other acts of possession upon it. Until the latter part of this period there was a house on the land, which burned in 1902 and was not rebuilt until after December of that year. We do not think that there was any such interruption of the possession during this time as would defeat appellee's title, if otherwise made out.

[1] It is contended that the appointment of receivers in the original cause worked an interruption of the possession of appellee's predecessors to all but the part of the land in their actual occupancy and under inclosure at the time of such appointment. The effect of the order of the court appointing the receivers was to put in their possession all property which was in the possession, actual or constructive, of the Houston Oil Company and to which it had title. This would not include property in the adverse possession of claimants at the time of the appointment and to which title by such adverse possession had not then ripened, since such property could not be said to be in the possession of the corporation. This is conceded to be the status of the property actually possessed by adverse claimants. We think it equally true that property in the constructive possession of an adverse claimant, though title to it has not become complete in such claimant, could not pass to the possession of the receivers under the order of their appointment, the effect of which was to vest them with possession of only such property as was in the possession of the defendants at the time the order was made; since, though the legal title to such property might have been in the corporation, it had neither actual nor constructive possession of such property. The constructive possession which usually attends the legal title was displaced by the constructive possession of the adverse claimant as against the receivers just as it would be as against the corporation which they represent.

The receivership interrupts the running of the statute only as to property of the corporation, which is not at the time of the seizure in the adverse possession, actual or constructive, of another. Property of the latter character can only be taken out of the possession of the adverse possessor and into that of the court, through its receivers, by adversary proceedings against such adverse possessor. The possession of L. S. Duff of the land claimed under the specific boundaries set out in his answer continued from November 19, 1895, till 1907—twelve years—without interruption. We therefore conclude that the land claimed by him was correctly allotted to him by the court below.

[2] Coming to the claim of C. J. Gerlach & Bro., the land claimed by them was part of the 160 acres claimed by L. S. Duff, which was purchased by them from the two Murphys in the fall of 1903, who in turn had purchased also in the fall of 1903 from L. S. Duff. The record fails to show that either the Murphys or C. J. Gerlach & Bro. ever entered into possession of the two forties so purchased by them after their purchases. The facts as to possession with reference to the claim of C. J. Gerlach & Bro. are identical with those relating to the claim of L. S. Duff up to the time of the sale by Duff to the two Murphys of the two forties afterward conveyed to C. J. Gerlach & Bro. From that time the two claims are to be differentiated in that L. S. Duff remained in possession of the balance of the 160-acre tract not conveyed by him, and there was no subsequent possession of the two forties which he so conveyed. The severance of the title to the two forties in the fall of 1903 prevented L. S. Duff's subsequent possession of the 80 not conveyed from thereafter inuring to the owners of the two forties which he did convey.

[3] So that the adverse possession of these two forties stops with the conveyance which severs their title from the balance of the 160 retained by L. S. Duff and which occurred in the fall of 1903. Ten years had not then elapsed since the survey of Withers in November, 1895. Conceding the possession of J. E. Duff through Mrs. Sumrall from 1900 till 1902 to have been sufficient to continue the running of the statute and that the receivership did not interrupt its running until the receiver filed his ancillary bill in 1907, the elapsed time was still less than the required statutory period. If title by adverse possession in C. J. Gerlach & Bro. exists, it is only by virtue of the possession of their predecessors prior to the survey of C. K. Withers in November, 1895. If Withers, while in possession up to the time of the survey, claimed the improvements only and not the land itself, then the claim of Gerlach & Bro. must fail in any event. In the event that Withers' possession be found to be adverse to the land from its inception, the question as to the character and sufficiency of the prior possession then becomes material upon the claim of Gerlach & Bro. It is quite clear from the record that prior to the Withers survey, while the occupants claimed an undefined 160 acres of the Gunderman survey of 640 acres, in connection with actual possession of a small area, there was no claim of the specific 160 acres described in the answer of C. J. Gerlach & Bro., and the record does not support the contention of appellee Gerlach & Bro. that their predecessors had been in possession of the 160

acres described in their answer, claiming that specific 160 acres adversely to the holder of the legal title, at any time prior to the Withers survey in November, 1895.

Upon the authority of the cases of *Lewis v. Dillingham*, 167 Fed. 779, 93 C. C. A. 267, *Houston Oil Co. v. Jenkins*, 182 Fed. 489, 104 C. C. A. 595, *Houston Oil Co. v. Farr*, 182 Fed. 491, 104 C. C. A. 597, *Bracken v. Jones*, 63 Tex. 184, and *Giddings v. Fischer*, 97 Tex. 184, 77 S. W. 209, construing articles 3343, 3344, 3347, 3348, and 3349 of the Revised Statutes of Texas, 1895, we think the appellee C. J. Gerlach & Bro. failed to establish title to the 80 acres described in their answer by evidence showing that they and their predecessors had been in possession of that 160 acres described in their answer, of which the two forties claimed were a part, claiming the specific lands so described for a period of 10 years adversely to the true owner, and that the court erred in awarding it to them upon this theory, which was the only one presented on their behalf on the trial of the cause in the court below, either by pleading or proof.

In reaching this conclusion, we have not overlooked the construction given to the sections of the Texas Revised Statutes by a line of cases (*Davis v. Houston Oil Co.*, 50 Tex. Civ. App. 597, 111 S. W. 219, and other cases), which hold that the occupancy of a small area, in connection with a claim to an undefined 160 acres of a larger survey, may entitle the occupant to the entire 160 acres, where the land is described in the pleadings and is asked to be awarded the occupant, not upon the idea that he has claimed that specific tract during the required period of limitation, but upon the idea that, though claiming without boundaries during the period of limitation, the statute entitles him to a location of the 160 acres in the larger survey in an equitable manner. This presents an issue as to whether the location contended for by the occupant is in fact an equitable one. The holder of the legal title and the adverse occupant are upon this theory considered to be quasi tenants in common, and each is entitled to be heard upon the question of what constitutes an equitable partition as between them. In the cases of *Lewis v. Dillingham* and *Houston Oil Company v. Jenkins and Farr*, *supra*, the pleadings presented no such issue, and they are to be distinguished from the line of cases last mentioned in this respect and were correctly ruled for that reason.

If the occupant, in his pleadings, relies exclusively upon a showing of adverse possession of 10 years under claim of a specific tract identified by metes and bounds, no issue as to tenancy in common of the entire survey as between him and the owner of the legal title is presented. If the parties, in spite of this condition of the pleadings, actually litigate this issue upon the trial, and the court allots the occupant his 160 acres after a hearing of the issue as to what is an equitable partition as between the parties, no injury could result therefrom. In this case the issue, as to what was a proper partition, was not only not presented by the pleadings, but was not entered upon by the parties or considered by the court upon the trial, and the land could only have been awarded appellees upon the other theory that a claim to the specific land described in the answers by boundaries during the entire

statutory period of limitation had been established by the proof. It may be that the allotment of the two forties described in their answers to appellees constitutes an equitable partition as between them, the other adverse claimants, and the holder of the legal title, and, in that event, no injury has resulted to appellants. In the absence from the record of proof to this effect, and in the absence of a showing that an opportunity was afforded the appellants to be heard upon that question, we cannot indulge in the presumption that no injury resulted. *Giddings v. Fischer*, 97 Tex. 184, 77 S. W. 209; *Louisiana & Texas Co. v. Kennedy*, 103 Tex. 297, 126 S. W. 1110; *Louisiana & Texas Co. v. Stewart* (Tex. Civ. App.) 130 S. W. 200.

Coming to the claim of Frank Dowden, we encounter the same difficulty in affirming the decree. Until the Withers survey, it is clear that Holmes, Dowden's predecessor in possession, claimed only an indefinite 160 acres in the southeast corner of the Gunderman survey of 640 acres. His house was in the adjoining Francis Kriner survey. The field, through the inclosure and cultivation of which he is said to have claimed 160 acres in the Gunderman survey, occupied partly the Kriner survey, partly the Texas & New Orleans section No. 1, partly the Gunderman survey, and encroached over Duff's east line as laid off by the Withers survey. Holmes claimed no specific 160 acres certainly before that survey. After it, the evidence tends to show that he claimed the east line of the Duff tract, as run by the Withers survey, as his west line, and Village creek as his south line. He never claimed under any definite north and east boundaries. The Withers line did not extend as far north as the Richardson tract, to which the Dowden tract was laid off by the decree in this case. The Withers survey, consequently, established only a part of Dowden's west line. We are unable to see from the evidence that even after the Withers survey Holmes claimed any specific 160 acres by definite boundaries—certainly not the land described in his answer, which was only 90 acres and was not in the southeast corner of the survey. As it turned out, there was no such quantity of land to be found subject to his claim in the Gunderman survey, and the court, accordingly, allowed him only 90 acres in a strip, across the east side of the survey, instead of 160 acres in the southeast corner. As in the case of *Gerlach & Bro.*, we think Dowden failed to establish from the evidence that he and his predecessors claimed a specific 160 acres, during the statutory period, as distinguished from a floating 160 acres out of the larger survey. As in the *Gerlach* case, no issue was presented or litigated in the court below as to the right of Dowden to have partitioned to him an undefined 160 acres or any part of it. We think the appellants were entitled to be heard upon the equitable character of any partition made between it and Dowden, and, it not appearing from the record that it was given an opportunity to be heard upon that issue, we cannot assume that the allotment made to Dowden was equitable between him and the appellant, or that no injury resulted to appellant from being deprived of the chance to be heard upon the partition which resulted in the allotment to Dowden of the land de-

scribed in his answer. This conclusion necessarily results in a reversal of the decree of the court below upon the claim of Dowden.

As to L. S. Duff and wife, the decree is affirmed, with costs. As to C. J. Gerlach & Bro., the decree is reversed, and the appellee taxed with the costs of the appeal, and the cause remanded, with directions that a decree be entered in favor of the intervener for the two forties described in the answer of the claimant, unless the answer is amended, upon leave granted, so as to present properly the issue based upon an undefined claim to 160 acres, and, in that event, that further proceedings be had in conformity with this opinion. As to Frank Dowden and S. A. Dowden, the decree is also reversed and appellees taxed with the costs of appeal, and the cause remanded, with directions that a decree be entered in favor of Frank Dowden and S. A. Dowden for that portion of the land allotted to them by the former decree which was inclosed under fence and in the actual possession of claimants when the suit was commenced, unless the answer of claimants is amended, upon leave granted, so as to properly present the issue based upon an undefined claim to 160 acres, and, in that event, that further proceedings be had in conformity with this opinion. The costs on appeal are to be taxed equally between the Houston Oil Company, appellant, C. J. Gerlach & Bro., appellees, and Frank Dowden and S. A. Dowden, appellees.

SHELBY, Circuit Judge (dissenting in part). I concur in the affirmance of the decree in favor of L. S. Duff and wife. I dissent from the reversal of the decree in favor of C. J. Gerlach & Bro., and I dissent from the reversal of the decree in favor of Frank Dowden and S. A. Dowden. I think the record shows that, if the pleadings had been framed as suggested in the opinion of the majority, the result should have been the same. The parties, in my opinion, according to the evidence in the record, are entitled to the lands allotted to them respectively, and I find nothing inequitable in the decrees. I am of the opinion that they should all be affirmed.

UNION PAC. R. CO. v. AMERICAN SMELTING & REFINING CO.

(Circuit Court of Appeals, Eighth Circuit. December 19, 1912.)

No. 3,769.

(Syllabus by the Court.)

1. CARRIERS (§ 194*)—CONSIGNEE'S LIABILITY FOR FREIGHT CHARGES.

An implied contract by the consignee to pay the freight charges on goods shipped under a bill of lading containing the stipulation, "the consignee or consignees paying freight," or any similar provision, arises from the acceptance by the consignee of the delivery of the goods under the bill, because the consignee knows that the carrier looks to him for the charges and by delivery waives his lien therefor in the faith that the consignee will pay them.

For the same reason an implied contract by the consignee to pay the freight charges, in the absence of a bill of lading, arises where the con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

signee knows that the carrier looks to him for their payment and waives his lien therefor and delivers the goods in the faith that the consignee will pay them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 870-872; Dec. Dig. § 194.*]

2. CARRIERS (§ 194*)—CONCLUSION.

Interstate shipments of ore consigned to the defendant were made. The legal charges for the transportation of this ore and the reasonable value of the transportation were \$7,549.70. The consignee received the ore, paid \$4,610.86 of the charges, and refused to pay the remainder thereof. *Held*, these facts raised an implied contract by the consignee to pay the unpaid balance of the legal charges.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 870-872; Dec. Dig. § 194.*]

In Error to the District Court of the United States for the District of Utah; J. A. Marshall, Judge.

Action by the Union Pacific Railroad Company against the American Smelting & Refining Company. From a judgment sustaining a demurrer to the complaint, plaintiff brings error. Reversed and remanded.

George H. Smith, of Salt Lake City, Utah (P. L. Williams, of Salt Lake City, Utah, N. H. Loomis, of Omaha, Neb., and Frank K. Nebeker, of Salt Lake City, Utah, on the brief), for plaintiff in error.

Franklin S. Richards, of Salt Lake City, Utah (Edward S. Ferry and Daniel Hamer, both of Salt Lake City, Utah, on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. This writ of error challenges a judgment which sustained a demurrer to the complaint of the Union Pacific Railway Company, on the ground that it failed to state facts sufficient to constitute a cause of action, and adjudged that the complainant should take nothing and pay the costs of the suit.

The complaint contained the proper jurisdictional averments, and also alleged these facts: In July and August, 1907, the plaintiff transported over its railroad and over its connecting lines from Goldfield, Nev., by a route designated to the initial carrier by the shipper, to Denver, Colo., seven car loads of ore, and delivered them at Denver to the American Smelting & Refining Company, the defendant, a corporation, to which they were consigned. The legal charges for this transportation and the reasonable value thereof were \$7,549.70. The defendant paid \$4,610.86 of these charges when it received the ore. The plaintiff has demanded the payment of the unpaid balance thereof, but the defendant fails and refuses to pay any part of them.

The main argument in support of the judgment below is that the consignor or shipper is primarily liable under a contract of consignment for the freight charges on the goods, and the consignee is not;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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that a new contract, either express or implied, between the carrier and the consignee is indispensable to the creation of a liability of the latter for such charges; and that the acceptance of the goods by the consignee raises no implication of a contract by the latter to pay the charges for the transportation thereof. But if this contention be sound, it is not conclusive of the question presented in this case, because the averments of the complaint, read, as they must be, in the light of the acts of Congress and the law, present much more than a mere acceptance by the consignee of the goods transported. By virtue of the law of the land, the railroad company had a lien upon this ore until it was delivered to the consignee for the charges for its transportation, and when the railroad company delivered it to the defendant it lost that lien. The amount of the charges for the transportation was fixed by schedules of rates legally published pursuant to the act to regulate commerce and the amendments thereof (Act June 29, 1906, c. 3591, 34 Stat. 586, § 2); and it was unlawful for the plaintiff to give, and for the consignee or any other person to receive, any rebate or concession from this amount, whereby this ore should be transported at a less rate than that named in the schedules of rates filed and published under the acts of Congress. Act Feb. 19, 1903, 32 Stat. c. 708, p. 847 (U. S. Comp. St. Supp. 1911, p. 1309). These things the consignee knew; for it was charged with knowledge of the law.

[1] Thus it will be seen that when the complaint and the law, in accordance with which it must be construed, are read together, its averments show that this ore was consigned to the defendant; that the legal charges for its transportation due to the plaintiff were \$7,549.70; that the defendant knew that there were legally published schedules of rates of transportation which fixed the amount of these charges; that the giving by the plaintiff, or the receipt by it, or by any other person, of any rebate or concession from that amount was illegal; that the railroad company had a lien upon this ore for this amount, which it lost by delivering it to the defendant; and that with this knowledge the defendant accepted the ore and paid \$4,610.86 of the legal transportation charges and refused to pay the balance. These facts leave no rational avenue of escape from the implication that the defendant, in consideration of the waiver by the plaintiff of its lien for its charges and its delivery of the goods, agreed to pay the lawful charges for their transportation.

[2] These facts certainly established an implied contract by the defendant to pay the \$4,610.86, which it did pay. But the legal charges were \$7,549.70. The legal presumption is that the plaintiff intended to charge, and the defendant intended to pay, a legal, and not an illegal, amount for this transportation; and the conclusion is that the facts pleaded evidence an implied contract by the defendant to pay the legal charges for the transportation, and that the complaint states a good cause of action. *Hatch v. Tucker*, 12 R. I. 501, 503, 34 Am. Rep. 707; 3 Kent's Comm. (14th Ed.) * page 222, * page 228, note (e); *Hutchinson on Carriers* (3d Ed.) § 807; 4 Elliott on Railroads, § 1559; *Philadelphia & Read-*

ing R. R. Co. v. Barnard & Sons, 3 Ben. Rep. 39, 41, Fed. Cas. No. 11,086; North German Lloyd v. Heule (D. C.) 44 Fed. 100, 101, 10 L. R. A. 814; Davison v. City Bank, 57 N. Y. 81, 83; Dart v. Ensign, 47 N. Y. 619, 622; New Haven & Northampton Co. v. Campbell, 128 Mass. 104, 105, 35 Am. Rep. 360; Grant & Stone v. Wood, 21 N. J. Law, 292, 295, 47 Am. Dec. 162; Taylor v. Fall River Iron Works (D. C.) 124 Fed. 826; Gates v. Ryan (D. C.) 37 Fed. 154, 155; Neilsen v. Jesup (D. C.) 30 Fed. 138, 139; Morse v. Pesant, *41 N. Y. 16, 18; Gulf, Colorado, etc., Ry. Co. v. Hefley, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910; Texas & Pacific Ry. Co. v. Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 448, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Baldwin Sheep & Land Co. v. Columbia Southern Ry. Co., 58 Or. 285, 114 Pac. 469, 471.

In every case of this character, in which there is no express contract by the consignee to pay the transportation charges, the question is whether or not the facts of the case raise the implication of such a contract. The law is well settled that such a contract is implied from the acceptance by a consignee or consignees of goods shipped under a bill of lading which contains the stipulation, the consignee or consignees paying freight, or any similar provision. Hatch v. Tucker, 12 R. I. 501, 503, 34 Am. Rep. 707; Cock v. Taylor, 13 East. 399; Dougal v. Kemble, 3 Bing. 383, 389; Merian v. Funck, 4 Denio (N. Y.) 110, 114; Pelayo v. Fox, 9 Pa. 489; Blanchard v. Page, 8 Gray, 281, 291; North German Lloyd v. Heule (D. C.) 44 Fed. 100, 101, 10 L. R. A. 814; Taylor v. Fall River Iron Works (D. C.) 124 Fed. 826, 828; Neilsen v. Jesup (D. C.) 30 Fed. 138, 139; Gates v. Ryan (D. C.) 37 Fed. 154, 155; Davison v. City Bank, 57 N. Y. 81, 85; Grant & Stone v. Wood, 21 N. J. Law, 292, 295, 47 Am. Dec. 162.

The reason for this rule is that the consignee accepts the goods with knowledge that the carrier looks to him for payment of the transportation charges and waives his lien for them by delivery in reliance upon the consignee's implied promise, evidenced by his acceptance of the goods, that he will pay the charges. But this reason exists in all its force, in the absence of a bill of lading, wherever the consignee accepts the goods knowing that the carrier looks to him for payment, waives his lien, and delivers the goods in the faith that he will pay the charges. And as there is in such cases the same reason for the implication of a promise by the consignee to pay these charges as in cases where bills of lading exist, the same implication ought to and does arise. Hatch v. Tucker, 12 R. I. 501, 505, 506, 34 Am. Rep. 707; 4 Elliott on Railroads, § 1559; New Haven & Northampton Co. v. Campbell, 128 Mass. 104, 105, 35 Am. Rep. 360; Irzo v. Perkins (D. C.) 10 Fed. 779, 780, 781.

The fact has not been disregarded that it was held in Sanders v. Vanzeller, 4 Ad. & Ellis (Q. B.) 259, that it was a question for a jury, and not for a court, whether or not a contract by the purchaser of a part of goods consigned under a bill of lading, which was con-

ditioned that the consignee or consignees should pay the transportation charges, was implied to pay a part of the charges by the purchaser's acceptance of the part of the goods he purchased, and that there are other authorities to this effect (*Wilson v. Kymer*, 1 M. & S. 157; *New York & New England Railroad Co. v. Sanders*, 134 Mass. 53), and still other authorities more or less out of accord, upon the special facts of the cases, with the propositions which have been stated (*Dempsey, Son & Co. v. Philadelphia & Reading Ry. Co.*, 30 Pa. Co. Ct. R. 484; *Central Railroad Co. of New Jersey v. MacCartney*, 68 N. J. Law, 165, 52 Atl. 575, 578; *Old Colony Railroad Co. v. Wilder*, 137 Mass. 536; *Merritt & Chapman D. & W. Co. v. Vogelman* [D. C.] 127 Fed. 770; *Elwell v. Skiddy*, 77 N. Y. 282; *Coleman v. Lambert*, 5 M. & W. 501); but the stronger reasons and the more persuasive authorities are in accord with the views which have been expressed; and the facts stated in the complaint are such that a verdict of the jury upon them in favor of the defendant could not be lawfully sustained by the court.

The judgment below must therefore be reversed, and the case must be remanded to the court below, with directions to overrule the demurrer and to permit the defendant to answer.

HIMROD v. FT. PITT MINING & MILLING CO.†

(Circuit Court of Appeals, Eighth Circuit. December 16, 1912.)

No. 3,721.

(*Syllabus by the Court.*)

1. LIMITATION OF ACTIONS (§ 183*)—CONTINUING TRESPASS—PLEA OF STATUTE TO ENTIRE COMPLAINT GOOD TO PART THOUGH BAD AS TO PART.

In an action for damages for continuing trespasses, a plea that they were not committed within the time limited by statute is sufficient to invoke the bar of the statute against those committed without the time limit, and there can be no recovery on their account, although some of the trespasses charged were within the time, and damages therefor are recoverable.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 683-692; Dec. Dig. § 183.*]

2. TRIAL (§ 45*)—EXCLUSION OF EVIDENCE—NECESSITY OF OFFER.

If a question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party who propounds it, its exclusion is error, although no offer to prove the fact sought to be established is made.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 110-114; Dec. Dig. § 45.*]

In Error to the Circuit Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by the Ft. Pitt Mining & Milling Company against Fred E. Himrod. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
† Rehearing denied February 26, 1912.

Charles C. Parsons, of Salt Lake City, Utah, and F. L. Collom, of Idaho Springs, Colo., for plaintiff in error.

Caldwell Martin, of Denver, Colo. (Charles W. Waterman, of Denver, Colo., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. On March 28, 1908, the Ft. Pitt Mining & Milling Company brought an action against Fred E. Himrod for \$30,000 and recovered a judgment for \$5,000. For its cause of action the Mining Company alleged that on the 1st day of March, A. D. 1903, and "at other times prior and subsequent thereto," Himrod had "willfully and maliciously entered" upon its Oneida Lode without its permission, had dumped thereon waste material he had taken from their property, had thereby "covered up, filled and entirely destroyed" the tunnels, drifts, adits, shafts, winzes, stopes, and workings on and in that lode, and "by his said acts and continuing trespasses" had injured the plaintiff and its property in excess of \$30,000. Himrod answered: (1) That he had never entered or dumped waste material on the Oneida Lode willfully or maliciously, or without the permission of the Mining Company; (2) that the acts of which complaint was made were done by him with leave of the plaintiff; and (3) that "the cause of action set forth in said plaintiff's complaint did not accrue within six years before the commencement of the action." The statutes of Colorado provided that all actions for waste and trespass on lands should be commenced within six years after the cause of action should accrue and not otherwise. Mills' Ann. Stat. of Colorado 1891, § 2900. There was evidence that in 1894 Himrod entered level No. 2, whereon was the Lamartine tunnel which had been driven in the Oneida Lode 540 feet by the plaintiff, drove it 360 feet farther within that lode and several thousand feet beyond that lode until it reached the Lamartine mines in which the defendant was a part owner, and that then and thereafter he worked these mines through this tunnel, that between his entry upon the tunnel in 1894 and the commencement of this action he dumped waste material from time to time on the surface of the Oneida Lode, and filled a stope under the tunnel, and that the plaintiff sustained substantial damages from the dumping on the surface of the lode and also from the filling of the stope. At the close of the trial the court instructed the jury to find what damage, if any, the plaintiff had sustained from the filling of the stope, and also what damage, if any, it had suffered from the dumping upon the surface of the lode, and to return a verdict against the defendant for the sum of these damages, if, under its other instructions, they found that the plaintiff was entitled to recover at all.

While proving its case in chief the plaintiff called a Mr. Nicholls as a witness, who testified that he worked for the plaintiff on the Oneida Lode in 1892, that he subsequently worked there for the defendant, that the defendant filled the stope under the tunnel, and he guessed that he was dumping there a month or two, though he had

nothing to do with the length of time he was dumping into the stope and made no note of it. After this testimony was given, in response to questions by plaintiff's counsel, the defendant's counsel, upon the cross-examination of this witness, asked him this question: "When did you do the dumping to which you have testified that you did in the No. 2 level when you were in the employ of Mr. Himrod?" An objection was made and sustained to this question and its answer on the sole ground that the evidence sought was immaterial, and this ruling is assigned as error.

The plaintiff does not allege in this case a single causal wrongful act and subsequent damages as aggravation. If it had done so, the statute of limitations would have run from the date of the causal wrongful act, and, if it barred that act, it would have barred all subsequent damages. *McConnel v. Kibbe*, 33 Ill. 175, 180, 85 Am. Dec. 265; 25 Cyc. 1138, note 79. Here the plaintiff avers that on March 1, 1903, and on divers other days and times prior and subsequent thereto, the defendant trespassed upon its land, and it demands damages for these continuing trespasses. This therefore is an action for continuing trespasses, and in such an action the damages from those committed without the time limited by the statute are barred thereby, although the damages from those committed within that time may be recovered. It is therefore difficult to perceive why proof whether the damages from the filling of the stope were inflicted without or within the six years before the commencement of the action limited by the statute for its beginning was not material.

In support of the ruling which excluded this evidence, counsel for the plaintiff below present three arguments. In the first place, they argue that this evidence was immaterial because the plea of the statute was to the entire complaint and was barred as to the part thereof which charged the trespasses within the six years and hence was insufficient as to all of them. Conceding for the moment, for the sake of the argument, the rule and its applicability to this case, the plea raised the issue whether or not any of the alleged trespasses were committed within the six years, and the defendant had the right to support his side of that issue by evidence that every one of the trespasses, and hence that any one of them, was not committed within the six years. The question challenged was asked in the plaintiff's main case before the court or the jury could have known whether the defendant's evidence would or would not establish the fact that all the trespasses were without the six years. The plaintiff had inquired of the witness whether the defendant had dumped waste material into the stope and how long he had continued to do so, and the witness had answered these queries. The question challenged was therefore proper cross-examination, and the answer to it was material because it would have tended to prove whether or not the trespasses in filling the stope were committed within or without the six years.

[1] Again, the rule cited is inapplicable to actions for continuing trespasses. In such an action a plea that none of the trespasses challenged was committed within the time limited by the statute for commencing suit upon it is sufficient to invoke the bar of the statute

against those committed without, although some of those charged were committed within, the time limited by the law. Angell on Limitations (6th Ed.) § 307; *Bergman v. Inman*, 43 Or. 456, 72 Pac. 1086, 73 Pac. 341, 99 Am. St. Rep. 771; *Missouri Pacific Ry. Co. v. Houseman*, 41 Kan. 300, 304, 21 Pac. 284, 286; *Carpentier v. Mitchell*, 29 Cal. 330, 336; 25 Cyc. 1138, note 80; *Baldwin v. Calkins*, 10 Wend. (N. Y.) 167, 179; *Western Union Telegraph Co. v. Moyle*, 51 Kan. 203, 32 Pac. 895; *Union Pacific Ry. Co. v. Foley*, 19 Colo. 280, 35 Pac. 542; *Smith v. Philadelphia & R. R. Co. (C. C.)* 50 Fed. 903; *Dean v. Thwaite*, 1 Morr. Min. Rep. 77. Every such trespass raises a new cause of action, and a plea that all of the trespasses charged were committed without the time limited by the statute is a plea that each of them was so committed, and those trespasses regarding which the proof sustains the plea fall, while those concerning which the proof fails to sustain it, stand. A separate plea for each alleged trespass, or any plea more specific than that here presented, would be burdensome, confusing, and useless.

In the second place, counsel for the Mining Company insist that the evidence sought was immaterial because the plaintiff by its complaint limited its claim to damages to the dumping of waste material extracted by the defendant from lands other than the Oneida Lode and counsel insist that the dumping in the stope was of material taken from the Oneida Lode. But the defendant had two defenses to this claim for damages for filling the stope: (1) That the claim was barred by the statute; and (2) that the stope was filled with material from the Oneida Lode. The fact that he proved, or that he had the privilege of proving, the latter defense, did not deprive him of the right to prove the former, nor make his proof of it immaterial. The subsequent course of the trial is a demonstration of this answer, for the court permitted the jury to find, and they probably did find, that the plaintiff was entitled to damages for this filling when no such recovery could have been allowed if satisfactory proof that the stope was filled more than six years before the action was commenced had been permitted and had been made.

[2] In the third place, the Mining Company's counsel insist that the ruling of the court below sustaining the objection to the defendant's question was not error because the defendant did not offer to prove the fact which he was trying to establish by the answer he sought to his query. But if a question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party who propounds it, its exclusion is error although no offer to prove the facts sought to be established by the question is made. *Buckstaff v. Russell*, 151 U. S. 626, 636, 14 Sup. Ct. 448, 38 L. Ed. 292; *Stanley v. Beckham*, 153 Fed. 152, 155, 82 C. C. A. 304; *Harris v. Brown*, 187 Fed. 6, 7, 109 C. C. A. 60; *Scotland County v. Hill*, 112 U. S. 183, 186, 5 Sup. Ct. 93, 28 L. Ed. 692; *Mo. Pac. Ry. Co. v. Castle*, 172 Fed. 841, 844, 97 C. C. A. 124. The question which defendant's counsel asked falls far within this rule, the evidence sought by it was relevant to one of the chief issues in the case, and the rule which excluded the answer was a fatal error which was subsequently re-

peated in the taking of the testimony of the witness Hanchett and which seems to have conditioned the entire trial.

It is assigned as error that the court refused to admit in evidence a lease of a portion of the Oneida Lode and a deed of the perpetual right of way through the tunnel made by the plaintiff to the defendant and another, to whose right the defendant had succeeded, on August 15, 1894. These instruments were marked Exhibits 16 and 17, and the defendant offered them in evidence to prove that he entered, drove, and used the tunnel in the Oneida Lode with the permission of the plaintiff and not willfully and maliciously. As this case must be reversed and a new trial must be directed on account of the error in the trial of the issue upon the plea of the statute of limitations, and as it is possible that the error, if any, here was extracted by the charge of the court, it is unnecessary to discuss the questions this assignment presents. It is sufficient to say that if the issues remain the same at the second trial as they were upon the first, and these exhibits are offered in evidence, this court is of the unanimous opinion that they should be received. They disclose and fix the rights, privileges, and relations of the parties to this action to the Oneida Lode and the Lamartine tunnel.

Some other questions are presented by brief and argument, but their discussion is unnecessary to the disposition of the case, and the judgment is reversed, and the case is remanded to the court below for the error in the trial of the issue under the statute of limitations, with directions to set aside the verdict and grant a new trial.

UNITED STATES v. BERNARD et al.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,180.

1. PUBLIC LANDS (§ 8*)—TRESPASS—RIGHTS OF UNITED STATES.

Irrespective of Act Cong. Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), relating to trespass and depredations on the public domain, the United States has all the common-law rights of an individual in respect to depredations committed on public lands, and may come into equity and avail itself of summary remedies given by such court in such cases.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 8, 148; Dec. Dig. § 8.*]

2. PUBLIC LANDS (§ 19*)—DEPREDACTIONS—REMEDIES—EQUITY—STATUTES.

Act Cong. Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), makes all inclosures of public lands illegal, and enlarges the equitable jurisdiction of the federal courts in enjoining such inclosures, extending it to injunctions against maintaining fences, the effect of which is to inclose public lands. *Held* to give the courts of the United States jurisdiction in equity over a suit to restrain the inclosure of public lands and to recover damages for the use thereof as incidental relief.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PUBLIC LANDS (§ 19*)—INCLOSURE—USE—DAMAGES.

Where defendants wrongfully inclosed public lands and deprived the public of the use thereof, they were liable to the government for the reasonable value of such use, notwithstanding the lands were not injured thereby, and would not have been leased by the government, if they had not been inclosed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.*]

4. PUBLIC LANDS (§ 19*)—EQUITABLE RELIEF—EXEMPLARY DAMAGES.

Where complainant sought relief in equity for the wrongful inclosure of public lands, it waived its right to claim exemplary damages which it might have recovered at law; equity having no jurisdiction to award such damages.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.*]

Appeal from the District Court of the United States for the District of Arizona; Julian W. Mack, Judge.

Suit by the United States of America against N. C. Bernard and others. From a judgment of dismissal, the United States appeals. Reversed and remanded.

J. E. Morrison, U. S. Atty., of Bisbee, Ariz., and J. C. Forest, Asst U. S. Atty., of Prescott, Ariz.

John B. Wright, of Tucson, Ariz., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The government filed a complaint in the court below, alleging in substance that the appellees had, without right or authority of law, on or about November 1, 1908, knowingly, willfully, and recklessly, without the appellant's consent and in disregard of its rights, inclosed with fences 840 acres of the public lands of the United States, and that they had maintained said fences and inclosure for their own exclusive use and occupancy continuously thereafter, and had caused and permitted a large number of their cattle and other live stock to graze upon the lands embraced within said inclosure, to the actual damage of the appellant in the sum of \$600. The relief prayed for was that the inclosure be adjudged unlawful, that the appellees be ordered to remove said fences, and adjudged to pay \$600 actual damages and \$500 exemplary damages. Prior to the trial of the cause, the appellees removed the fences. The court, upon a showing of that fact, dismissed the case at the cost of the appellees, holding that the United States was not entitled to damages.

Upon appeal to this court, the sole question presented is whether the court below erroneously denied the appellant damages. It requires the citation of no authority to sustain the general proposition that, where a court of equity has entertained jurisdiction of a controversy for any purposes, or on any ground, it may retain jurisdiction for the purpose of administering complete relief or doing complete justice with respect to the entire adjustment of the subject-matter in controversy. But the appellees deny that the court below, in entertaining jurisdiction of the case at bar, was exercising the general powers of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an equity court, or that it was authorized to grant any of the incidental relief which ordinarily pertains to suits in equity, and they contend that the jurisdiction was special and limited, and measured by the express terms of Act Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), and that, since that statute confers jurisdiction only to grant injunctions to restrain violations of the act and to order the destruction of inclosures, the court was powerless to grant other relief such as it might grant in an ordinary suit for an injunction.

[1] There can be no question that, irrespective of the act of 1885, the United States has all the common-law rights of an individual, in respect to depredations committed on the public lands. In *Camfield v. United States*, 167 U. S. 518-524, 17 Sup. Ct. 864, 867 (42 L. Ed. 260), Mr. Justice Brown said:

"It needs no argument to show that the building of fences upon public lands with intent to inclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the government, or by the ordinary processes of courts of justice."

And he observed that if the act of February 25, 1885, be construed as applying only to fences actually erected upon public lands, it was manifestly unnecessary. In *Cameron v. United States*, 148 U. S. 301, 13 Sup. Ct. 595, 37 L. Ed. 459, the court said that the suit provided for by the act was in the nature of a suit in equity.

In *United States v. Brighton Ranch Co. (C. C.)* 26 Fed. 218, the defendant had built a fence partly on its own land, and partly on land belonging to the government, and inclosing a tract of several thousand acres. The suit was in equity to compel the defendant, by mandatory injunction, to remove its fence from the government land, and thus leave the inclosed government land free from all obstructions to approach. The court said:

"The question made is whether the government can come into a court of equity and avail itself of the summary remedies given by such a court. We are of the opinion that it can; and, whether the act of the defendant comes within the technical definition of *purpresture* or that of a public nuisance, we are of the opinion that the government can come into a court of equity, and by its orders have an end put to this trespass on the public rights. * * * We think, too, an action of injunction is the appropriate remedy, and that an action of ejectment would not furnish full protection to the government."

This was held by Judges Brewer and Dundy on exceptions to the answer. On the final decision of the case (*United States v. Brighton Ranch Co. [C. C.]* 25 Fed. 465) Mr. Justice Miller said:

"I am of opinion that the United States is entitled to its injunction, mandatory as to so much of the fence complained of as exists, and prohibitory as to building any future fences, so far as either of them comes within the following principles: (1) There exists no right in the defendants to build any fence on the lands of the United States. (2) All lands are for this purpose lands of the United States, so long as the legal title remains in the United States. (3) It is the right of the United States, and its duty, to protect all such lands from this misuse in cases where there have been any kind of entries, whether of pre-emption, homestead, or private entry, though the purchase money be paid, so long as the legal title remains in the United States, except where these latter parties build their own fences, or give ex-

press license to others to do it. In these cases it holds the title in trust, and can maintain this bill to remove the fence or prevent its erection."

Those decisions were rendered in a case which was begun before the act of February 25, 1885 was adopted, and without discussion of or reference to that act.

[2] As we construe that act, it was its purpose, first, to render illegal all inclosures of public lands; and, second, to enlarge the equitable jurisdiction of the Circuit Courts in the matter of enjoining such inclosures, and to extend it to injunctions against maintaining fences on lands other than the public lands, with the effect to inclose the public lands; also to confer the same jurisdiction upon the District Courts. Its effect is to give to the courts of the United States jurisdiction in equity over such a case as the case at bar, and it should be held that the jurisdiction is as broad as the ordinary jurisdiction of courts of equity in the classes of cases in which injunctions may issue, and that it comprehends the granting of any appropriate relief ordinarily incidental to such a suit, such as an accounting and the awarding of damages.

[3] Notwithstanding that the acts of the appellee were deliberately done with full knowledge of the statute, and were continued in disregard of numerous notices to abate the inclosure, and that the value of the use of the inclosed public land was the full amount sued for, the appellees contend that no damages are recoverable by the government, for the reason that the public land of the United States has not been injured by their acts, that they have destroyed no government property, that the general public was licensed to pasture on the lands, and that others would have used the pasture on the lands if the appellees had not inclosed them. These reasons are not sufficient. It is true there has been no destruction of government property by the appellees, as in the case of cutting and removing timber, or taking turpentine sap from pine trees on government lands; but the appellees, by their wrongful act, have obtained the sole benefit of that which belonged to the United States, and was of value, the right to the use of which the government might have leased and thereby have obtained revenue. It is no answer to the claim of the government for damages to say that the government would not have used the land or derived any pecuniary benefit therefrom, and that the government had licensed the public to use it. The license was a general one, and was for the benefit of all the people who were in a situation to avail themselves of it, and it was for the public good, and the fact that the government would have received no money consideration for the use of the pasture lands inclosed by the appellees is no ground for saying that it may not recover damages measured by the actual value of that which belonged to the United States, and which the appellees took without authority of law, and against the prohibition of the law. The fact that a plaintiff in an action for continued trespass would have made no use of the land which the defendant has wrongfully used to his advantage and profit will not prevent the plaintiff from recovering the actual value of that which has been so used and acquired by the defendant. The measure of damages for an appropriation of land by

a continuing trespass is the worth of the use of the property. *McWilliams v. Morgan*, 75 Ill. 473; *Western Book & Stationery Co. v. Jevne*, 179 Ill. 71, 53 N. E. 565; *Eno v. Christ*, 25 Misc. Rep. 24, 54 N. Y. Supp. 400; *Bunke v. New York Telephone Co.*, 110 App. Div. 241, 97 N. Y. Supp. 66, affirmed in 188 N. Y. 600, 81 N. E. 1161; *Jacob Tome Inst. v. Crothers*, 87 Md. 569, 40 Atl. 261.

[4] The appellant's counsel contend that the government is entitled to recover exemplary damages. In actions of trespass, where the injury is wanton or malicious, or gross and outrageous, or is done against the protest of the plaintiff, or in known violation of the law, the court may permit the jury to add to the measured compensation of the plaintiff further damages by way of punishment or example, the amount thereof to be left to the jury's discretion, in view of the special, peculiar circumstances of the case. But the function of a court of equity goes no farther than to award as incidental to other relief, or in lieu thereof, compensatory damages. It has no authority to assess exemplary damages. By applying to a court of equity for relief, the complainant waives all claim to vindictive damages. *Bird v. Wilmington, etc., R. Co.*, 8 Rich. Eq. (S. C.) 46, 64 Am. Dec. 739.

The decree is reversed, and the cause is remanded to the court below, with instructions to assess and award damages against the appellees in accordance with the views herein expressed.

UNITED STATES v. COLORADO MIDLAND RY. CO.

(Circuit Court of Appeals, Eighth Circuit. December 21, 1912.)

No. 3,810.

(*Syllabus by the Court.*)

MASTER AND SERVANT (§ 87*)—SAFETY APPLIANCE ACTS—CONSTRUCTION.

The proviso of section 4 of the act of April 14, 1910 (36 Stat. 299, c. 160 [U. S. Comp. St. Supp. 1911, p. 1328]), which permits the hauling in interstate commerce by a common carrier of a properly equipped car, whose equipment has become defective or insecure, to the nearest available repair point, without liability for the penalty previously imposed for such an act by the safety appliance acts, is inapplicable to offenses committed before its passage and neither that proviso nor the other provisions of the act relating to that subject operate retrospectively.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 138; Dec. Dig. § 87.*]

Duty of railroad companies to furnish safe appliances, see note to *Fenton v. Bullard*, 37 C. C. A. 8.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by the United States against the Colorado Midland Railway Company for violation of the safety appliance act. Judgment for defendant, and the United States brings error. Reversed on certain counts, with instructions to grant new trial.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ralph Hartzell, Asst. U. S. Atty., of Denver, Colo. (Harry E. Kelly, U. S. Atty., of Denver, Colo., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C., on the brief), for the United States.

George A. H. Fraser, of Denver, Colo. (Henry T. Rogers, Daniel B. Ellis, Lewis B. Johnson, and Pierpont Fuller, all of Denver, Colo., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. This writ of error questions judgments for the defendant upon two counts of a complaint for violations of the Safety Appliance Acts (Act March 2, 1893, 27 Stat. 531, c. 196, as amended by Act April 1, 1896, 29 Stat. 85, c. 87 [U. S. Comp. St. 1901, p. 3174], and Act March 2, 1903, 32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1911, p. 1314]; and Act April 14, 1910, 36 Stat. 298, c. 160 [U. S. Comp. St. Supp. 1911, p. 1327]), which charged, and upon the trial of which there was substantial evidence tending to prove, that the defendant, on and after the 7th of March, 1910, and before the 1st of April in that year, hauled in interstate commerce two cars which had been properly equipped, but which had become so defective at Arkansas Junction, while they were being used on its line of railroad, that they were not equipped as required by the acts, a distance of 77 miles to Cardiff, the nearest available point where the equipment could be repaired and the place where the defects were discovered.

By section 6 of the act of March 2, 1893 (27 Stat. 532, c. 196), the defendant was liable for a penalty of \$100 for so hauling each of these cars. But section 4 of the act of April 14, 1910, re-enacted this declaration of liability, and added others, with the proviso that:

"Where any car shall have been properly equipped as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used on its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section 4 of this act, or section 6 of the act of March 2, 1893, as amended by the act of April 1, 1896, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point." 36 Stat. 299.

The court below instructed the jury that under this act the defendant had the right to haul the cars, found in a defective condition in the manner testified to and described in these counts, to the first repair point and there repair them, and that such hauling was not a violation of the acts of Congress, unless such repair point was unreasonably distant from the place where the cars were first discovered to be in a defective condition. The United States, the plaintiff below, excepted to this charge and assigned it as error, on the ground that the act of April 14, 1910, was inapplicable to the facts of the case, because it was not enacted until after the offenses charged were committed; and the question presented to this court is: Did the proviso

of section 4 of the act of April 14, 1910, and a compliance therewith, discharge a common carrier from a violation of the Safety Appliance Acts committed before the act of 1910 was passed?

A first reading of the proviso fails to suggest to the mind that Congress intended that it should have any retrospective effect. On the other hand, it produces a strong impression that the question should be answered in the negative. In opposition to this view counsel for the defendant argues: (a) That acts of Congress of a remedial nature should be given a retrospective operation whenever it is necessary to do so in order to give effect to the intention of the Congress; and the soundness of this proposition is admitted. (b) That the proviso is rather a part of the body of the act, an exception and an amendment to the main provision of section 4, and an amendment of the provision of the act of 1893 defining the offense, than a proviso: but it was not enacted by Congress in the form of an exception, or in the form of an amendment to the definition of the offense in the act of 1893, and no good reason occurs why the court should transform it into either in order to interpret it. (c) That the provisions of section 5 of the act of 1910, to the effect that "except as aforesaid," that is, that except that "within the limits specified in the preceding section the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes," all the provisions, liabilities, and requirements of the earlier safety appliance acts "shall apply to this act," has the same meaning as if they had declared that the provisions, liabilities, and requirements of the earlier acts should not apply where a car with defective or insecure equipment is hauled to the nearest available repair point; but section 5 reads that except that the movement of such a car "may be made without incurring the penalty," and thereby clearly refers to a movement to be made and a penalty liable to be incurred after the passage of the act, and there is neither express nor implied reference in it to a movement made or a penalty incurred before its passage. (d) That Congress intended by the act of 1910 to relieve offenders from liabilities for previous violations of the earlier safety appliance acts in cases like those specified in the proviso of section 4, wherein the penalties had not been reduced to judgment because the act of 1910 contains no express provision saving these penalties; but the act of 1910 was not a repealing, but was a supplemental, act, and no saving clause was requisite to preserve lawful claims based on statutes that were not repealed. And (e) that it clearly appears from all these considerations, and from the purpose and terms of the act, that the Congress intended thereby to discharge all offenders who had complied with the terms of the proviso from all liabilities they had incurred by previous violations of the earlier safety appliance acts.

But a review of these contentions of counsel for the company and a study of the act and all its terms has forced our minds to the opposite conclusion. It is an indisputable canon of construction that, unless the intention of the legislative body that a law should operate retrospectively is clear, it should not be given that effect. There is no provision or term in this act which expresses any intention of the

Congress to release offenders who prior to its passage had found and hauled cars with defective or insecure equipment in the manner described in the proviso of section 4 from the liabilities for penalties which they had admittedly incurred by such acts under the earlier safety appliance acts. On the other hand, the proviso of section 4, and the other provisions of the act of 1910 relating to this subject, use expressions which either customarily or naturally refer to the future. The proviso reads that a car whose proper equipment has become defective or insecure "may be hauled" to the nearest available repair point without liability for the penalties imposed by the earlier safety appliance acts and by that act. The act speaks at the time of its passage. This provision means that after that time, after the passage of the act, a car may be hauled without liability; and under the rule that the expression of one excludes other like times or conditions, this provision excludes the thought that at any previous time a car could have been so hauled without liability for the penalties. There is nothing in the act to indicate that it was the purpose of Congress to release offenders from liabilities already incurred. Its purpose appears to have been to permit common carriers to avoid possible liabilities in the future, and upon a consideration of its purpose, its terms, and its provisions the conclusion is that the proviso of section 4 of the act of April 14, 1910, is inapplicable to violations of the Safety Appliance Acts prior to its passage, and that the act did not release offenders who had hauled cars with defective or insecure equipment in the manner described in the proviso of section 4 from liabilities for penalties incurred by such previous violations of the earlier safety appliance acts.

The judgments upon counts 9 and 11 of the complaint in this action must therefore be reversed, and the case must be remanded to the court below, with instructions to grant a new trial upon those counts.

PHILADELPHIA & G. S. S. CO. v. M'CAULDIN.

(Circuit Court of Appeals, Third Circuit. February 3, 1913.)

No. 1,685, October Term, 1912.

1. ADMIRALTY (§ 118*)—REVIEW ON APPEAL—FINDINGS OF FACT.

A finding of fact by an admiralty court made on conflicting testimony heard in whole or in part before the judge should have great weight with an appellate court, and should not be disturbed unless clearly wrong.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758-775, 794; Dec. Dig. § 118.*]

2. SHIPPING (§ 58*)—TIME CHARTER—RIGHT OF CANCELLATION.

Evidence considered, and *held* not to justify a time charterer in canceling the charter, on the ground that the vessel had become defective for service within the meaning of a charter provision giving such right.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233-244, 314, 327; Dec. Dig. § 58.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. SHIPPING (§ 58*)—CHARTERS—FITNESS OF VESSEL—INSPECTION AS EVIDENCE.

In the absence of any evidence of concealment, latent defect, bias, or fraud, an inspection of a vessel and a finding of fitness for charter service should have persuasive weight.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233-244, 314, 327; Dec. Dig. § 58.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Chas. B. Witmer, Judge.

Suit in admiralty by Joseph McCauldin, managing owner of the steamship Lassell, against a cargo of lumber, the Philadelphia & Gulf Steamship Company, claimant, and same against the Philadelphia & Gulf Steamship Company in personam. Decrees for libelant, and respondent appeals. Affirmed.

For opinion below, see *McCaldin v. Philadelphia & G. S. S. Co.*, 198 Fed. 328.

Lewis, Adler & Laws, of Philadelphia, Pa., for appellant.

Howard M. Long, of Philadelphia, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. The libels in this case concern a dispute over two charter parties, wherein Joseph McCauldin, managing owner of the steamship Lassell, hired that vessel to the Philadelphia & Gulf Steamship Company. The original charter was from June 15, 1909, and its extension on December 28, 1909, was for six months. The charter hire not having been paid in full, McCauldin filed a libel in rem against a cargo of lumber aboard the Lassell to recover \$2,375, charter hire from March 28 to April 14, 1910. The defendant admitted the use of the vessel, but made, by cross-libel, a counterclaim for damages for breach of the charter party. On final hearing the court awarded plaintiff the full amount of the charter hire, \$2,375, and also allowed defendant a reduction of \$746.40 for extra coal consumed by reason of a reduction of allowable steam pressure made by the government inspectors, and \$742.69 for expenses of delays caused by the stranding of the vessel at Tinicum Island. From a decree for the balance of \$885.91, defendant appealed.

The second libel was in personam against the Philadelphia & Gulf Steamship Company to recover \$4,607.98, an alleged balance of charter hire from April 14 to June 12, 1910, after allowing certain credits realized upon recharters. Defense was made to such second libel on the ground of a surrender of the vessel, alleged to be justified by plaintiff's failure to maintain the Lassell as provided by charter, and her failure to proceed with dispatch. The court below did not sustain such defense, and entered a decree in favor of libelant for \$3,917.84, being the charter hire in full, \$4,607.98, less \$690.14 of allowances not here necessary to detail. From a decree for said balance of \$3,917.84, defendant appealed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The substantial controversy between the parties turns on two questions: Was the *Lassell* maintained up to the charter party requirements, viz., "she being then tight, staunch, strong and every way fitted for the service. That the owners shall maintain her in a thoroughly efficient state in hull and machinery for the service. That the captain shall prosecute his voyage with the utmost dispatch"? Secondly. Was the charterer, by virtue of the provision, "subject to cancellation of the said charter on thirty days' notice, if the ship becomes defective for service," justified in surrendering the vessel?

[1] On the first issue a large mass of conflicting testimony was given by both sides, either before the judge or by deposition. This testimony, as appears by his opinion, was carefully considered, and upon it he has found against the defendant. This finding, as said in *The Charles Hebard v. Lyons*, 56 Fed. 315, 5 C. C. A. 516, and approved in *City of Cleveland v. Chisholm*, 90 Fed. 431, 33 C. C. A. 157, and *Monongahela Con. Coal & Coke Co. v. Schinnerer* (C. C. A.) 196 Fed. 375, "ought to have great weight with an appellate court, hearing the cause upon the record only, and without any additional evidence. The judgment below ought not to be disturbed, excepting upon a clear showing that it was wrong."

[2] The testimony has had our careful re-examination, and we are satisfied its substantial weight justifies the court's findings. Without entering into a discussion in detail of the very numerous phases of the proofs, we may refer to the fact that the vessel had been classified as "A No. 1" by the American Bureau of Shipping, and that the local surveyor of the bureau, in response to a complaint of the defendant, made a reinspection of the *Lassell*, covering several different days, both with and without steam, and found the complaints unfounded. He so reported to the bureau, and the *Lassell's* classification was continued to run four years. Moreover, after the defendant gave notice of the intention to cancel, the *Lassell* was on complaint of defendant inspected by the federal Board of Local Inspectors, who on April 15, 1910, reported, "after having carefully examined vessel's hull, boilers and machinery, we are of opinion she is in a condition to navigate with safety as a steamer, on the route named in her certificate of inspection." The integrity of this inspection is supported by the testimony of the officials who made it.

[3] In the absence of any evidence of concealment, latent defect, bias or fraud, an inspection, like a survey, should have persuasive weight, for, while a survey is not conclusive and in certain cases not a justification, yet, as said in *The Amelie*, 73 U. S. (6 Wall.) 27; 18 L. Ed. 806, one supported by a survey "is in a condition to furnish the court or jury reviewing the proceedings, strong evidence in justification of his conduct." See, also, *The Piskataqua* (D. C.) 35 Fed. 622. Nor are we impressed with the contention that the defendant was debarred from thoroughly inspecting the ship. In brief the circumstances were that in pursuance of an agreement between the parties a joint survey was attempted. As its surveyors, defendant sent some eight or ten persons. They were permitted to examine the body of the ship, but, when it came to inspecting the machinery and boil-

ers, plaintiff declined to permit them to do so, claiming that a number of them were not surveyors, but boiler makers sent to secure evidence. At the same time plaintiff, however, agreed that one of the ten, Boyt, who all parties agree was a competent engineer and steamship surveyor, and any person he might select, should be permitted to make the survey below. The testimony of Boyt, which was: "First we went through the 'tween decks and lower holds, and I, in company with the other surveyors, made a very careful examination of all of the framing and beams and bulkheads and beam gussets and 'tween decks, and then we came on up to the deck, and looked around. I tested the seams as far as I could, and the sills of the houses, and around the combing of the hatches, and when we were through with that we went along to the engine room door. Mr. McCauldin stood there with the captain, and Mr. McCauldin said that he could not permit so large a body of surveyors to go down below, and then, of course, I turned around to Mr. Wright to know what we were to do. Mr. McCauldin said that he would be perfectly satisfied for me to go alone, if necessary, to represent both parties, or to go in company with Mr. Wright, or with any other surveyor, but this course was objected to, and the survey was called off"—satisfies us that the plaintiff cannot be justly charged with unreasonably preventing a survey.

Without entering on all the minor questions raised, it suffices to say that on the broad question of the Lassell fulfilling the charter requirements we agree with the conclusion reached by the court below. It follows, therefore, that the cancellation of the charter was not justified.

The decrees below are affirmed.

MATTLEY v. GIESLER.

(Circuit Court of Appeals, Eighth Circuit. December 17, 1912.)

No. 3,739.

APPEAL AND ERROR (§ 1214*)—REVERSAL—REMAND—JURISDICTION OF TRIAL COURT—FURTHER PROCEEDINGS.

Where, in a suit by a bankrupt's trustee to recover the value of property sold under a chattel mortgage, on the theory that the mortgage was a voidable preference, the trustee alleged that the value of the property was \$2,500, and on appeal the Circuit Court of Appeals reversed a decree dismissing the bill, and remanded the cause with directions to enter a decree in conformity with the views expressed in the opinion, without any finding as to the value of the property, the trial court was not bound to render judgment for the trustee for the amount demanded in the bill, but was authorized to receive further evidence as to the value of the property, and find the value from such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4715; Dec. Dig. § 1214.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action by Herman N. Mattley, trustee in bankruptcy of one Parker, against John Giesler, administrator c. t. a. of the estate of Joseph W. Wolfe, deceased. Judgment for defendant, and plaintiff appeals. Modified and affirmed.

John S. Bishop, of Lincoln, Neb., for appellant.

D. H. McClenahan, of Lincoln, Neb. (John M. Stewart, of Lincoln, Neb., on the brief), for appellee.

Before SANBORN and HOOK, Circuit Judges, and McPHERSON, District Judge.

SANBORN, Circuit Judge. Mr. Mattley, the appellant, is the trustee of the estate of Parker, who was adjudged a bankrupt on April 6, 1907. At the time of his adjudication his property was in the hands of Mr. Wolfe, who had taken possession of it under his chattel mortgage on April 3, 1907, and on September 14, 1907, he sold it under this mortgage for \$825. On December 24, 1907, the trustee brought a suit in equity against Wolfe to set aside this chattel mortgage and the proceedings under it, on the ground that it constituted a voidable preference, and to recover of Wolfe the value of the mortgaged property, which the trustee alleged to be \$2,500. Witnesses were produced, evidence was introduced, the case went to a final hearing, and the District Court dismissed the bill, on the ground that the mortgage did not constitute a voidable preference. Upon an appeal this court reversed the decree and remanded the case, with directions to enter a decree in conformity with the views expressed in its opinion. *Mattley v. Giesler*, 187 Fed. 970, 110 C. C. A. 90. Upon the return of the case to the District Court that court considered the evidence and the arguments and briefs of counsel on the question of the value of the property taken by Wolfe, found that it was worth \$1,040.50, and rendered a decree in favor of the trustee for that amount, interest, and costs. The trustee challenges this decree, because the court did not find and adjudge the property taken by Wolfe to have been of greater value, and assigns several errors in support of this contention.

On July 15, 1909, the court below filed an opinion to the effect that the mortgage was fraudulent and void, and that the trustee was entitled to recover "the amount prayed for in this bill (\$2,500), which is less than the proven value of the goods seized and converted by the defendant." This court said in its opinion that the trustee was entitled to recover the value of the property taken by Wolfe, and remanded the case for a decree in conformity with that view. Counsel for the trustee maintains that these facts imposed the duty on the court below to render a decree for \$2,500 and interest, and that it erred in considering the evidence again and making another finding of the value of the property. But upon a motion for a rehearing the court below on September 28, 1909, withdrew its opinion of July 15, 1909, in which it found the property to be worth \$2,500, and delivered

another opinion to the effect that the defendant was entitled to a decree, and it was pursuant to the latter opinion that the decree of dismissal of the bill of May 24, 1909, was made. In this latter opinion no finding of the value of the property appeared. There was, therefore, no finding or judgment of the value of the property taken by Wolfe in effect when the decree of dismissal was rendered, or when that decree was reversed, and it was not error for the court below, after receipt of the mandate, to consider the evidence in the case and find the value of the property. Indeed, it was necessary for it to do so in order that it might obey the mandate of this court.

Another contention of counsel for the trustee is that, laying aside the first finding on the subject, the evidence clearly proves that the value of this property was at least \$2,500. This claim is met by the defendant with a denial, and with the legal proposition that where the chancellor has determined a question of fact upon conflicting evidence the appellate court will not disturb his findings, unless it clearly appears that he has fallen into some error of law, or has been misled by some substantial mistake of fact. The proposition of law, however, is deprived of its persuasive force in this case by the fact that the chancellor made two findings of the value of this property on the same evidence, one of \$2,500 and another of \$1,040. This court has accordingly carefully examined the record upon this question of value. The property consists of many items. The evidence of its value comprises a confused and contradictory mass of testimony and inventories, and a review and discussion of it would furnish no guide for future decisions and would be useless. Suffice it to say that this evidence has persuaded this court that the value of the property taken by Wolfe was \$1,500.

Let the decree below, therefore, be so modified that it shall adjudge that the trustee shall recover, in addition to the recovery therein granted, \$460 and interest on this sum at 7 per cent. per annum from April 4, 1907, and let the decree, so modified, be affirmed. Let the appellant recover his costs in this court, and let the case be remanded to the court below, with instructions to modify its decree as herein directed.

CLARK v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 18, 1912.)

No. 3,751.

POST OFFICE (§ 48*)—MISUSE OF MAILs—INFORMATION WITH REFERENCE TO ABORTION—INDICTMENT.

An indictment for mailing a letter designed to give information where, from whom, and by what means articles intended for procuring an abortion could be obtained, set out a letter addressed to accused, who was a surgeon, containing a statement that the writer was pregnant, desired relief, and requested that defendant write and tell her whether or not he could get her out of the trouble, etc. The indictment then alleged that defendant in answer, for the purpose of giving the information requested,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

knowingly deposited in the mail a letter, addressed to his correspondent and signed by him, stating that her case could be treated with perfect success, and that if she had no place to stay she could come direct to his office, and that such letter gave information where, how, from whom, and the means by which articles and things designed, adapted, and intended for procuring abortion could be obtained, etc. *Held*, that the indictment was not demurrable for failure to state facts sufficient to show wherein the letter gave information where, from whom, or by what means articles designed, adapted, and intended to procure abortion could be obtained, in that it did not state what articles or things were to be used, how they were to be used, or when or by whom they were to be used.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.*]

Nonavailable matter, see notes to *Timmons v. United States*, 30 C. C. A. 29; *McCarthy v. United States*, 110 C. C. A. 548.]

In Error to the District Court of the United States for the Western District of Missouri; John C. Pollock, Judge.

S. M. Clark was convicted of mailing a letter giving information where, from whom, and by what means articles designed, adapted, and intended for procuring an abortion could be obtained, and he brings error. Affirmed.

Leslie J. Lyons, U. S. Atty., and Thad. B. Landon, Asst. U. S. Atty.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

SANBORN, Circuit Judge. The defendant below was convicted and sentenced for depositing in the mail a letter giving information where, from whom, and by what means articles designed, adapted, and intended for procuring abortion could be obtained, in violation of section 3893 of the Revised Statutes (U. S. Comp. St. 1901, p. 2658).

The first specification of error is that the court erred in refusing to sustain the demurrer to the indictment. The indictment charged that about February 13, 1911, the defendant was a practicing physician and surgeon at Kansas City, Mo., and that E. A. McBride on February 10, 1911, addressed to him a letter, which is set forth in full in the indictment. That letter was dated "Garden City, Kansas, Feby. 10, 1911," was addressed to "S. M. Clark, #4 E. 10th St., Kansas City, Mo.," was signed "Miss E. Alexander," contained a statement that the writer was in trouble, that she was pregnant and must have relief soon, and a request that he would write and tell her whether or not he could get her out of this trouble, and how long it would take and how much it would cost. Following this letter the indictment contains an allegation that in answer to it the defendant, for the purpose of giving the information requested therein, knowingly deposited for mailing and delivery an envelope addressed to "Miss E. Alexander, P. O. Box 891, Garden City, Kansas," which contained a written letter, dated "Kansas City, Mo., Feb. 11, 1911," addressed to Miss E. Alexander, and signed by the defendant, in which he wrote that her case

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

could be treated with perfect success, and that if she had no place to stay she could come direct to his office, northeast corner Tenth and Main. This letter was also set forth in full. And the indictment contained the further averment that the defendant deposited for mailing this letter giving information where, how, from whom, and the means by which articles and things designed, adapted, and intended for producing abortion could be obtained, and where and by whom acts and operations for the producing of abortions could be done and performed.

The ground of the demurrer to this indictment was that it did not state facts sufficient to show wherein the letter to Miss E. Alexander gave information where, or from whom, or by what means articles designed, adapted, and intended to produce abortion could be obtained; that is, that it did not state what articles or things were to be used, or how they were to be used, or when or by whom they were to be used. But the letter to Miss Alexander and the letter to which it was an answer, must be read and considered together, and when so considered they give unmistakable information that the articles and things to be used to procure abortion could be obtained at the defendant's office in Kansas City from him, and that they were to be used and applied by him. No further information was requisite to violate the statute. Nor would any discussion or argument make the fact that this indictment clearly charged the offense denounced by the statute more manifest than the reading of the indictment itself, and the conclusion is that there was no error in overruling the demurrer to it.

There are other specifications of error, but the rulings they attempt to assail were not challenged by objection or exception, and hence they are not here for review.

The judgment below must be affirmed, and it is so ordered.

WILSON CYPRESS CO. v. POZO Y MASCOS et al.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1913.)

No. 2,354.

TAXATION (§ 5*)—PROPERTY TAXABLE—PUBLIC LANDS.

Public lands are not taxable by the state prior to the issuance of patent.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 17, 31-44; Dec. Dig. § 5.*]

Appeal from the District Court of the United States for the Southern District of Florida; Jas. W. Locke, Judge.

Suit in equity by the Wilson Cypress Company against Enrique del Pozo y Mascos and others. Decree for defendants, and complainant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. C. Cooper and C. M. Cooper, both of Jacksonville, Fla., for appellant.

Wm. W. Dewhurst, of St. Augustine, Fla., and Jos. H. Jones, of Orlando, Fla., for appellees.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. The lands in controversy were not segregated from the public domain, and the title thereto remained in the United States until the issuance of the patent; therefore they were not taxable by the state of Florida at the several times they were listed for taxes and sold for nonpayment thereof.

In the other questions involved in the case we find no reversible error.

The decree appealed from is affirmed.

GIBSON v. SAMPLES.

In re HARVEY.

(Circuit Court of Appeals, Fourth Circuit. November 19, 1912.)

No. 1,105.

APPEAL AND ERROR (§ 1022*)—REVIEW ON APPEAL—QUESTIONS OF FACT.

Findings of fact by a referee, who heard the witnesses, confirmed by the District Court, will not be disturbed by an appellate court, unless clearly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. A. 9.]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi, in Bankruptcy; Alston G. Dayton, Judge.

In the matter of O. L. Harvey, bankrupt; W. P. Samples, trustee. From an order of the District Court, M. C. Gibson appeals. Affirmed.

J. Blackburn Ware, of Belington, W. Va., and F. E. Parrack, of Tunnelton, W. Va., for appellant.

W. P. Samples, of Grafton, W. Va., for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

PER CURIAM. There are a number of assignments of error. In terms, some of them raise questions of law. An examination of the record, however, shows that such questions are not material, if the conclusions of the court below as to the facts are correct. The referee had the witnesses before him. The conclusion he reached was confirmed by the learned judge of the court below. The record does not persuade us that they were mistaken.

Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

STAFFORD CO. v. COLDWELL-GILDARD CO. et al.
(Circuit Court of Appeals, First Circuit. January 30, 1913.)
No. 994.

1. PATENTS (§ 136*)—REISSUES—AUTHORITY TO GRANT.

To authorize a reissue patent under Rev. St. § 4916 (U. S. Comp. St. 1901, p. 3393), there must be clear proof that the error which renders the original patent inoperative or invalid arose by "inadvertence, accident or mistake," and that the party asking for relief acquires no more than he was originally entitled to; and what is called for by the words "same invention" in the statute cannot be gathered from mere inferences or suggestions with reference to what the patentee might or might not have conceived.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 198½; Dec. Dig. § 136.*]

2. PATENTS (§ 328*)—VALIDITY OF REISSUE—STOP-MOTION FOR LOOMS.

The Coldwell & Gildard reissue patent, No. 11,923 (original No. 637,234), for a warp stop-motion for looms, in which claims 19 to 30 inclusive are new, is void as to claim 19 and all subsequent claims which are substantially broader than claim 23 as not for the same invention disclosed in the original patent.

Appeal from the District Court of the United States for the District of Massachusetts; Arthur L. Brown, Judge.

Suit in equity by Coldwell-Gildard Company and others against the Stafford Company. Decree for complainants, and defendant appeals. Reversed.

Wilmarth H. Thurston, of Providence, R. I., for appellant.

William K. Richardson, of Boston, Mass. (J. Lewis Stackpole, of Boston, Mass., on the brief), for appellees.

Before COLT, PUTNAM, and DODGE, Circuit Judges.

PUTNAM, Circuit Judge. This case, in our opinion, turns on the validity of a reissued patent to Coldwell & Gildard, dated July 30, 1901, No. 11,923, entitled "Warp Stop-Motion for Looms." The reissued patent contained 30 claims, of which claims 19 to 30, each inclusive, were brought in on the reissue, and are the only claims we need especially trouble ourselves about.

The patent is for a warp stop-motion for looms. Original claims 3 to 18, each inclusive, related to a combination of a drop-bar with other elements, constituting a warp stop-motion for looms; but claims 1 and 2 related only to a peculiar form of a drop-bar. The claims introduced in the reissue relate to a subject-matter different from any of the original claims. They do not cover stop-motion combinations, and they are not all limited to a particular kind of drop-bar. They concern the location of the drop-bars in whatever form they may be, and the capability of free movement with reference to the avoiding of chafing of the threads.

In the original patent there was nothing whatever of this, unless the following expression in the specification, namely:

"It will also be noticed that by the relative location of the lease-rods with the circuit-rods a warp-thread can only chafe against one of the adjacent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

drop-bars instead of that at each side, as would be the case if the lease-rods were located in advance of the circuit-rods."

In lieu of that, we find in the specification of the reissued patent the following:

"It will also be noticed that, owing to the location of the lease-rods with reference to the drop-bars and to the shape which we give these drop-bars, each drop-bar is entirely free from contact with the warp-threads on either side of its own warp-thread, and can only come in contact with them (if at all) by jumping upward while the loom is in motion. By this arrangement we prevent the injurious chafing of the warp-threads which takes place where each thread passes by the drop-bars of the two adjacent threads, and is normally in contact with one or both of these drop-bars."

[1] It is not necessary here to go into any lengthy examination of the authorities, because the law is too manifest to need multiplication of restatements. The statute (Rev. St. § 4916 [U. S. Comp. St. 1901, p. 3393]) provides that "whenever any patent is inoperative or invalid by reason of a defective or insufficient specification," "if the error has arisen by inadvertence, accident or mistake," "the Commissioner shall" "cause a new patent for the same invention to be issued." Two leading and imperative requirements stand in the path of a reissue: First, that the error must have arisen "by inadvertence, accident or mistake"; and, second, that the new patent is to be for the "same invention." Consequently, it must appear, in some manner provided by law, that the invention for which the reissue is granted was in the contemplation of the patentee at the outset, and that he failed to acquire it by reason of "inadvertence, accident or mistake."

Starting with these propositions, the rules which govern the Commissioner and the courts are those applied by the fundamental principles of equity, that in order to relieve against "inadvertence, accident or mistake" there must be clear and positive proof that there was such "inadvertence, accident or mistake," and that the party asking for relief acquires no more than he was originally entitled to. The burden of maintaining the facts to which these requirements relate is of a character that requires clear and positive proof, in harmony with the universal rules of equity not to disturb the existing status except by proof of that character. No mere inferences can take the place of such proof. Ordinarily, what is called for by the words "same invention" should appear in some way on the face of the original patent, and it cannot be gathered from mere inferences or suggestions with reference to what the patentee might or might not have conceived.

[2] Of course, in many respects, the ruling of the Commissioner in authorizing a reissue, like all other departmental rulings, may be of special weight and force, and sometimes quite conclusive. This applies not to questions of law appearing on the face of the record, but to questions of fact, and sometimes to mixed questions of law and fact, especially where the real issue is the application of doubtful or disputed facts to the law. Also it must be remembered that, with reference to the topic of "inadvertence, accident or mistake," equity gives great effect in neutralizing the errors of scriveners where the scrivener departs from what was clearly the intention of the parties. In the petition for the reissue, and the deposition which is a part

thereof, the patentees represented to the Commissioner that they had intrusted the matter of an application for letters patent to their solicitor, "to whom as they supposed they had sufficiently explained all the features of the machine which they desired to patent, including the improvements for preventing the chafing of the warp-threads, which," as they said, "formed an important part of their invention, and which they supposed he had properly described and claimed"; and that they had, however, "recently discovered that, while the specification correctly describes the manner in which the warp-threads are passed over and under the lease-rods, and while the drawings correctly show, especially in Fig. 5, the manner in which the chafing of the warp-threads is prevented, the passage in the specification which especially relates to this subject is not clearly or accurately expressed," "and that upon discovering this defect they at once instructed their solicitor to apply for a reissue in their behalf." This undoubtedly, according to the practice of the Patent Office, laid the foundation for an investigation by the Commissioner of the two important questions involved, namely: First, of "inadvertence, accident or mistake"; and, second, of the question of the "same improvement." The question of the "same improvement" is not very satisfactorily answered. However, this was a matter to a certain extent within the jurisdiction of the Commissioner, and so far within his jurisdiction, that we think, upon the entire state of facts presented in this record, we should follow his ruling thereon. The other question, that of "inadvertence, accident, or mistake," was a pure question of fact, and on this record was clearly within his jurisdiction, as no evidence was anywhere offered contravening the patentees' propositions in reference thereto.

In view, therefore, of the Commissioner's decision, we find that the reissue was valid, at least to a certain extent. This, however, is far from concluding the difficulties of the case.

There are substantial differences between the various claims numbered from 19 to the end. Claim 19 is a broad claim, and one which ought not be sustained except after careful consideration. It would prohibit almost any form of arrangement of drop-bars by which chafing would be avoided; while claim 23, which we were told at bar substantially represents in detail the method of the patentees, is extremely limited. That is as follows:

"23. A loom, having, in combination, means which divide the warp-threads into intersecting planes, guides located beneath the warp-threads on opposite sides of the intersection between said planes and out of vertical alignment with said dividing means, and a drop-bar for each warp-thread, said drop-bars being arranged in banks positioned respectively by said guides, and suspended respectively from said warp-threads on opposite sides of said intersection, each drop-bar terminating at its upper end below the plane of the warp-threads which is intersected by the thread from which said drop-bar is suspended, whereby each drop-bar comes in contact only with the warp-thread which supports it, and is free to move vertically."

Nevertheless, the decree went against the respondent on all the new claims en masse. It becomes necessary, therefore, to consider whether the reissue is valid for anything beyond claims of the character of

No. 23. The petition for reissue, to which we have referred, uses the words:

"While this specification correctly describes the manner in which the warp-threads are passed over and under the lease-rods; and while the drawings correctly show, especially in Fig. 5, the manner in which the chafing of the warp-threads is prevented," etc.

This *prima facie* bars the patentees from claiming any improvement beyond that specifically described in Fig. 5. Moreover, the complainants, describing the reissue, now say:

"It corrected the inaccurate paragraph as to chafing, stating what was plain from the original patent, namely, that in the patentees' arrangement the drop-bar would be free from contact with the warp-threads of each of the adjacent drop-bars."

Also they say that "a part of their invention was the subcombination in question shown in the drawings, particularly in Fig. 5." Consequently, the whole goes back to what was thus pointed out by Fig. 5, and the broad claim of No. 19 was beyond anything the Patent Office could lawfully have found to be a part of the patentees' improvement, or consequently to have been omitted by "inadvertence, accident or mistake." Consequently, therefore, the reissue is invalid as to claim 19, and all claims substantially broader than claim 23. It is not within our province to go through all these numerous claims, and sift out the result of our conclusion. Therefore we leave it to the District Court to work out the details of that character.

It must also be remembered that while with reference to all the new claims, Nos. 19 to 30, each inclusive, the question of infringement might be very simple, yet with regard to claims of the character of claim 23, the question of infringement might be of an entirely different character, and the infringement not found. This fact may require special investigation in this particular.

We say nothing herein on the question of anticipation, because with reference to a claim of the nature of claim 23 it would be almost beyond belief that anticipation could be found on this record.

The decree of the District Court is reversed, and the case is remanded to that court for proceedings in accordance with our opinion passed down the 30th day of January, 1913; and the appellant recovers its costs of appeal.

EMERSON & NORRIS CO. v. SIMPSON BROS. CORPORATION.

SAME v. STRUCTURAL CEMENT STONE CO.

(Circuit Court of Appeals, First Circuit. January 30, 1913.)

Nos. 961, 962.

1. PATENTS (§ 62*)—ANTICIPATION—SUFFICIENCY OF PROOF.

The rule applied that to sustain the defense of anticipation in a patent case, by a prior use by another, where there has been a considerable lapse of time, something more than oral testimony, is ordinarily re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quired to establish the identity of structure as between what is patented and what is alleged to have anticipated it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 78; Dec. Dig. § 62.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS OF MAKING ARTIFICIAL STONE.

The Stevens patent, No. 624,563, for a process of making artificial stone by the use of a mold of relatively dry sand which absorbs the surplus moisture from the stone compound, *held*, on the evidence, not anticipated, valid, and infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Suit in equity by Emerson & Norris Company against Simpson Bros. Corporation, and same against the Structural Cement Stone Company. Decrees for defendants, and complainant appeals. Reversed.

For opinion below, see 188 Fed. 808.

Louis W. Southgate, of Worcester, Mass., and R. A. Parker, of Detroit, Mich., for appellant.

Frederick L. Emery and Laurence A. Janney, both of Boston, Mass. (Emery, Booth, Janney & Varney, of Boston, Mass., on the brief), for the appellees.

Before COLT, PUTNAM, and DODGE, Circuit Judges.

PUTNAM, Circuit Judge. These suits were proceedings on alleged infringements of a patent for invention, and the bills were dismissed, and these appeals taken to us by the complainant below. We find it necessary to consider only one question.

The substantial defense is anticipation, first by reference to the general use of sand molds, as to which all we need say is that it is not in the same art, as this patent relates only to artificial stone; and the alleged anticipatory publications were not within the strict rules laid down by Walker on Patents (4th Ed.) § 57, which we have several times accepted and applied. A further reference will be required to what is known as the Sellars patent, which will not be intelligible until we have proceeded somewhat further.

These suits are based on the patent issued on May 9, 1899, on an application filed November 12, 1897, to Charles W. Stevens, entitled a patent for a "process of making artificial stone," No. 624,563. The facts, except as referred to by us, are sufficiently stated in the opinion of the learned judge of the District Court for the District of Maine, 188 Fed. 808. The first claim, which is all we need consider, is as follows:

"1. The process of forming artificial stone consisting in molding the stone compound while in a plastic or semiliquid state in or on a mold formed of relatively dry sand and then allow the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or nonliquid form, substantially as and for the purpose set forth."

The peculiar features of this claim are that the mold is formed of "relatively dry sand," which "absorbs the surplus moisture from the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

compound." It might seem to a nonexpert doubtful whether this method of molding could succeed; but not only the complainant shows that it did succeed, but the respondents' attempts to make use of it confirm the complainant's position in this respect.

The particular defense which we need consider is an English patent to Sellars, of April 9, 1877, No. 1,379, and what came out of it. The nature of the patent is sufficiently pointed out for this appeal by the following extracts:

"This invention relates to molds and frames to be used in the formation of concrete blocks and structures, and has for its object to insure that the concrete shall not adhere to the surfaces of such molds or frames, and hence the surfaces shall present a smooth, neat and finished appearance.

"Under the first part of my improvement I make the molds of paraffin, or similar wax-like substance unacted upon by alkaline matter, mixed with sand, charcoal or other finely-divided material; in some cases paraffin alone may be used."

Then Sellars says that under the second part he forms molds of timber, etc., and under the third part he forms the molds of a rigid material, and covers the surface with lac, mastic, or other varnish; and that under the fourth part he forms the molds of metal and japan, or enamels the surfaces. This is an entirely different art than that we are dealing with, as it is only the art of constituting molds of sufficiently binding strength; so we need not consider this patent further. The difficulty arises from what one Berthelet, who became interested in Sellars and Sellars' patent, did afterwards as the result thereof in Wisconsin and Minnesota, in the years 1881, 1882, and 1883, nearly 30 years before the important evidence in this case was given. It is claimed that in that connection, and making use of the suggestions of Sellars, he extensively availed himself of substantially the sand mold pointed out by the Stevens claim which we have quoted. The case on this point is put in behalf of the defendant very forcibly, and with much care and clearness, by the learned judge who sat below, in the following language:

"Up to the fall of 1881, Berthelet operated a sewer-pipe manufactory; but he then turned his pipe works into a letter factory. He and his wife had visited Sellars at Birkenhead, England, where Sellars had explained the process to them of making liquid concrete in sand molds. Berthelet himself is not living; Mrs. Berthelet has testified very fully, not only from memory, but from letters and a diary which she kept. There is also the testimony of other witnesses who had means of observation in reference to the conduct of Berthelet's manufactory during the years he was making artificial stone. From the testimony I am induced to believe that the letters and numerals produced by Berthelet, and the panel upon the Blatz Brewery, which has stood the test of time, were made from artificial stone produced from sand molds by absorption, or capillary attraction, after the manner set out in the claim of the patent in suit. The burden of proof rests upon the defendant; every reasonable doubt should be resolved against it; and the greatest scrutiny should be given to testimony of a long past prior use. I think the defendant has met the weighty burden of showing that the process described in the Stevens patent was known to Berthelet long before the invention of Stevens."

[1] This clearly represents a very careful and thorough review of proofs in this case, and a satisfactory weighing thereof so far as all ordinary civil litigation would be concerned. The difficulty, how-

ever, is that the settled rules with reference to those Departmental adjudications which are of a quasi judicial nature, involving the hearing of parties and the consideration of what is offered by them, rigidly applied in this circuit, stand across the path of the case thus made by the respondents below. These rules were considered by us in *Brooks v. Sacks*, 81 Fed. 403, 26 C. C. A. 456, announced on June 10, 1897; although there they were not applied with the utmost strictness, because the case was only as between an admitted date of invention and an alleged anticipation thereof, and not as against a finding of the Patent Office in issuing the patent. This case, however, developed the underlying rule that ordinarily, in cases like the present, it is necessary that the anticipations should be supported, not merely by the testimony of one or numerous witnesses relating to matters many years previous, but by concrete, visible, contemporaneous proofs which speak for themselves. In that case, the testimony of credible witnesses was rejected because there were no contemporaneous visible objects of that nature, and solely for that reason. Among other cases, the rule came up again in *Westinghouse Co. v. Stanley Co.*, 133 Fed. 167, 68 C. C. A. 523, announced on September 9, 1908. In that case the whole topic was considered, and the fact was referred to that the Supreme Court has once said that, under the circumstances here, the respondent's proofs should be "beyond reasonable doubt"; though we observed that we did not feel bound to adhere to that stringent expression. There was no difficulty in that case because only a specific date was in question, and that was settled by contemporaneous facts beyond all doubt. The main difficulty is with reference to cases where it is undertaken by parol evidence to prove the precise characteristics of the alleged anticipatory matter, as is the fact here, and as was the fact in *Greenwood v. Dover*, 194 Fed. 91, 114 C. C. A. 169, decided by us on December 12, 1911. There, as against an order of the Circuit Court of Appeals for the District of Columbia, we stood in the same class as against the finding of the Commissioner in this case, and other cases involving the issue of patents. There we said that the evidence of anticipation must at least meet the expression in *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, there repeated, namely, "that the proof must at least establish a clear conviction"; and we further explained that in this respect the action of the department was to be held to be of the high character which was required in the *Maxwell Land Grant Case*, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949, and in *United States v. Bell Telephone Co.*, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144. The result of all these cases is that, with reference to questions of the class which we have here, namely, the identity of structure as between what is patented and what is alleged to have anticipated it, something more than oral testimony, even of the highest character, is required where there has been a considerable lapse of time. A close examination of the issues and proofs which appear in this record show that this case is peculiarly noticeable in that respect.

The case seems to have proceeded in large part on the theory that the question here was broadly between the old method of forming

artificial stone, involving tamping, and the new method by which the mechanical action, or reaction, between the material of which the mold is constructed and the plastic, or semiliquid, material of which the casting is formed, accomplishes the result desired. Very likely the patentee was mistakenly of that opinion; but it is plain that this broad distinction was made by the anticipatory patent of Sellars to which we have referred. Nearly all the testimony of the respondents, and page after page of their brief, are based on this fact. This constantly appears in the testimony of their main witness, Mrs. Berthelet, showing that she had in mind a composite mold, covered by the Sellars patent as we have explained it. This matter is perhaps put more clearly by comparing with the patent in suit the claims in the Sellars American patent of July 22, 1881, as follows:

"What I claim, and desire to secure by letters patent of the United States, is:

"1. A composition to be used in the formation of molds for shaping concrete and like plastic material, the same consisting of a lubricating binding material which is not affected by alkalies, such as paraffin, and a finely-divided body material, such as sand or charcoal, substantially as and for the purpose specified.

"2. A composition mold for shaping concrete and like plastic material, composed of paraffin and sand or charcoal, substantially in the proportions and for the purpose specified."

It is not important for this part of the case that we should point out again that Sellars' invention was for a mold, or molds, and not for a process; but wherever it appears, and from every point of view, it was for a mold of composite material. A comparison of these claims with the simple claim of the patent in this case at once makes clear the real issue here. The latter claim gives no material for the mold except molding sand, which is to be relatively dry, expressly operating by absorption. The nature of this claim is emphasized by the testimony of Benedict, who shows the process as actually carried on by the complainant in its factory, and as actually carried on by the respondent Simpson Bros. Corporation in its factory. In each case the evidence makes clear that the "workmen were forming molds of relatively dry sand, using wooden patterns," and that they poured the mixture "into the molds which they had formed in the sand"; and such clearly was the entire process as shown by this witness. Of course, as we have already said, the question at once arises in the lay mind whether this would be an effectual process; but the leading expert for the complainant, Carpenter, testified as follows:

"The fact that a dampened sand mold would hold its shape and at the same time absorb water so as to compact a nearly liquid stone compound is certainly a phenomena, which would never have been believed had it not been tried. * * *

"This discovery, which is set forth in the claim of the Stevens patent in suit, was the first disclosure to the world of the process of making an artificial stone of a homogeneous structure resembling natural stone, and in many ways superior to natural stone, and which was adapted for use in buildings of the best style of architecture."

Therefore this was plainly the entire process of the patentee. On the other hand, the Sellars process called for a combination with the

sand; and, so far as this record shows, it was practically applied in that way. Mrs. Berthelet, who saw it in England, both at the foundry of one Butler and at that of Sellars himself, said that at Butler's foundry she saw Butler's men "pouring the liquid concrete into molds made of paraffin treated with sand"; and she also said the same with reference to Sellars' factory. She further stated that the process she described was the same "we used ourselves in Milwaukee"—meaning by "we" her husband and herself. This and like this appear in her evidence over and over again. The most significant fact in her evidence is that she herself took part in preparing the sand at the hotel where she and her husband lived; that while her husband was laying out the sand she was on the floor using paraffin, and making sure that the sand was thoroughly coated with it. The process she described was comparatively tedious, and in an extensive business must have added very largely to the cost of production.

If there is evidence which tends to show that Berthelet, in whose operations the molds at first used are admitted to have been of sand coated with paraffin, came afterwards to use molds of relatively dry sand only, it is this part of the evidence tending to show prior use which lacks the support of those concrete, visible, cotemporaneous proofs, speaking for themselves, which we have held necessary as above for a finding that Berthelet made such use of the Stevens process as amounted to anticipation. Except the Blatz Brewery panel and the letters and numerals produced in court, there is nothing before us having any claim to possess that character. But the panel was admittedly molded in sand coated with paraffin, and as to the letters and numerals, though the evidence regarding the place and time of their manufacture has some tendency to show that they may have been made at Racine, where molds of sand only were most used, and while such molds were being used there, it falls short of sufficient proof that these articles were actually made in such molds.

While what Berthelet did was not merely experimental in the sense of the patent law, it was not a success financially; and it is not impossible that the saving in cost arising from the simplicity of Stevens' method was equal to the difference between failure and success. At any rate, the facts here illustrate the wisdom of the rule with reference to parol evidence in cases of this nature which we have explained. In the lapse of time the memory becomes especially confused as to the identity of matters similar in part, and especially of processes. Also, if they establish anything, they establish that Sellars' method and Berthelet's method were not the method of Stevens. Stevens' patent must be sustained precisely as it stands, and for nothing more. Any process which uses for any practical purpose, to an extent not absolutely negligible, any element besides the sand described and claimed by Stevens, cannot be held to be an infringement.

[2] In the case against the Simpson Bros. Corporation, the testimony of Benedict, to which we have referred, establishes infringement, and the other facts explained establish the validity of the patent in suit.

In the case against the Structural Cement Stone Company the question of infringement is left in a somewhat unsatisfactory condition,

but the complainant offered some evidence tending to prove infringement, and we are not satisfied that this has been fully met by the defendant.

In both cases the judgment is:

The decree of the Circuit Court is reversed, and the case is remanded to the District Court, with directions to enter a decree for the complainant for an injunction and an account; the complainant recovers its costs of appeal; and the costs of the District Court are to await final decree.

OEHRING et al. v. WILLIAM GARDAM & SON.

(Circuit Court of Appeals, Second Circuit. January 13, 1913. On Petition for Rehearing, January 24, 1913. On Rehearing, February 10, 1913.)

No. 111.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MULTIPLE DRILL.

The Oehring patent, No. 560,171, for a multiple drill, consisting of a machine by which a plurality of holes arranged at regular or irregular intervals and extending to various depths may be simultaneously drilled, claim 1, was not anticipated, and discloses patentable invention, in that the bracket supports for the drill carrying spindles are "independently adjustable in all directions," a combination not found in the prior art. Claim 3 also *held* valid, and both said claims infringed.

Appeal from the District Court of the United States for the Southern District of New York; John R. Hazel, Judge.

Suit in equity by August J. Oehring and the Pratt & Whitney Company against William Gardam & Son. From that part of the decree finding certain claims of the patent in suit invalid, complainants appeal. Reversed.

For opinion below, see 180 Fed. 476.

The decree of the District Court, Southern District of New York, dismissed the bill with respect to claims 1, 2, 7, 10 and 11 in a suit to restrain the alleged infringement of letters patent No. 560,171 issued on May 12, 1896, to the complainant Oehring for an improvement in multiple drills.¹ The complainant corporation is an assignee under the patent.

A. v. Briesen and T. E. Brown, Jr., both of New York City, for appellants.

J. Q. Rice and M. B. Philipp, both of New York City, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The patent itself at its commencement clearly discloses its subject-matter:

"This invention relates to multiple drills, and has for its object to provide a machine by means of which a plurality of holes arranged at regular or irregular intervals and extending to various depths may be simultaneously drilled."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

¹ The decree finds claim 3 of the patent valid and infringed but the defendant does not appeal.

Several claims are in issue but as the complainant will obtain sufficient relief if the first claim be found valid and infringed, we may confine our examination to that. This claim reads as follows:

"In a multiple drill, the combination, with the drill carrying spindles, and flexible shafts for driving the same, of a frame arranged in a plane at right angles to the axes of the spindles, and bracket supports for the said spindles, connected with said frame and independently adjustable in all directions in the plane of the same, substantially as described."

The claim, then, covers a drilling machine whereby a multiplicity of holes may be drilled simultaneously and according to any desired arrangement, regular or irregular. But as showing merely a multiple drill, nothing new is disclosed. Multiple drills of various kinds were old in the art. Whatever novelty is to be found in the claim is to be looked for in the words "independently adjustable in all directions." The claim is valid, if at all, because the multiple drill which it shows has

- (1) *Independent* adjustability;
- (2) *Universal* adjustability.

Independent adjustability as we now use the phrase is the capacity of adjusting the drill spindles in a desired arrangement without the aid of an additional perforated pattern plate or "jig" to guide them." This independence is found to some extent in the prior art. Thus for example the Morgan patent shows a multiple drill machine in which the drill spindles may be adjusted and different arrangements made without the aid of a pattern plate. But the field of arrangement is very limited. The holes must be drilled either in a straight, slightly curved or zigzag line. The drill carriers can be moved only so far as is permitted by the connecting links and are held in the same relation to them. In this as in the other patents and uses of the prior art, independent adjustability does not go with universal adjustability in a substantial field.

Universal adjustability in multiple drills is to be found in the prior art. Thus the Woodcock and Gwyn English patent permits every adjustment in a substantial field but a pattern plate is provided to guide the drills. There is no capacity for adjusting the drills by themselves—for independent adjustment. So other patents and uses disclose universal adjustability but do not disclose it in combination with independent adjustability.

Probably the nearest approach to the patent is the Gardner machine but if the slotted plate of that machine can be said to permit independent adjustment, it does not permit universal adjustment. The slots permit only a limited radial adjustment. The Gardner machine cannot be said to be "independently adjustable in all directions."

Going over the prior art with care, the two things, capacity for uni-

² The words "independently adjustable" in the claim undoubtedly mean primarily that the drills may be individually adjusted. But the claim, in connection with the specification, makes capacity for independent adjustment as defined in the text, an element, and the phrase "independent adjustability" is used as a convenient expression of the idea involved in connection with the phrase "universal adjustability."

versal adjustment and capacity for independent adjustment will not be found together. Those patents and uses in the prior art which show capacity for universal adjustment do not show capacity for independent adjustment and we are not convinced that it would be merely a matter of shop practice to make a drill which is adjustable by a pattern plate as in the English patent referred to independently adjustable. So those uses which show a capacity for independent adjustment do not show with it a capacity for universal adjustment. It is not altogether apparent that mere mechanical skill would suffice to remove the slots of the Gardner machine and substitute the field of the patent.

To sum up the situation: It does not appear that any one before Oehring made the combination of the claim and it does appear that his structure supplanted the earlier drills and made a real advance in the art. Taking this into consideration we think that invention should be said to exist in the first claim and that it should be sustained. We also think it very clear that this claim has been infringed by the defendant. We do not think the defense of laches established.

The decree appealed from is reversed with costs and the cause remanded with instructions to enter the usual decree for the complainant upon claim 1 of the patent.³

On Petition for Rehearing.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The petition for rehearing is granted with respect to the question whether the complainants have waived or have lost by laches the right to an accounting and with respect to costs.

Oral argument is not required, but the case may be considered as resubmitted on printed briefs to be filed within two weeks.

On Rehearing.

After carefully considering the briefs submitted, we adhere to the the conclusion stated in the opinion that the defense of laches was not established either as a bar to an injunction or an accounting. We think that the complainants by waiving an accounting upon the narrow claim did not waive it upon the broad one, and, under all the circumstances, that the delay in bringing this suit after the notice to the defendants was not inexcusable. The complainants were prosecuting another infringer, and the defendants were hardly misled.

The complainants are entitled to the costs of the appeal and in the lower court. This is not a case where the complainants have prevailed on certain claims and the defendants on others. We held that the broadest claim in question was valid and infringed, and, as that would give the complainants adequate relief, we thought it unnecessary to consider the narrower claims.

The opinion of the court as rendered will stand without modification.

³ Assuming that we may review upon this appeal that part of the decree which finds for the complainant on claim 3 of the patent, we see no reason to differ from the conclusions reached by Judge Hazel.

HORSEY v. CONSUMERS' AUTO SUPPLY CO. et al.

(Circuit Court of Appeals, Third Circuit. February 4, 1913.)

No. 1,661.

PATENTS (§ 328*)—PRIOR USE—PATCH FOR RUBBER TIRES.

The Tingley patent, No. 787,010, for a patch for rubber tires, is void for prior use of the device by others.

Appeal from the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Suit in equity by Edgar T. Horsey against the Consumers' Auto Supply Company and others. Decree for defendants, and complainant appeals. Affirmed.

Frederick W. Winter, of Pittsburgh, Pa. (Arthur J. Hudson and Thurston & Kwis, all of Cleveland, Ohio, of counsel), for appellant.

Paul Synnestvedt, of Pittsburgh, Pa. (J. C. Bradley, of Pittsburgh, Pa., and Harvey L. Lechner, of Philadelphia, Pa., of counsel), for appellees.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. The nature of this controversy will appear from Judge Young's opinion:

"The bill was filed in this case against the defendants alleging the infringement of letters patent No. 787,010, obtained by C. O. Tingley, dated April 11, 1905, and subsequently assigned to Edgar T. Horsey, the complainant, and now comes before us upon bill, answer, replication, and proofs. The claims of the patent in suit are two:

"1. As an article of manufacture, a rubber patch of ordinary vulcanized material, and a reinforce *C* of raw rubber, and a protection *D* of easily-removable material, adapted to serve substantially as herein specified.

"2. As a patch for rubber tires and analogous articles of vulcanized rubber, a plug *A* having a head *B* of vulcanized rubber, a reinforce *C* of raw rubber, and a protection *D* of easily-removable material, adapted to serve substantially as herein specified."

"These claims are very simple. The first consists of three elements: A layer of vulcanized material; a layer of raw rubber; the raw rubber covered by some material as a protection until used. The second claim is the first claim identically, except that a vulcanized plug is used projecting from the raw rubber of the patch.

"The defenses are prior patents and prior use. The prior patents are Tillinghast, No. 516,691, March 20, 1894; Kenyon, No. 581,235, April 20, 1897; Bancroft, No. 622,436, April 4, 1899. These patents all show the patch consisting of two layers, one of vulcanized rubber and the other of raw rubber. Two of them, the Tillinghast and the Kenyon, show a flexible rubber stem. These patents clearly anticipate the patent in suit in every element except that described in the claims as 'a protection *D* of easily-removable material.' This protection is used for the purpose of preventing the raw rubber surfaces from adhering to each other in shipment and before use. The placing of some nonadhesive substance over the raw rubber does not in our opinion show any inventive genius, but even if it did it was clearly anticipated by the Mullett patent, No. 208,484, October 1, 1878, which provided for the placing of layers of tin foil between unvulcanized sheets

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of rubber when preparing them for shipment. Clearly, then, the patent in suit was anticipated by the prior patents presented.

"The defense of prior use is established by the evidence introduced by defendants and represented by defendants' exhibit 'Goodrich Factory, Combination Repair Sheet,' and manufactured and used by the Goodrich Factory since 1901. This shows a sheet of rubber material consisting of a layer of vulcanized rubber and a layer of unvulcanized rubber and a nonadhesive fabric laid over the unvulcanized rubber. The evidence of the defendants shows conclusively that this was manufactured and sold as early as 1901 and during the subsequent years prior to the Tingley patent. This was clearly an anticipation by use of the Tingley patent."

Accordingly, the bill was dismissed "for lack of equity," which evidently means because the patent was void.

We do not find it necessary to discuss the prior art; the defense of prior use has been satisfactorily established. All the evidence on this subject has been carefully examined in the light of the well-known cautionary rules of decision (whose latest application in this court is *Sarfert Co. v. Chipman*, 194 Fed. 116, 114 C. C. A. 191), and the result is that we agree with what we understand to be the finding of the district judge. There is no such exhibit as "Goodrich Factory, Combination Repair Sheet." That phrase may be intended to combine the descriptions of two exhibits; but we suppose it to refer to the exhibit that is described indifferently by the witnesses as "Combination Repair Sheet" or "Repair Material." So understanding it, we are of the same opinion; it has been proved, we think, that the so-called Repair Sheet or Repair Material (not the Factory Sheet, which is a different article and may be laid aside without comment) was publicly used and sold for more than two years before the patent in suit was applied for. The two claims are therefore invalid, and the plaintiff's bill was properly dismissed.

The decree is affirmed.

METAL STAMPING CO. v. GERHAB.

(Circuit Court of Appeals, Third Circuit. February 4, 1913.)

No. 1,516, October Term, 1912.

PATENTS (§ 328*)—INFRINGEMENT—THILL COUPLING.

The Worrest patent, No. 662,050, for a thill coupling, must be confined to the narrow limits of the precise device disclosed, which includes a flat curved spring as a part of the mechanism for automatically taking up the wear of the bolt coupling. As so construed, the patent is not infringed by the device of the Bradley patent, No. 838,767.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; James B. Holland, Judge.

Suit by the Metal Stamping Company against Lena Gerhab, doing business under the name of Jacob Gerhab. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 180 Fed. 112.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

Wm. A. Megrath, of New York City, for appellant.
Howard P. Denison, of Syracuse, N. Y., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Metal Stamping Company, owner of patent No. 662,050, granted November 20, 1900, to Alfred H. Worrest, for an improvement in thill couplings, charged defendant with infringing claims 2, 3, and 6 thereof. On final hearing that court, in an opinion reported at (C. C.) 180 Fed. 112, found defendant had not infringed. From a decree dismissing its bill complainant appealed.

As the opinion referred to enters fully into the details of the patent and the prior art, we limit ourselves to stating the conclusions to which a study of this case has led. Both the patent in suit and the patent to Bradley, No. 838,767, under which defendant justifies, which avers that its invention, "is very similar to Worrest, No. 662,050, November 20, 1900, in which a bow-spring link is used," are restricted to a very narrow field. Without entering upon the question of the patentable character of the devices of either, it is evident that the claims of the patent here in suit must be confined to the narrow limits of the precise device disclosed by the patentee. His disclosure was of a thill coupling which automatically takes up the wear of the bolt coupling, a vehicle axle and a thill. And, omitting a discussion of details, it suffices to say that the wear-controlling element in the device is a flat, curved spring. The specifications and drawings show, not only that such a flat, curved spring, and no other, was disclosed by the patentee, but that the co-operating element of the device, viz., a link-shaped lever, is specially adapted to rest on and adjust itself to such a spring. It is urged that the peculiar tension to which a flat curved spring was subjected in the working of this device made it give way in continuous service, and that the device itself proved inoperative in practical use. Indeed, the court below so found. But without going to that extent, or entering on that question, it suffices to say the claims must be restricted to the flat curved spring of the disclosure.

So construed, it follows that defendant's device, the spring of which is not of that type, does not infringe. The decree of the court below is affirmed.

WESTINGHOUSE ELECTRIC & MFG. CO. v. SUTTER et al.

(Circuit Court of Appeals, Third Circuit. January 27, 1913.)

No. 1,638, October Term, 1912.

PATENTS (§ 328*)—INFRINGEMENT—ELECTRICAL TRANSFORMER.

The practical gist of the Stanley patent, No. 469,809, for a system of electrical distribution, lies in two factors: First, the application of the so-called Stanley or C²R rule for determining the length of wire on the primary coil of the transformer, and, second, the use of a predetermined length of wire on such coil; as so construed *held* not infringed.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Westinghouse Electric & Manufacturing Company against Frederick C. Sutter and others for infringement of letters patent No. 469,809, for a system of electrical distribution granted to William Stanley, Jr., March 1, 1892. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 194 Fed. 888.

Gifford & Bull, of New York City, for appellant.

Edwards, Sager & Wooster, of New York City, and S. S. Mehard, of Pittsburgh, Pa., for appellees.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. This case, while it involves a large record and a review of alleged conflicting decisions in the First and Second Circuits, comes down finally to a narrow question of fact in the end. The opinion of the court below (C. C.) 194 Fed. 888, is so full that we confine ourselves to briefly stating our conclusions. The problem to which both complainant's and defendants' devices are addressed was to provide self-regulating means whereby a variable number of electric lights located on a secondary wire would not have their brilliancy varied by reason of variation in number. In other words, that, in spite of a varied pull and consumption on the capacity of the device, the light product would be uniform. To accomplish this result, the patent in suit made use of a predetermined length of wire on the primary coil, which length was such "that reacting self-inductively upon its own magnetic circuit the average counter potential so produced approximately equals the potential applied to the primary circuit." This length of wire Stanley, the patentee, determined by what is called the Stanley C²R rule. The operative gist of his device was this predetermined length of wire on the primary coil. The defendants' device attacked the problem in a different way. In it the length of wire on the primary coil was a matter of indifference, and the variable factor was the varying voltage. It was the antithesis of Stanley's device and involved neither a predetermined length of primary wire nor the application of the C²R rule. The view of the Second Circuit was that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the gist of Stanley's patent was a predetermined length of wire, and not the Stanley rule by which that predetermined length of wire was figured out. The view of the First Circuit was that the gist of the patent consisted in the process in which the C²R rule was applied. In our view the alleged diversity between the two views is rather a difference in statement than substance, for giving full weight to both, as we do, we are clear that the practical gist of the Stanley disclosure lies in the two factors: (1) The application of the C²R rule; and (2) the use of a definite limited length of primary wire. The two factors, first, definite wire length, and, second, application of rule to obtain it, are neither of them present or utilized in the defendants' device.

It follows, therefore, that defendants do not infringe, and the case is affirmed on the opinion of the court below.

BUFFALO SPECIALTY CO. v. ART BRASS CO.

(District Court. S. D. New York. April 13, 1912.)

In Equity, No. 6—183.

PATENTS (§ 328*)—VALIDITY—DESIGN FOR BATHTUB SEAT.

The Robertson design patent, No. 29,993, for a design for a bathtub seat, when compared with the structures of the prior art, does not disclose the exercise of patentable invention, and is also void because the alterations did not result in giving the article any distinctively attractive appearance which is essential to the validity of a design patent.

In Equity. Suit by the Buffalo Specialty Company against the Art Brass Company. On final hearing. Decree for defendant.

E. G. Mansfield, of Buffalo (James L. Steuart, of New York City, of counsel), for complainant.

James B. Curtis, of New York City (O. W. Jeffery and Edmund Wetmore, both of New York City, and H. R. Williams, of counsel), for defendant.

HAZEL, District Judge. The bill charges infringement of a design patent for a bathtub seat granted to William Robertson on January 10, 1899; said patent being No. 29,993. The design consists of metallic arms attached to a seat, extending outward from the seat at their lower parts and then bent upward at a point where they diverge outward, having their upper parts curved downward, and having concavo-convex supports thereunder. The curved portion of the seat is formed to fit over the rounded sides or top of the bathtub to enable sliding the seat from one position to another.

The defenses are want of patentable novelty, noninfringement, and lack of ornament and artistic configuration in the mechanical device described in the patent. The stipulation of the parties, together with the exhibit evidence, shows that the patentee has assembled well-known mechanical features in such a way as to permit placing the bathtub seat in a desired position in the tub for use, either

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as a seat, or as a headrest when lying down. The design has no pronounced ornamental features, but the patentee claims that the structural elements or parts are combined in a pleasing manner and impart to the design an original and distinctive appearance, as a result of which its salability is enhanced.

In my opinion there is nothing in the shape or configuration of the article in question which appeals to the eye or serves to commend it to users as a thing of ornament or special nicety. It is practical, useful, and plain, possessing no attractiveness over other seats of the prior art that might be placed in a bathtub and suspended by polished metal arms from the top thereof. The configuration of the seat, arms, and curved top-plate is not materially distinctive from that of the Sloat patent, No. 390,407, dated October 2, 1888. Said patent at its lateral ends has metal arms supporting it and extending upwards to the edges of the bathtub on which it rests. The arms are bent, metal strips formed to slide within a groove on the under side of the seat and secured by thumbscrews as in complainant's patent. The seat is of precisely the same shape as the seat of the patent in suit, and is supported in the same way. The only perceivable differences in the two are that the arms in one are perpendicular, and slanting in the other, and that the supports for the arms are flat in one, and concavo-convex in the other. It is obvious that Robertson made the metal arms slanting, and the supports curved, so as to conform them to the sides and rounded edges of the up-to-date bathtub. To make the upper ends of the arms concavo-convex was not a patentable thing to do, but was merely an adaptation of the Sloat patent, in which the supports were flattened to permit resting them on a flat-edged bathtub, to present conditions.

A comparison of the design in suit with the Sloat patent presents very little difference between them. They are equally plain and practical without possessing any such attractiveness as in my judgment is in the contemplation of the patent law relating to design patents, and as said by Judge Coxe in *Mygatt v. M. Schauffer-Flaun Co.*, 191 Fed. 836, 112 C. C. A. 350:

"In order to sustain a patent, whether for mechanical construction or for design, it must appear that there was an exercise of the inventive faculties. A mere change in construction which shows no originality and adds no beauty to existing structures is not sufficient to sustain a patent for a design. If this were otherwise, a mere mechanic by inconsequential changes in a structure which embodies a pleasing design could secure a patent for each change which he might make."

This quotation may fittingly be applied to the design under consideration. The alterations which were made by the patentee over designs of the prior art were not the result of the exercise of patentable ingenuity, nor have such changes or alterations resulted in giving to the article a distinctively attractive appearance.

There are numerous other patents in evidence to anticipate the novelty of the Robertson design, but it is not thought necessary to advert to them. Each has been examined by me, and I have become satisfied (1) that the conception of the patentee consisted merely of a rearrangement of various features shown in the prior art and gener-

ally used in bathtub seats; and (2) that even though he has made slight changes in the configuration of the arms and supports over the Sloat patent, it does not appear to me that his modifications, in view of the prior art, were patentably novel, or that he combined the parts to impart to the structure as a whole, aside from its practicability and usefulness, anything ornamental or attractive.

The bill is dismissed, with costs.

In re BURNHAM.

(District Court, W. D. Washington, S. D. February 4, 1913.)

No. 725.

1. BANKRUPTCY (§ 399*)—HOMESTEAD—DILIGENCE.

Where a bankrupt's wife was a party to the bankruptcy proceedings and appeared therein, and it was held that the community property of the bankrupt and his wife, as well as the bankrupt's separate property, was a part of the estate in bankruptcy, the wife was bound to exercise as great diligence as the bankrupt himself in making any claims to homestead or other exemptions under the state law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

2. BANKRUPTCY (§ 395*)—EXEMPTIONS—HOMESTEAD—TIME OF CLAIM.

The extent and requisites of a homestead exemption to which a bankrupt may be entitled are governed by the state law; but the time within which such exemptions must be claimed and the manner of claiming the same are controlled by the bankruptcy act, and this, though the claim is made by the bankrupt's wife, and not by him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. § 395.*]

3. BANKRUPTCY (§ 400*)—HOMESTEAD EXEMPTION—CLAIM—PERFECTION.

Where a homestead exemption is seasonably claimed in a bankruptcy proceeding, it may thereafter be perfected under the state law, if the claimant proceeds expeditiously.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670, 671-675; Dec. Dig. § 400.*]

4. BANKRUPTCY (§ 399*)—HOMESTEAD—PERFECTION—TIME.

Where a homestead claim has been perfected and identified under the state law, bankruptcy courts will not be strict in determining what constitutes due diligence in claiming the homestead in the bankruptcy court after adjudication, if through inadvertence it has not been claimed in the schedules.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

5. BANKRUPTCY (§ 399*)—HOMESTEAD—EXEMPTIONS—TIME OF CLAIM.

Where community property and the separate property of the bankrupt were scheduled as his estate in bankruptcy, without claiming a homestead exemption in the schedules, and the land constituting community property had been converted into money before any homestead claim by the bankrupt's wife was made, a homestead claim, then made, could not be allowed out of the fund so derived.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

In Bankruptcy. In the matter of bankruptcy proceedings of H. A. Burnham. Cross-demurrers by the trustee to the petition of Udella B. Burnham, and by Mrs. Burnham to the petition of the trustee. Demurrer to the petition of the trustee overruled, and sustained as to the petition of Mrs. Burnham.

Dix H. Rowland and Raymond J. McMillan, both of Tacoma, Wash., for trustee.

Troy & Sturdevant, of Olympia, Wash., for Udella B. Burnham.

CUSHMAN, District Judge. This matter is now before the court upon two demurrers, one of which is the demurrer of the trustee of the bankrupt estate to the petition of Udella B. Burnham, the wife of H. A. Burnham, bankrupt, alleging the bankrupt's failure to make and file a declaration of homestead on certain real estate, upon which it is alleged they reside, that petitioner has made and filed a declaration of homestead thereon, and that there is \$675 in the registry of the court, proceeds from the sale of a portion of said homestead. The prayer of the petition is that this money be paid to the petitioner.

The other demurrer is that of Udella B. Burnham to the petition of the trustee of the bankrupt estate. The prayer of this petition is that Udella Burnham be decreed to have no interest in one portion, and in an undivided half interest of another portion of the land covered by her petition, or declaration of homestead, for the reason that the same is a portion of the bankrupt estate, which the trustee had advertised and was about to sell when the said Udella Burnham claimed it as a homestead, thereby clouding the title; that the claim of a homestead exemption was made subsequent to the adjudication in bankruptcy; that she and her family did not reside upon the premises claimed at the time of filing said declaration; and that a portion of said premises is owned by other parties, tenants in common with H. A. Burnham, bankrupt.

It is further alleged that she was made a party to the bankruptcy proceedings, in order that her interest in the community real estate of H. A. Burnham and herself might be determined; that she answered in this proceeding, claiming all of said real estate in her separate right, and, on an order to show cause why the trustee should not sell the same, a trial was had, and it was determined that she had no separate right or interest in the same, that it was community property of herself and said H. A. Burnham, and was subject to the claims of creditors herein, and that, by such proceeding, she is now estopped from setting up any claim by reason of homestead rights, or otherwise.

The trustee relies on the following authorities: *Harrison Goodwin et al. v. Colorado Mortgage & Inv. Co. of London*, 110 U. S. 4, 3 Sup. Ct. 473, 28 L. Ed. 47; *In re Youngstrom*, 153 Fed. 98, 82 C. C. A. 232; *In re Gerber*, 186 Fed. 693, 108 C. C. A. 511; *Hookway v. Thompson*, 56 Wash. 57, 105 Pac. 153.

Udella B. Burnham relies upon the following authorities: *In re Maxson* (D. C.) 170 Fed. 356; *In re Fisher* (D. C.) 142 Fed. 205;

York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Hewit v. Berlin Mach. Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Snelling et al. v. Butler, 66 Wash. 165, 119 Pac. 3; sections 529, 533, 534, and 559, Rem. & Bal. Code; sections 1040, 1041, and 1042, Remington on Bankruptcy; section 419, Loveland on Bankruptcy; page 153 et seq., Collier on Bankruptcy, 8th Ed.; page 207 et seq., 9th Ed.

On July 28, 1909, a petition was filed to have H. A. Burnham adjudged an involuntary bankrupt. On August 24, 1909, Udella B. Burnham, the petitioner herein, was made a party to such proceeding. On January 5, 1910, H. A. Burnham was adjudged a bankrupt. On January 14, 1910, H. A. Burnham filed his schedules, which contained no claim to exemptions. On March 4, 1910, the trustee's bond was filed and approved. On April 12, 1910, the trustee reported no claim of exemptions had been made. On August 17, 1910, a claim to exemptions was filed by the bankrupt. On September 6, 1911, this claim to exemptions was disallowed by the referee. On March 16, 1912, H. A. Burnham and Udella B. Burnham petitioned the court for further time in which to present exceptions to this disallowance of exemptions. On August 28, 1912, after a hearing upon the disallowance of the exemptions by the referee, the exceptions were by this court overruled.

The exact time of the making by Udella B. Burnham, the petitioner herein, of the present claim of a homestead exemption is not shown (her present petition for homestead exemption having been filed herein November 18, 1912), but it must have been between October 7, 1912—when the declaration, which she claims was filed with the county auditor, was acknowledged—and November 18, 1912, the date the trustee had advertised the real property, a portion of which she now claims, for sale.

The statutes of the state of Washington contain the following provisions in regard to homesteads:

"The homestead consists of the dwelling house, in which the claimant resides, and the land on which the same is situated, selected as in this act provided." Section 5456, Pierce's Code; 1 Rem. & Bal. § 528.

"If the claimant be married the homestead may be selected from the community property, or the separate property of the husband, or, with the consent of the wife, from her separate property. When the claimant is not married, but is the head of a family within the meaning of section 25 of this act, the homestead may be selected from any of his or her property." Section 5457, Pierce's Code; 1 Rem. & Bal. § 530.

"The homestead is exempt from execution or forced sale, except as in this act provided." Section 5459, Pierce's Code; 1 Rem. & Bal. § 532.

"The homestead is subject to execution or forced sale in satisfaction of judgments obtained: 1. On debts secured by mechanics', laborers' or vendors' liens upon the premises. 2. On debts secured by mortgages on the premises executed and acknowledged by the husband and wife or by an unmarried claimant." Section 5460, Pierce's Code; 1 Rem. & Bal. § 533.

"The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Section 5461, Pierce's Code; 1 Rem. & Bal. § 534.

"There shall be also exempt from execution and attachment to every householder, being the head of a family, a homestead not exceeding in value the sum of *one thousand dollars*, while occupied as such by the owner thereof, or his or her family. Said homestead may consist of a house and lot or lots in any city, or a farm, consisting of a number of acres, so that the value of the same shall not exceed the aforesaid sum of one thousand dollars. Such homesteads may be selected at any time before sale." Section 836, Pierce's Code; 1 Rem. & Bal. § 529.

"Homesteads may be selected and claimed in lands and tenements with the improvements thereon, not exceeding the sum of two thousand dollars. The premises thus included in the homestead must be actually intended and used for a home for the claimants and shall not be devoted exclusively to any other purposes." Section 5479, Pierce's Code; 1 Rem. & Bal. § 552.

"The husband cannot select a homestead from the separate property of the wife, nor the wife from the separate property of the husband, but either may select and hold a homestead from his or her separate property, and the husband may select a homestead from the community property. But if the husband neglect or refuse to select such homestead then the wife may select the same: Provided, That but one homestead shall be selected or held by husband or wife, and it must embrace the dwelling house in which one or both of them reside." Section 3882, Pierce's Code.

"In order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead and file the same for record." Section 5485, Pierce's Code; 1 Rem. & Bal. § 558.

[1] Udella B. Burnham having been made a party to the bankruptcy proceedings and appearing herein, and after the determination by the referee and by this court that the community property of H. A. Burnham and Udella B. Burnham, as well as the separate property of H. A. Burnham, was a part of the bankrupt estate, whatever her rights under the state law may be, she would, under the bankruptcy statute, be bound to as great diligence as the bankrupt himself in making any claims to homestead or other exemptions.

[2] The Bankruptcy Act making no provision, there is no question but that the state law will control, as to the extent of, and requisites of, a homestead exemption; but the time within which exemptions are to be claimed and the manner of claiming the same are fixed by the Bankruptcy Act itself, and its provisions in that respect are controlling. *In re Gerber*, 186 Fed. 693, 108 C. C. A. 511. And this applies where the claim to exemptions is made by the wife of the bankrupt. *In re Youngstrom*, 153 Fed. 58, at 101.

[3] If the homestead exemption is claimed seasonably in the bankruptcy proceeding, it has been held, it may thereafter be perfected under the state law, if the claimant proceeds expeditiously. *In re Culwell* (D. C.) 165 Fed. 828; *Goodman v. Curtis*, 174 Fed. 644, 98 C. C. A. 398; *In re Fisher* (D. C.) 142 Fed. 205.

[4] Where a homestead claim has been perfected and identified under the state law, courts have not been too strict in determining what would constitute due diligence in claiming the homestead in bankruptcy courts after the adjudication, if, through inadvertence, it had not been claimed in the schedules. Under such facts, in the *Maxson Case*, *supra*, this right was accorded the intervening spouse of the bankrupt; but no case has been called to the court's attention, where the homestead exemption had not been perfected under the state law and had

not been seasonably claimed under the bankruptcy law, that either upon the petition of the bankrupt or his spouse either has been allowed to recover from the trustee, as a homestead, any part of the estate, title to which had vested in him. Nor have any persuasive reasons been advanced to depart from the rule, especially so in a case where, as here, the wife had sought to hold the community estate as her separate property, and made no claim to any part of it as a homestead, until after it had been advertised for sale by the trustee. Bankruptcy Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451).

Under the authority given in the Bankruptcy Act to amend the schedules, in which schedules, under the bankruptcy rules adopted, the claim to exemptions should be made, the courts have been liberal in the matter of allowing amendments, where the original schedules had not made exemption claims; but they have uniformly required, before doing so, that the omission to make the claim to exemption had occurred through inadvertence, and that there had been diligence in seeking to cure the defect. Collier on Bankruptcy (9th Ed.) p. 213. These essentials are recognized by the principal authority relied upon by the petitioner, Udella B. Burnham (*In re Maxson* [D. C.] 170 Fed. 356, at 359):

"But it cannot be that a failure, through oversight in preparing the schedules, to therein make such claim will deprive the bankrupt of the exemption allowed by the state, when timely application is made to the court of bankruptcy therefor."

In the case now at the bar neither inadvertence nor diligence is shown. The Maxson Case is distinguished from the case now before the court; for, under the Iowa law, occupancy by the bankrupt was all that was required to exempt the homestead. It is further distinguished because the interest of the husband of the bankrupt in the homestead, in that case, was fixed and attached prior to the institution of the bankruptcy proceedings.

[5] Real estate of the community property having been converted into money before the claim of homestead was made, such money would be as any other personal estate. It can in no sense be considered the "proceeds of the homestead."

Demurrer to petition of Udella B. Burnham sustained. Demurrer to the petition of the trustee overruled.

THOMAS v. CHICAGO & N. W. RY. CO.

(District Court, N. D. Iowa, Cedar Rapids Division. February 17, 1913.)

No. 19.

1. DEATH (§§ 11, 32, S3*)—RIGHT OF ACTION—STATUTES—EMPLOYER'S LIABILITY ACT.

Under the federal Employer's Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), creating a right of action against railroad companies engaged in interstate com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

merce in favor of employes injured through the railroad company's neglect, or that of any of its officers or agents, and, in case of death of such employe from such injuries before he is compensated therefor, in favor of his personal representative, for the benefit of his surviving widow and children, if any, and, if none, of his parents, and, if none, of his next of kin dependent on him, no action can be maintained for the benefit of relatives other than those specified, and the action conferred on the relatives specified is independent of that given to the servant, and does not include any damages that he might have recovered had he lived, but is given for the pecuniary loss which such relatives may have sustained because of decedent's untimely death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 10, 15, 47, 48, 107; Dec. Dig. §§ 11, 32, 83.*]

2. REMOVAL OF CAUSES (§ 25*)—ACTIONS REMOVABLE—PETITION.

Where an action was instituted in an Iowa state court by an Iowa administratrix against an Illinois railroad company engaged in interstate commerce for the death of plaintiff's intestate while employed by defendant in such commerce, but the petition failed to allege that decedent left surviving him a widow, child, parent, or next of kin, for whose benefit a right of action survives and should be brought under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), the petition did not state a cause of action thereunder, though it alleged that by reason of the facts alleged a cause of action had accrued to plaintiff against defendant under and by virtue of that act, and hence the action was removable for diversity of citizenship.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

3. ACTION (§ 45*)—JOINDER—PETITION—SEPARATE COUNTS.

It is permissible under the Iowa practice for plaintiff to allege different causes of action in separate counts of the petition.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 378-383, 385-448; Dec. Dig. § 45.*]

At Law. Action by Maud M. Thomas, as administratrix of the estate of Ernest H. Thomas, deceased, against the Chicago & Northwestern Railway Company. On motion of plaintiff to remand. Denied.

Dawley & Wheeler, of Cedar Rapids, Iowa, and Searle & Marshall, of Rock Island, Ill., for plaintiff.

James C. Davis, of Des Moines, Iowa, for defendant.

REED, District Judge. This action was commenced by the plaintiff, a citizen of Iowa, in the district court of Iowa in and for Linn county, August 23, 1912, and was, in due time, removed by the defendant to this court.

The petition is in two counts, the first of which alleges: That the plaintiff is the duly appointed and legally qualified administratrix in the state of Iowa of the estate of Ernest H. Thomas, deceased, and that defendant is a railway corporation engaged as a common carrier by railroad in interstate commerce. That one of its lines of railway extends from Chicago, in the state of Illinois, into and through the state of Iowa. That on or about November 6, 1910, said Ernest H.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Thomas was in the employ of the defendant in interstate commerce as a brakeman upon a freight train in which were being transported cars and freight from points without the state of Iowa to points in and beyond that state. That while plaintiff's intestate was engaged in the performance of his duty in switching said train in defendant's railroad yard at Tama, Iowa, his foot became caught in a frog or switch, which the defendant had negligently failed to properly block or guard and keep the same in repair, so as to be reasonably safe for its employes; and, being unable to extricate the same, he was struck by said train and received injuries which then and there caused his death, and by reason of his death his estate has been damaged in the sum of \$25,000. That by reason of the foregoing a cause of action has accrued to the plaintiff against the defendant under and by virtue of the provisions of the act of Congress approved April 22, 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), entitled "An act relating to the liability of common carriers by railroad to their employes in certain cases." Judgment is asked against the defendant in said sum of \$25,000 and costs.

In the second count it is alleged: For further cause of action against the defendant, plaintiff refers to and makes a part hereof all the allegations of count 1, excepting the allegations "that defendant was engaged in interstate commerce, and that plaintiff's intestate was employed in interstate commerce," as fully as though the same were herein repeated at length. That by reason of said facts a cause of action has accrued to plaintiff against the defendant under and by virtue of the provisions of the statutes of the state of Iowa. Judgment is asked against the defendant upon this count of the petition in the sum of \$25,000 and costs.

In due time the defendant removed the action to this court upon the ground alone of the diverse citizenship of the parties; and the plaintiff moves to remand it to the state court upon two grounds, viz.: (1) That this court has no jurisdiction of the action. (2) That the removal of the action is expressly forbidden by the amendment of April 5, 1910 (36 Stat. 291, c. 143 [U. S. Comp. St. Supp. 1911, p. 1324]), to the act of April 22, 1908, and section 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]).

The first count of the petition purports to rest upon the Employer's Liability Act of Congress approved April 22, 1908 (35 Stat. 65, c. 149), as amended by the act of April 5, 1910, commonly known as the Employer's Liability Act of Congress. That act provides:

"That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents, and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of the carrier, or any of its officers, agents or employes."

By the amendment of April 5, 1910, it is provided that:

"The jurisdiction of the courts of the United States under this act shall be concurrent with that of the several states, and that no case arising under this act, and brought in any state court of competent jurisdiction, shall be removed to any court of the United States."

Also that, in case of the death of such injured employé, any right of action given by the act to a person suffering injury shall survive to his or her personal representative—

"for the benefit of the surviving widow or husband and children of such employé, and, if none, then of such employé's parents, and, if none, then of the next of kin dependent upon such employé; but in such cases there shall be only one recovery, for the same injury."

In any action brought in the proper District Court of the United States under this act as thus amended, or removed thereto from any state court, it cannot rightly be said that the United States court "has no jurisdiction thereof," for under said act the proper state and United States courts are given concurrent jurisdiction of the same. It is obvious, however, that Congress by the amendment intended to give to the injured employé, or, in case of his death, his personal representative, the right to sue for such injuries, or death, in either the proper state or United States court; and if suit is brought therefor in the state court, the plaintiff may seasonably object to its removal by the defendant to a United States court, and, if removed over his objection, he may have it remanded by the United States court to the state court from which it is removed. Should he not, however, if the cause is removed to the United States court, seasonably move to remand the same, and should consent to its remaining in the United States court, the action may rightly proceed to final judgment therein the same as though it had been originally brought in that court. The objection that this court is without jurisdiction of the action is not, therefore, well taken.

[1] Was the action rightly removed from the state court? The answer to this question depends upon whether or not the plaintiff in her petition states a cause of action arising under the federal Employer's Liability Act as amended. This act creates a right of action against a railroad company engaged in interstate commerce, in favor of an employé employed by it in such commerce, who is injured through its neglect, or that of any of its officers or agents, and, in case of the death of such employé from such injuries before he is compensated therefor, in favor of his personal representative, "for the benefit of his surviving widow and children, if any, and, if none, then of his parents, and, if none, then of the next of kin dependent upon such employé." No right of recovery is given for the benefit of relatives other than those specified. Such a right of action did not exist prior to this enactment, and the enactment itself supersedes all state laws upon the subject. *Mondou v. Railroad Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

The right of action given to the dependent relatives by the act is independent of that given to the decedent, and does not include any

damages that he might have recovered from the carrier, had he lived, but is given to them for the pecuniary loss which they may have sustained because of his untimely death. Prior to the amendment of April 5, 1910, the right of recovery given to the injured employé did not survive his death, but died with him. *Michigan Central R. R. Co., v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. —. By that amendment the right of recovery given to decedent survives his death, but not, however, for the benefit of his estate, but of specified relatives in the order stated, and for the pecuniary loss which they may have sustained because of his death. If no such relative survives the decedent, then no right of recovery is given by the act to his personal representative.

[2] The first count of the petition alleges plainly enough that the defendant, at the time of the injury to and death of the plaintiff's intestate, was engaged in interstate commerce by railroad between the states of Illinois and Iowa, and that Thomas was employed by the defendant in such commerce, and received injuries while so engaged, through defendant's neglect, which resulted in his death. But it is nowhere alleged that deceased left surviving him a widow, child, parent, or next of kin, for whose benefit the right of action given to the decedent survives, nor for whose benefit an original right of action was given for the pecuniary loss either may have sustained because of his untimely death, and for whose benefit alone the plaintiff is entitled to recover in either event. No facts are therefore alleged in this count of the petition from which it can rightly be determined that a right of action accrued to, or exists in favor of, the plaintiff as administratrix of the deceased employé under the federal act. True, there is an allegation "that by reason of the foregoing a cause of action has accrued to plaintiff against the defendant under and by virtue of" the Employer's Liability Act. But this is a conclusion only, and does not enlarge the facts previously alleged, and from which the conclusion is drawn. The court takes notice of the acts of Congress, and it is to the facts alleged in the petition that it must look to determine whether or not a cause of action is alleged thereunder; and, if they do not show a cause of action arising under some act of Congress, an averment that they do so arise avails nothing.

It may be that it was intended to allege in this count of the petition a cause of action arising under the federal Employer's Liability Act. If so, essential facts are wholly wanting to show such a cause of action; the averment alone that "the carrier and its employé were engaged in interstate commerce at the time of the injury to and death of the employé" being insufficient to show such a right. If it appeared upon the face of the petition that sufficient facts existed to show a right of action under the federal act, but were inaptly or defectively alleged, such defects could be cured by an amendment, and they might be overlooked. But, when essential facts are wholly wanting, effect must be given to the petition as it is written. Besides, this count of the petition plainly alleges that it was the estate only of the deceased employé that was damaged by the alleged wrongful acts which caused his death, and recovery is asked for the benefit of his estate. The

damage to the estate, and the measure of recovery therefor, are essentially different from the pecuniary loss or injury to the dependent relatives because of the death of the employé, and the measure of recovery therefor. *Michigan Central R. R. Co. v. Vreeland*, above; *American R. R. Co. v. Didrickson*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. —.

[3] The second count of the petition is identical with the first, except that it omits the allegations "that defendant was engaged in interstate commerce, and that plaintiff's intestate was employed in interstate commerce," at the time of his alleged injury and death; and recovery is sought for such injury and death under the statute of Iowa for the benefit of the estate of the deceased employé. It is permissible under the Iowa practice for the plaintiff to allege different causes of action in separate counts of the petition. *Bankson v. Illinois Central R. R. Co.* (D. C.) 196 Fed. 171.

The second count of the petition, therefore, alleges a cause of action arising alone under the law of Iowa; and it being alleged in the petition for removal that the plaintiff was at the time of the commencement of the suit a citizen of Iowa, and the defendant then an Illinois corporation operating its railroad in the state of Iowa, and in the Northern judicial district thereof, but was never incorporated under the law of Iowa, the cause was rightly removed to this court.

Whether or not any cause of action is alleged in the first count of the petition against the defendant will not be determined upon this motion; it being sufficient that none is alleged that arises under the federal Liability Act. Whether or not the action would have been removable, if sufficient facts were alleged in that count to show a right of action under the federal act as amended, is a question that does not arise upon this record, and need not be considered. See *Bankson v. Illinois Central R. R. Co.* (D. C.) 196 Fed. 171.

The conclusion, therefore, is that the motion to remand should be denied; and it is so ordered.

HAGERLA v. MISSISSIPPI RIVER POWER CO.

(District Court, S. D. Iowa, E. D. April 19, 1912.)

No. 277.

REMOVAL OF CAUSES (§ 44*)—PARTY ENTITLED TO REMOVE AS DEFENDANT— CONDEMNATION PROCEEDINGS—EFFECT OF CROSS-BILL.

While, on an appeal by a landowner from the award of a sheriff's jury in condemnation proceedings, under the Iowa statute, the landowner is the defendant for removal purposes, the filing by such landowner in the state court of a pleading which is in effect a cross-bill in equity, alleging that the adverse party is a private corporation, without power to maintain the proceedings, and praying for an injunction, makes such corporation the defendant as to the issues raised by such pleading and entitles it to remove the cause, where grounds for removal exist and the requisite amount is involved.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 88; Dec. Dig. § 44.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

In Equity. Suit by Albert Hagerla against the Mississippi River Power Company. On motion to remand to state court. Motion denied. See, also, 202 Fed. 776.

Hughes & McCoid, of Keokuk, Iowa, for complainant.

W. E. Blake, of Burlington, Iowa, and Geo. B. Stewart, of Ft. Madison, Iowa, for defendant.

SMITH McPHERSON, District Judge. The Power Company, a corporation under the laws of Maine, is constructing a dam across the Mississippi river between Keokuk, Iowa, and Hamilton, Ill., for the purpose of generating electricity to sell for power and light; and in conjunction therewith is erecting a lock to lift boats to such a height as to pass over the rapids of the river, and is constructing a dry dock. The river, both in fact and in law, is a navigable stream. The improvement was authorized by congressional enactment, approved February 9, 1905, and is to be built under the supervision of the Secretary of War.

Hagerla owns land in Lee county, Iowa, which will be submerged by the backwater occasioned by the erection of the dam, lock, and dock. That is a taking of property within the meaning of the Constitutions, state and national. *United States v. Lynah*, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539. The parties not being able to agree, the Power Company applied to the sheriff of the county for the appointment of six freeholders to appraise the damages that Hagerla will sustain. Commissioners were appointed by the sheriff, who, upon due notice to Hagerla, appraised the damages at the sum of \$7,816.60.

Within the statutory time Hagerla appealed to the district court of the county. The appeal was by written notice directed to and served on both the sheriff and the Power Company, and the notice is one of much detail, reciting all that had been done in the matter, both by the Power Company and the sheriff's jury, describing the land, and the award. Thereupon the case was docketed in the district court of the county. Hagerla then filed a pleading in two paragraphs. The first paragraph is not designated by name, but recites the appraisement, and that the damages sustained by Hagerla are \$20,000. The second paragraph is as follows:

"(2) This plaintiff by way of cross-petition and for affirmative relief alleges."

Then follow recitals to the effect that the Power Company is a naked trespasser on the bed of the river, the lands of the state of Iowa, erecting a cofferdam; that it is a mere private corporation for profit, impeding navigation, beyond legal control, and is a continuing trespasser. The paragraph concludes in this language:

"And this plaintiff therefore prays that the defendant be enjoined and restrained from taking and appropriating the property of this plaintiff for its said illegal use and unwarranted purposes, and that said injunction be made permanent and perpetual, and that this plaintiff have all such other and further relief as in equity and good conscience he is entitled to."

Thereupon the Power Company filed its petition and bond for removal to this court.

The state court ordered the removal.

A motion by Hagerla to remand is now for decision.

There are some matters relating to removals, not longer subject to debate.

Under the Act of March 3, 1887, c. 373, 24 Stat. 554, and (Act Aug. 13, 1888, c. 866, 25 Stat. 436 [U. S. Comp. St. 1901, p. 582]), and the present Judiciary Act (Act March 3, 1911, c. 231, § 28, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]), whether by reason of a diversity of citizenship, or by reason of a federal question, no one but a defendant can obtain a removal.

Another proposition equally clear is that in a mere naked proceeding to appropriate land and ascertain the indemnity, under eminent domain proceedings, the landowner is the defendant and the corporation is the plaintiff. *Railroad v. Boynton*, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 629.

The designation by the Iowa statute of the landowner as plaintiff, and the corporation as defendant, is without effect as to removal proceedings, and the self-designation by the parties to the record is of no importance. And it is equally clear that such a proceeding is an action of a civil nature, and in this case the requisite amount is involved.

That there is no other phase of American jurisprudence with so many refinements and subtleties, as relate to removal proceedings, is known by all who have to deal with them.

Those who doubt this statement should but read my opinion in *Kirby v. Railroad* (C. C.) 106 Fed. 551, followed on the same record in *Myers v. Railroad*, 118 Iowa, 312, 91 N. W. 1076, citing my decision with approval. Then there is my decision in the *Boynton Case*, in which I reversed my own decision in the *Kirby Case*, and then the affirmation of my *Boynton* decision (204 U. S. 571, 27 Sup. Ct. 321, 51 L. Ed. 629). Then turn to the *Wisner Case*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, followed by the criticism and partial overruling in *Re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, and in *Re Winn*, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873, and then see *Ex parte Harding*, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, overruling the *Wisner* and *Winn Cases*.

I call attention to those cases, not by way of criticism, but to show the late decisions, and to show the vexing questions judges on the circuit have had to consider.

Here is a case which presents removal questions relating both to diversity of citizenship, and federal questions. Both of such questions are presented by the pleading filed by Hagerla and the removal petition filed by the Power Company. The latter specifically recites federal questions, and the pleading of Hagerla recites facts, coupled with facts of which the court takes judicial notice, such as the navigability of the river, and the ownership of the bed of the river, and the supervision and control over the same by the general government, which present federal questions equally clear. So that, both phases are kept in mind as I reach a conclusion.

And another proposition must not be overlooked. Under the Iowa practice acts, both legal and equitable defenses can be pleaded; even

contradictory defenses can be pleaded. But the United States procedure forbids such a practice.

As a defendant only can remove a case, the question here is as to whether Hagerla or the Power Company is the real defendant. That Hagerla is the defendant as to the taking of his property in the proceedings at law, and the assessment of his damages, is not longer questioned, by reason of the Boynton Case. But this is not all of the case. He says in effect that the building of the lock and dry dock are but incidents to the building of the dam, and that the dam is an enterprise of a private nature for private gain. That is a question of fact coupled with matters judicially noticed. But it is not a question for a jury. It is a question to be heard either in certiorari or quo warranto, of doubtful efficiency. But even with such proceedings there would have to be an auxiliary writ of injunction to protect Hagerla, if in the right. His counsel recognize this by a distinct prayer for the writ, coupled with another prayer for general equitable relief. And Hagerla's counsel emphasize this, after first suggesting a withdrawal of the prayer, they reinstate it and keep it of record. This is a matter of very great importance. If sustained, neither the dam, nor lock, nor dry dock can be completed, and if completed must be abated by destruction, and millions of dollars lost, and one of the great enterprises of all history abandoned; and all this because of the contention as to a difference as to damages, whether Hagerla shall be paid \$7,816.-60 or \$20,000, or some intermediate sum. A court of equity can issue the injunction as prayed; it can order the full sum deposited in the registry of the court; it can order the full sum of \$20,000 paid over to Hagerla with a bond back to refund; or it can order the Power Company to give a bond for the full payment when ascertained. And as conditions change, a court of equity can take hold of and control the situation to the full protection of both parties. This is so because of the general principles of equity recognized by section 723 of the Revised Statutes (U. S. Comp. St. 1901, p. 583), by reason of the fact that there is not at law a plain, adequate, and complete remedy. And these matters cannot be grasped other than by a bill or cross-bill in equity, to which the other party can both answer and file a cross-bill. And that is precisely what Hagerla's counsel conceded when they filed this pleading to which they gave no name. It is a bill in equity, both as to phrasing and in substance and effect. And by filing it Hagerla made himself a complainant in a bill in equity, and thereby challenged the Power Company to contend against it, by reason of which it is a defendant.

And such a defendant has the right of removal.

West v. Aurora, 6 Wall. 139, 18 L. Ed. 819, is relied on to defeat a removal. That case arose under the Judiciary Act of Sept. 24, 1789, c. 20, 1 Stat. 73. The record does not clearly appear. But it does appear that an answer only was filed, attended, however, with a prayer for injunctive relief, and it was held that the case was not removable by the plaintiffs who brought the action. This was so held because, when the plaintiffs dismissed their original pleading, then nothing was left for decision other than the defensive pleas. To make that case

in point, Hagerla would have to first dismiss his case, viz., his appeal, from the award, which he does not purpose doing.

The following cases sustain the proposition that the Power Company has the right of removal: *Clarkson v. Manson* (C. C.) 4 Fed. 257, by Blatchford, Judge; *Carson & Rand Lbr. Co. v. Holtzclaw* (C. C.) 39 Fed. 578, by Thayer, Judge; *Walcott v. Watson* (C. C.) 46 Fed. 529, by Hawley, Judge; *Price v. Ellis* (C. C.) 129 Fed. 482, by Trieber, Judge. And that the party bringing the case becomes a defendant to a cross-bill, see *Kirby v. American Co.*, 194 U. S. 141, 24 Sup. Ct. 619, 48 L. Ed. 911. Such has been the uniform practice in so far as my experience and observation has extended. In some jurisdictions within this circuit the uniform practice is to separately docket the cross-bill, making the party filing it appear as complainant.

My holdings are:

1. This is an action of a civil nature, and presents matters in value, both in the law action, and by paragraph 2 of Hagerla's pleading, in excess of \$3,000.

2. It is a controversy between citizens of Iowa and Maine, and also presents federal questions.

3. That as the case stood when the record made by the sheriff and appraisers were filed in the state court, the case, and it was then first made a case, was not removable.

4. When Hagerla filed paragraph 2 of his pleading, he filed in effect a cross-petition in equity, which in this court is in effect a bill in equity in which Hagerla is complainant, and the Power Company is the defendant.

5. The Power Company is a nonresident and noncitizen of Iowa, and has the right of removal.

6. By reason of the removal of the cross-bill, the entire case is now in this court.

7. The Power Company must plead to the cross-bill by way of cross-bill, answer, or other plea. But I hold that the landowner Hagerla is entitled to a jury trial on the question of the amount of his damages.

8. And I hold that neither by certiorari, quo warranto, nor by proceedings instituted before the sheriff, can the power to take the land be determined. The only plain, adequate, and complete remedy is by proceedings in equity.

This court will retain jurisdiction over the parties and the entire subject-matter for further proceedings, and the motion to remand is overruled.

HAGERLA v. MISSISSIPPI RIVER POWER CO.

(District Court, S. D. Iowa, E. D. February 3, 1913.)

No. 277.

1. NAVIGABLE WATERS (§ 36*)—TITLE AND RIGHTS OF RIPARIAN OWNERS.

Under the law of Iowa, a riparian owner on a navigable stream owns the fee only to high-water mark, while the state in its sovereign capacity holds title to the soil below in trust for navigation and commerce and other public uses. It has been the policy of the state for many years to permit such riparian owners to build structures from their boundaries into the stream for use in connection with navigation and commerce.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. § 36.*]

2. FRANCHISES (§ 15*)—FORFEITURE—CONDITIONS SUBSEQUENT.

Conditions subsequent are never self-forfeiting, and the failure of a corporation to perform the conditions of a grant from the state within the time limited does not forfeit its grant without action by the state, and in no event can its right be questioned by an individual.

[Ed. Note.—For other cases, see Franchises, Dec. Dig. § 15.*]

3. EMINENT DOMAIN (§ 288*)—ACTION BY LANDOWNER—LACHES.

A landowner, whose land would be flooded by a projected dam across the Mississippi, who took no action until after the corporation building the dam had expended millions of dollars in the work and in the purchase of other lands similarly situated, but negotiated for the sale of his own land and awaited the action of a sheriff's jury in condemnation proceedings, is estopped by laches from then questioning the power of the company to build the dam or to exercise the power of eminent domain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 783-788; Dec. Dig. § 288.*]

4. REMOVAL OF CAUSES (§ 106*)—REMAND—WAIVER OF RIGHT.

Where a removed cause was one within the general jurisdiction of the federal court, and after complainant's motion to remand had been overruled he joined in a stipulation, filed additional pleadings, and set the case down for hearing on bill and answer, the question of defendant's right to remove cannot be again raised.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 216; Dec. Dig. § 106.*]

5. NAVIGABLE WATERS (§ 22*)—CONSTRUCTION OF STATUTE—"ASSENT" DEFINED.

Act Feb. 9, 1905, c. 566, 33 Stat. 712, "granting to the Keokuk & Hamilton Water Power Company rights to construct and maintain * * * a dam across the Mississippi river," provides, in section 1, that "the assent of Congress is hereby given" to such company to construct the dam. *Held*, that the word "assent" as so used was equivalent in meaning to the word "authorize."

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 100-120, 132; Dec. Dig. § 22.*]

For other definitions, see Words and Phrases, vol. 1, pp. 545-547.]

6. CONSTITUTIONAL LAW (§ 130*)—EMINENT DOMAIN—DELEGATION OF POWER—FOREIGN CORPORATION—CONTRACT RIGHT.

Where a foreign corporation by complying with the laws of a state acquires the right under such laws to exercise the power of eminent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

domain in the state and expends money on the project to which the exercise of such power is essential, it has a contract right to exercise it which is protected from impairment by the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 301; Dec. Dig. § 130.*]

7. EMINENT DOMAIN (§ 10*)—DELEGATION OF POWER—FOREIGN CORPORATION.

A corporation, although without the power of eminent domain in the state of its creation, may exercise such power in another state if vested therewith by the statutes of such state.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. § 10.*]

8. EMINENT DOMAIN (§ 10*)—DELEGATION OF POWER—FOREIGN CORPORATIONS—PUBLIC USE.

Code Iowa 1897, § 1990, authorizes any corporation organized for the purpose of utilizing any water power within the state or of any stream lying upon the borders thereof to condemn such lands as may be necessary for its plant under the power of eminent domain, and section 1637 et seq. authorizes foreign corporations on compliance with their provisions to come into the state with all the rights of domestic corporations. *Held*, that a foreign corporation complying with such provisions, which was authorized by its charter and also by act of Congress (Act Feb. 9, 1905, c. 566, 33 Stat. 712) to build a dam across the Mississippi river at a rapids, in aid of navigation, and also to utilize the water power to generate electricity to be transported and used in different states, had power to condemn land which would necessarily be overflowed by its dam; such flowing constituting a taking for a public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. § 10.*]

9. EMINENT DOMAIN (§ 10*)—DELEGATION OF POWER—EXCEPTION OF "MANUFACTURING" CORPORATIONS.

A corporation organized to engage in the business of generating electrical power, to be sold to others, is not a "manufacturing" corporation within the meaning of a statute excepting such corporations from those developing water power on which it confers the right of eminent domain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4346-4358.]

10. NAVIGABLE WATERS (§ 22*)—MISSISSIPPI RIVER—IMPROVEMENT OF NAVIGATION—POWER OF CONGRESS.

Congress has supreme authority as to plans and methods of improving navigation on the Mississippi river, and whether it appropriates money from the treasury for the construction of a dam and lock to enable vessels to pass rapids, or whether it authorizes a corporation to build such improvements and permits it to use the water power created thereby to generate electricity to be distributed and sold in adjoining states to compensate for the public improvement, its action is equally beyond the control of the courts.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 100-120, 132; Dec. Dig. § 22.*]

In Equity. Bill by Albert Hagerla against the Mississippi River Power Company. Hearing on bill and answer. Decree for defendant. See, also, 202 Fed. 771.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Felix T. Hughes, of Keokuk, Iowa, and Ernest McCoid, of Keokuk, Iowa, for complainant.

W. E. Blake, of Burlington, Iowa, George B. Stewart, of Ft. Madison, Iowa, J. O. Boyd, of Keokuk, Iowa, and Hazen I. Sawyer, of Keokuk, Iowa, for defendant.

SMITH McPHERSON, District Judge. This case presents the question as to whether the above-named Power Company, in constructing a dam across the Mississippi river, has the power of eminent domain. The case was set down by Hagerla for hearing on bill and answer. The rule in such a case is:

(1) All facts well pleaded in the bill and not denied must be taken as true. Allegations denied are taken as untrue.

(2) Affirmative recitals pleaded in the answer and germane to the bill will be taken as true.

(3) Mere conclusions, either of fact or law, whether in the bill or answer, will be disregarded.

(4) Facts of which courts take judicial notice will be considered, although not pleaded by either party.

The Keokuk & Hamilton Water Power Company, a corporation created under the laws of Illinois, was empowered to develop and utilize the water power of the Des Moines rapids in the Mississippi river, with power to construct a dam and other improvements as may be necessary to create and utilize such water power and to rent and sell power, and to carry on and conduct all business enterprises by which water power and its products may be directly or indirectly used. That company was licensed and authorized to do business in Iowa. Later on the Congress of the United States enacted a statute entitled:

"An act granting to the Keokuk & Hamilton Water Power Company rights to construct and maintain for the improvement of navigation and development of water power a dam across the Mississippi river."

This act was approved February 9, 1905 (33 Stat. 712, c. 566).

Section 1 provides:

"That the assent of Congress is hereby given to the Keokuk & Hamilton Water Power Company, * * * its successors, and assigns, to erect * * * a dam * * * across the Mississippi river at * * * the foot of the Des Moines rapids, from Keokuk, Iowa, to Hamilton, Illinois, and to construct, operate and maintain power stations * * * in connection with the said dam, with suitable accessories for the development of water power, and the generation, use, and transmission * * * of electric energy. * * *"

The statute provides that, in lieu of the three locks and the dry dock now owned by the government, the company shall build, in connection with the dam, at places designated by the Secretary of War, a lock and dry dock to accommodate the traffic on the river. The Secretary of War was empowered to approve the plans for the dam, lock, dry dock, and appurtenant works, and all said works should be constructed under the supervision of an army officer designated by the Secretary of War.

The company was required to pay all persons for lands thus taken, overflowed, or damaged by the construction and operation of the said works, and the general government was not to be liable for any dam-

ages or for any part of the costs of said works. But when completed to the satisfaction of the Secretary of War, the United States should have the ownership and control of the lock, dry dock, and appurtenances, and operate and maintain the same. The company was further required to provide, in connection with said improvements, a suitable power plant for operating and lighting the lock, dry dock, and appurtenances, under specifications approved by the Secretary of War. The company was required to commence said improvements within five years from the date of the approval of the statute, and complete the same within ten years from said date. The Keokuk & Hamilton Water Power Company commenced the construction of said improvements on January 8, 1910.

The Des Moines rapids of the Mississippi river are $11\frac{1}{2}$ miles in length, with a fall of 22.68 feet, by reason whereof there can be no navigation on the river in low or ordinary stages of the water. In the interest of navigation, more than 30 years ago, after an expenditure of many millions of dollars, the government completed a canal on the Iowa side around said rapids, with a depth of 5 feet, and in which there is a dry dock and three locks. But such canal and locks have long since become inadequate for the navigation and for the commerce. The government is put to an annual expense of a large sum for the operation and maintenance of said canal and dry dock and the three locks. When the dam in question is completed, the government canal, locks, and dry dock will be submerged in water and rendered useless.

The dam will have a length of 4,278 feet, or practically four-fifths of a mile. The base of the dam will be 42 feet wide, and the top 29 feet wide, with a height of 53 feet. In the dam are 119 arches, in which are as many spillways and gates, the use of which are to provide a constant level of water above the dam. At the foot of the rapids on the Iowa side is the city of Keokuk, opposite which is the city of Hamilton, Ill. In the dam will be a lock 400 feet in length and 110 feet in width, inside measurements, with a lift of 40 feet, through which all boats can be carried to or from the river below and the water above as formed by the dam. The dam will back the water up, or form a pool, as far to the north as the city of Burlington, something like 60 miles distant. Between the thread of the river and the Iowa shore there is to be a power house built in the bed of the river. The foundation of this power house is 26 feet deep in the rock bed, 1,800 feet in length, and 266 feet in width. The power house itself will be 1,718 feet long, 135 feet wide, and 144 feet high. On the Iowa side there is to be a dry dock of sufficient capacity to dock any river vessel therein, so that the water can be drawn off and vessels repaired. The river at the point in question runs from north to south. The dam proper extends from the Illinois shore to the northeast corner of the power house; the power house lengthwise being from north to south. Between the southwest corner of the power house and the Iowa shore is the dry dock, and adjoining on the west of the dry dock is the Iowa shore. Protection is given against floating ice and driftwood from getting into the turbines. The dam and the locks, power house and

dry dock, arches and spillways, as well as foundations, are all to be built of concrete formed from crushed rock, sand, water, and cement, and, when completed, all said improvements and structures will comprise one structure of solid concrete from the Illinois to the Iowa shore. The power house is to be equipped with 30 turbines each furnishing 10,000 horse power at the works, the revolutions of which will be 57.7 per minute, with an efficiency of 86 per cent.

After the Keokuk & Hamilton Company had proceeded with the work until February, 1911, it assigned and conveyed its rights to the Mississippi River Power Company, a corporation created and existing under the laws of the state of Maine. That company is still prosecuting the work, which will be completed within a few months. It has already entered into a contract for the furnishing of 60,000 horse power of electric energy for a term of 99 years, to be delivered to parties in the city of St. Louis, approximately 135 miles distant. It proposes to furnish the remainder of the power to parties at cities in the states of Iowa, Illinois, and Missouri, but it does not propose to use any of this power for its own uses other than in the operation of its power house in connection with the power for lighting the same and for operating the locks and the dry dock. The capacity of the dam at the points of delivery at St. Louis and elsewhere will equal at least 200,000 horse power.

Hagerla, a citizen of Iowa, owns, on the bottoms on the Iowa side of the river, 35 miles distant from the dam, 220 acres of land, a part of which all the time, and at times the whole thereof, will be submerged by reason of the pool formed by the dam and gates. The Power Company has bought and paid for, at an expense of more than \$1,000,000, more than 600 farms; all to be thus submerged, with the exception of Hagerla's and six others. Hagerla and the company were unable to agree as to the valuation to be placed on his land. Thereupon the Power Company, under title 10 of chapter 3 of the Iowa Code, 1897, filed its petition praying for the appointment of a commission, or jury of six men, to fix the valuation of Hagerla's land. Hagerla was given timely notice of the time and place of hearing. This proceeding resulted in an award in favor of Hagerla of \$7,816.60. From that award Hagerla appealed to the district court of Lee county, Iowa, asking that the award be increased to \$20,000. The company at once deposited with the sheriff of the county the amount of the award and the costs. In the district court of Lee county, Hagerla filed a pleading, coupled with which was a cross-bill in equity, by which he challenged the constitutional right of the Power Company to thus take his land for any sum. Thereupon the company, a defendant as to said cross-bill, obtained an order to remove the case to this court. Thereafter Hagerla filed a motion in this court to remand the case to the state court, and that motion was denied.

Thereafter Hagerla filed a stipulation as to pleading, and then filed an elaborate bill of complaint in equity asking that the Power Company be enjoined from overflowing his land, and, coupled with the prayer, prays for a writ of injunction on final hearing, and for general equitable relief. Later Hagerla filed a motion to dismiss his cross-

bill, and still later by writing withdrew his motion. To that bill of complaint the Power Company filed an answer. Since then each party has filed amendments to pleadings; and it is upon that bill of complaint and answer, each as amended, that the case has been set down for hearing on Hagerla's motion, and is now to be determined by this court. There are other facts to be stated later.

[1] Hagerla contends that from the thread of the stream to high-water mark, the title to both water and soil is in the state of Iowa. That is true, but such title is held in *trust* for navigation and commerce and other public uses. To contend that such title is in trust for the people of Iowa as tenants in common is without the slightest force. And when it is said that the state holds such title in trust, the word "state" is as was defined in the great case of *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227. The state has no proprietary ownership, but the title and holdings are in trust for public uses—navigation, fisheries, and other public uses.

Much was said in argument as to the riparian rights. In this case the Power Company holds the legal title in fee to the soil at the shore place of these structures, and for a long distance up the river on each side. And since the year 1874 (Code 1897, § 2032), it has been the legislative policy of Iowa to allow the fee owners of adjacent shore lands to build piers, cribs, "and other convenient erections" to be used in connection with navigation and commerce. But the riparian proprietor only owns to high-water mark. *Hall v. Hobart*, 186 Fed. 426, 108 C. C. A. 348 (Circuit Court of Appeals, Eighth Circuit); *Steele v. Sanchez*, 72 Iowa, 65, 67, 33 N. W. 366, 2 Am. St. Rep. 233; *Musser v. Hershey*, 42 Iowa, 356; *Grant v. Davenport*, 18 Iowa, 179, 185; *McManus v. Carmichael*, 3 Iowa, 1.

At the common law no stream above tidewater was navigable in law. But the question was otherwise settled as to this country in 1851 by the Supreme Court in the case of *Genesee Chief*, 12 How. 443, 13 L. Ed. 1058, and from that day to this the conclusion therein reached has been followed by all American courts, state and national. If a stream is navigable in fact, it is navigable in law. And the Mississippi river is not only navigable both in fact and law, but is navigable for 2,000 miles, more than one-fourth of which is between Keokuk and St. Paul. And it is equally true that Congress, and Congress alone, has the supreme control thereof, because it is a navigable stream, and because its commerce is interstate and foreign. *Philadelphia v. Stimson*, Secretary of War, 223 U. S. 605, 635, 32 Sup. Ct. 340, 56 L. Ed. 570; *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; *United States v. Rio Grande*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136. And such has been the uniform holdings, with the single exception, allowing the states to act, as held in the famous case of the *Black Bird Creek*, 2 Pet. 245, 7 L. Ed. 412, and subsequent like cases, as to matters of local concern only, until Congress takes action.

And the legislative declarations have been equally emphatic. The ordinance of 1787 recognized it. The Spanish Treaty of 1795 so declared. The enabling act for the territory of Orleans to form a state,

of February 20, 1811 (chapter 21, 2 Stat. 641), declared that the Mississippi river "shall be a common highway and forever free." The act admitting Louisiana as a state (Act April 8, 1812, c. 50, § 1, 2 Stat. 703) so declared, the act forming Missouri as a territory (Act June 4, 1812, c. 95, § 15, 2 Stat. 747), and the later act admitting Missouri as a state (Act March 6, 1820, c. 22, § 2, 3 Stat. 545, 546), likewise declared. The statute for the survey and sale of public lands (May 18, 1796, c. 29, § 9, 1 Stat. 468) declared that the navigable waters shall remain public highways. And the same is true as to all the enactments forming the territories, and admitting the states of Illinois, Wisconsin, Minnesota, and Iowa. So that from any view, this river is peculiarly and solely under the power and control of the nation, and the nation can and does act only through Congress, acting either directly or by and through powers delegated. And it is for neither Iowa nor Illinois, and much less an individual, to in the slightest degree attempt to control navigation or commerce on this river. And Congress never has attempted to limit or burden navigation on the river, with but one exception, and that exception is in the interest of interstate commerce by land. When the first bridge across this river (Davenport and Rock Island) was provided for, the owners of steamboats combined to prevent its building, insisting that they had the monopoly of the free use of the river, and that the bridge piers, and draws would delay them, and add to the hazards. But that eminent equity judge and scholar in constitutional law, Judge Love, who so long presided in this court, adopted the argument and phrasing of Abraham Lincoln representing the railway company, and held that interstate commerce should be free "across" as well as "lengthwise" the river. And see *United States v. Railroad Bridge Co.*, 6 McLean, 517, Fed. Cas. No. 16,114. And now we have near 20 bridges across this river, all built with the "assent" or "authority" of Congress, and all built under the supervision of the Secretary of War or other designated officer, but all built so as to place the lightest possible burden on the commerce of the river.

[2] Hagerla contends by counsel that this dam, the lock, etc., were not commenced as soon as required by Iowa statute, Iowa Code, § 1994. But conditions subsequent are never self-forfeiting, but are grounds only for declarations of forfeiture by the power which makes the grant. And if a declaration of forfeiture by the granting power is delayed, then the grant as originally made will remain in force until such forfeiture is lawfully declared. A citation of authorities to support this elementary statement is unnecessary. Aside from that, it is never within the rights or power of an individual to raise a state or governmental question as to excess of power. *Kerfoot v. Farmers' Bank*, 218 U. S. 281, 31 Sup. Ct. 14, 54 L. Ed. 1042; *C. B. & Q. R. v. Lewis*, 53 Iowa, 101, 4 N. W. 842; *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370, by Chancellor Kent.

[3] In this case Congress by enactment provided for the improvements in 1905. Work visible to all was actually commenced on the ground in January, 1910. Newspapers of the vicinity had had many detailed accounts, with reference to the project. Thousands of men

were employed in and about the works. Hundreds of landowners, many of them neighbors of Hagerla, had sold their lands which would be overflowed to the Power Company. Hagerla had gone into the Illinois courts (September 30, 1911) to enjoin the prosecution of the enterprise, which action voluntarily by Hagerla awaits this case. In the meantime the Power Company had expended millions of dollars. He made no protest as to lack of authority of the Power Company to take by condemnation proceedings, but, on the contrary, negotiated to have a price fixed by agreement. He awaited the action of the sheriff's jury. He was disappointed as to the amount of the award. He then appealed, by which he elected to adopt the remedy at law to have damages assessed. And then on appeal, after first claiming he was entitled to a larger award, for the first time challenged the power to thus take his land, excepting at a price to be named by him alone, and not by negotiations, nor by judicial award. He then did not ask for a temporary injunction. This is not equitable. These acts are within the doctrine of laches. It is now too late for him to be heard on the question of power. *New York v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820; *Abraham v. Ordway*, 158 U. S. 416, 15 Sup. Ct. 894, 39 L. Ed. 1036; *Galliher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Bliss v. Anaconda (C. C.)* 167 Fed. 342 et seq.; *Penrhyn v. Granville*, 181 N. Y. 80, 73 N. E. 566, 2 Ann. Cas. 782.

The period of the statute of limitations is not the sole test. Mere time is not of itself controlling. But if investments are about being made, and the status of the parties changing, a complaining party must act promptly before a court of equity will give attention to an alleged wrong. Such is the rule as uniformly stated by the text-books and authorities.

[4] The question as to the removal of this case has again been argued. If Hagerla had stood on his motion to remand, it might still be a live question. But after this court had denied his motion to remand, he and the Power Company signed and filed in the case a stipulation as to time for pleading. He filed a motion to withdraw his cross-petition, and later withdrew his motion. Still later Hagerla filed an amended bill setting out his case with most elaborate detail, with all the particularity of an original bill in equity with the prayer included. Instead of filing a general replication, he then filed a motion to have the case heard on bill and answer. The Power Company accepted the issues thus tendered, and the court has taken the submission of the case on such issues. Hagerla is a citizen of this district, and the Power Company is a corporation of Maine. Besides, a federal question is presented by the bill. The jurisdictional amount is involved. It is an action of a civil nature. Therefore this proceeding has all the requirements of an original bill, in which he invokes the powers of this court sitting on the equity side of the docket. Any and all that occurred in the state court can be taken for naught, and the case can stand as it does stand on the pleadings filed in this court, vesting this court with all its powers, so that it is immaterial what was done as to the removal or motion to remand.

[5] The title of the act is "granting" the right to construct and

maintain the dam. Section 1 of the statute recites that the "assent" of Congress is given. Whether the word "assent" is as though the word "authorize" had been used, has been in this case the subject of much discussion. It is worthy of but little consideration in my opinion, other than to state that the statute as a whole shows what Congress had in mind, and what Congress attempted to do. And that the statute must be read in its entirety falls within an elementary rule for the construction of statutes. The statute as a whole, with the acceptance by the company, makes a contract. With reference to bridges and other structures on or across navigable waters, in all the statutes for many years, those enacted both before and since the act of Congress in question, Congress has used the words "assent" and "consent" and "authorize" and "empower" indiscriminately, as though synonyms of the same and like meaning. Such is the fact, and it is unnecessary to schedule these statutes. Not only so, but the act of Congress approved June 29, 1906 (chapter 3628, 34 Stat. 632 [U. S. Comp. St. Supp. 1911, pp. 1543, 1544]), amending an act approved May 16, 1906 (chapter 2465, 34 Stat. 196), following the report No. 4,945 of the Committee on Rivers and Harbors, House of Representatives, Fifty-Ninth Congress, First Session, and the act of Congress approved June 23, 1910 (chapter 360, 36 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1559]), all show most clearly that the word "assent" has received the legislative construction and means the same as though the word "authorize" or "empower" had been used.

[6] The state of Iowa, through the proper officers, acting under a valid statute, admitted the Power Company, a corporation of Maine, to come into the state to transact the very business now questioned, namely, to construct the dam, power house, lock, and dry dock, and expend millions of dollars therefor. The state extended such invitation, granted the entrance into the state, and accepted the statutory license fee. Coming into the state, paying the fees, and obtaining permit from the Secretary of State is expressly authorized by section 1637 of the Iowa Code. Section 1638 provides:

"No foreign corporation which has not in good faith complied with the provisions of this chapter and taken out a permit shall possess the right to exercise the power of eminent domain * * * until it has so complied herewith and taken out such permit."

So that this Power Company, having complied with the statute, had all the rights to remain in Iowa, built its structure, at least from the Iowa shore to the thread of the stream, and was given the power of eminent domain, and to take lands by purchase. Now to drive it from the state and render useless such improvements and such expenditures would be in violation of the clause of the Constitution prohibiting the impairment of contracts. *American Smelting Co. v. Colorado*, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393, 9 Ann. Cas. 978.

[7] *Southern Bridge v. Stone*, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301, holds that a foreign corporation without the power of eminent domain in the state of its creation may exercise such power in the state where the property is situated, if the statutes of such state vest the power in a foreign corporation. So that it is not material whether the

constructing company under the laws of Illinois or Maine have such power.

There are three questions, which, if affirmatively decided, give the Power Company the power of eminent domain, as stated by the Circuit Court of Appeals for this circuit in *Foltz v. Railroad*, 60 Fed. 316, 319, 8 C. C. A. 635, 638, Judge Sanborn writing the opinion:

(1) Has the corporation legal capacity to exercise the power of eminent domain?

(2) Is it necessary for the corporation to take the land it seeks to condemn?

(3) Does it seek it for a public use?

[8] Section 1 of the act of Congress of February 9, 1905, provides that the Power Company shall make compensation for all lands that may be taken, overflowed, or damaged by the construction, maintenance, and operation of said works, in accordance with the laws of the state where such lands or other property may be situate.

Section 1990 of the Iowa Code, being a part of title 10 thereof, provides that any person or corporation organized for the purpose of utilizing any water power within the state or any streams lying upon the borders thereof may take and hold so much real estate as may be necessary for the location, construction, and convenient use for the means employed in the utilization of such water power and for the construction of such buildings and appurtenances as may be required. But compensation shall be made for the lands so taken, in the manner provided for taking private property for the works of internal improvement.

When the Constitution was adopted empowering Congress to regulate commerce between the states, with foreign nations, and with Indian tribes, the then existing evil sought to be remedied was as to the commerce carried between Connecticut and New York, and between some of the other states, which commerce was carried in part by small boats, but largely by wagon. The commerce consisted largely of vegetables and cordwood. The steam engine had but recently been invented, and railroads were not to be known for about 30 years. Steamboats were not to be known for nearly 20 years, and so wise a man as Chancellor Kent reached the erroneous conclusion in the great case of *Ogden v. Gibbons*, 4 Johns. Ch. 150, that steamboats did not come within the constitutional provision when carrying commerce between the states. Electricity was unknown except as demonstrated by Franklin with his kite, followed by the lightning rod. The text-books on the subject of natural philosophy or physics as then used, and continued in use until within the last 40 years, devoted less than two pages to the subject of electricity, and could suggest no utility therefor other than the lightning rod, and defining electricity as "a very subtle and unknown agency." Later came the telegraph, consisting of a pressure at one end of the wire and with breaks on such pressure, forming the Morse alphabet at the other end of the wire. *Morse Telegraph Case*, 15 How. 62, 14 L. Ed. 601 (1853). When such pressure is over and beyond the state line, it is an interstate commerce, and a foreign corporation doing a telegraph

business cannot be denied admission to or excluded from the state, nor subjected to burdens by the state. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355. Then came the telephone, then the wireless telegraph, and now we have 1,500,000 horse power in the United States created by the electric current generated by water power, with many millions to follow, if waterfalls now useless are conserved. The pressure and carrying of such current is surely a commerce, as much so as the pressure and carrying of telegrams or natural gas by pipe line. And it has been held by the Supreme Court that natural gas when reduced to possession is a subject of commerce, and a state statute which provides that such gas shall not be carried by means of pipe line beyond the limits of the state is repugnant to the commerce clause and therefore void. *Oklahoma v. Kansas Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716.

From this it seems to follow that the pressure of the electric current from this power house into Illinois and Missouri will be regarded by the courts as interstate commerce, and as such to be regulated only by Congress, either by action or nonaction, and that the state of Iowa will be without any power in the matter. It has been the boast of both the courts and the legal profession that the courts keep pace as civilization advances, and methods of business change, and new inventions are brought about. And it will be a reproach to our jurisprudence if the courts fail to keep in touch with the advancement made as to the use of the electric current. The power in question will be approximately 300,000 horse power and fully equal to 200,000 at the end of the line 200 miles distant; the difference being on account of leakage by reason of climatic conditions and the size of the copper or aluminum wire which may be commercially obtainable. This means the saving of 12 tons of coal per year by steam for every water horse power—equal to three times that used in manufacturing in Iowa, more than is now used in the state of Missouri, and one-third of what is used in the state of Illinois, including the city of Chicago, as is gathered from the last census reports. Until recently this power has gone to waste. This is not theoretical conservation of natural resources of which we hear so much, but is conservation of the practical kind that ought to appeal to every thinking man.

A statutory declaration declares the necessity, but as of course is not conclusive on the courts, as to whether such use is a public use within the meaning of the Constitution. The commerce clause, the clause as to the impairment of contracts, the clause as to ex post facto laws, the clause as to pardons, have all been construed by the Supreme Court, not as understood when the Constitution was adopted, but as understood when time for action arises. And it is utterly illogical, and some will say absurd, to construe the words "public use" as applied to taking of private property, by defining those words as relating to utilities in use in the year 1787.

[9] The articles of incorporation of the Keokuk & Hamilton Water Power Company, to which the grant of power was made by the act of Congress in question, specifically authorized that company to construct the works. Section 1 of the statute expressly granted such

rights to that company, its successors and assigns. A sale, transfer, and assignment was made by that company to the Power Company now constructing said improvements, and which company is the party to the record herein. And the articles of incorporation of this company authorized it to build the dam, the lock and dry dock, and power house, and to operate the same. Section 1637 et seq. of the Iowa Code provides for a foreign corporation, such as this company is, to enter the state, to transact business, and to exercise the power of eminent domain, and all the powers with all the rights of an Iowa corporation. It is true that a manufacturing corporation is excluded from the terms of the statute. But by both the letter and the spirit of the term "manufacturing" it does not apply to this company. This is so because it is to generate electricity, and not to manufacture any product. Another reason is that, so far as the government is concerned, the purpose is to deepen the waters for navigation and make one lock answer for three locks, and that one lock much larger than all of the former three, and to save nearly two hours of time for boats in making the trip. Still another reason is that the Iowa Secretary of State, empowered to pass on the question, construed the statute in favor of the company, accepted the fees, and granted the permit. So that I conclude that the Power Company has the legal capacity to exercise the power of eminent domain if the other two requisites exist.

The physical fact that water seeks a level subjects Hagerla's land to overflow by the building of this dam and maintaining the water on a level with the 119 gates at the arches. So that we have a "taking" under the holding in the Lynah Case, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539, and it is not only necessary, but not to be avoided, that Hagerla's land be submerged. The question of power is a judicial one, but the question of necessity is a legislative question. *Kaw Valley v. Metropolitan*, 186 Fed. 315, 108 C. C. A. 393 (Circuit Court of Appeals, Eighth Circuit).

The procedure for taking Hagerla's land was that which is provided for in the statute of Iowa of which section 1637 is a part. Hagerla, although duly served with notice thereof, made no objection to such procedure until the amount of the award was made known. He then recognized it by taking an appeal therefrom. The Iowa statutes as respects taking of private property for public use, such as constructing ditches, straightening and widening streams, providing for railroad right of way, for court and schoolhouses, constructing waterworks, cities taking over system of waterworks, gasworks, and other public utilities, cemeteries, highways, and perhaps other public uses, provide for the appointment of a commission commonly called a jury, in some instances of one man, in other instances three men, in still others six, and still others twelve men. Such awards thus made, while only preliminary, are final and binding unless there is an appeal. But in every instance to meet the requirements of the Iowa Constitution in such cases of taking private property for a public use, an appeal is allowed the party feeling aggrieved to the district court of the county—a court provided for by the Constitution, in which court either party on demand is given the right of a trial to a common-law jury of 12 men,

such a jury as is meant by the Iowa Constitution when the right of trial by jury is given. So that I am of the opinion that the matter of procedure prior to the time the case is lodged in the district court on appeal is not at all pivotal or decisive. It is all in the nature of a process to secure the parties a trial in the district court with the aid of a jury. This is illustrated by the Cincinnati post office case of *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449.

A statutory declaration in any given case authorizing the taking of property for a public use, while not binding, is persuasive, unless clearly and without doubt it is beyond the Constitution. Whether this property will be subject to state and municipal taxation is not before the court. Possibly (but not deciding the question), because a governmental agency, these improvements cannot be taxed, nor levied upon by writ of attachment or execution against the Power Company. But all this is here of little importance, for the reason that this is a court of equity with power to require, on a showing, an additional deposit to be placed in the registry of this court, or a bond with surety to meet any award that in the end may be given Hagerla for his land. The authorities show this work as one for public use. *Carothers v. Philadelphia*, 118 Pa. 468, 12 Atl. 314; *Helena Power Co. v. Spratt*, 35 Mont. 108, 88 Pac. 773, 8 L. R. A. (N. S.) 567, 10 Ann. Cas. 1055; *Hollister v. State*, 9 Idaho, 8, 71 Pac. 541; *Gas Light v. Richardson*, 63 Barb. (N. Y.) 437; *Dodge v. Council Bluffs*, 57 Iowa, 560, 10 N. W. 886, holding that a foreign corporation had the power of eminent domain in the construction of waterworks under ordinance of the city. A statute of Wisconsin was enacted to improve navigation and to create hydraulic power for sale. It was held that the company building it had the power of eminent domain, it being for a public use. In *re Southern Co.*, 140 Wis. 245, 122 N. W. 801. In *Walker v. Shasta Power Co.*, 160 Fed. 856, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725 (C. C. A. Ninth Circuit), it was held that in building a ditch and a flume to convey water in furnishing electricity to the public generally for lighting, power, and heating purposes, gives the right of eminent domain.

Sisson v. Board of Supervisors, 128 Iowa, 442, 104 N. W. 454, 70 L. R. A. 440, holds that private property may be taken in connection with a ditch constructed to drain agricultural lands.

In *Head v. Amoskeag*, 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889, it was held that a state statute authorizing a person to erect on his own land a mill and dam across a stream not navigable, paying to the owners of the land overflowed, was the taking of property by due process of law. The holding of the court on the facts in the case and the authorities cited is strongly applicable to the case at bar.

Strickley v. Highland Boy, 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174, sustained the Supreme Court of Utah (28 Utah, 215, 78 Pac. 296, 1 L. R. A. [N. S.] 976, 107 Am. St. Rep. 711, 3 Ann. Cas. 1110), in holding that private property could be taken under the power of eminent domain for a right of way for a bucket line across the property of another in carrying ores from the mountain to a railroad station.

In *Hollister v. State*, 9 Idaho, 8, 71 Pac. 541, the Supreme Court of Idaho held that the power of eminent domain is given to obtain lands for the improvement of water power in which the power is to generate electricity for light and power.

These cases and cases therein cited show that the power of eminent domain has been lawfully exercised in a variety of cases, such as ditching and for irrigation and to aid in mining, straightening streams, widening and deepening channels, and perhaps in other instances, showing thereby that the courts are keeping pace with the progress of our institutions and improved facilities for business.

But a much broader view than the foregoing should be and is taken in the decision of this case. This dam, lock, power house, and dry dock all in combination is one solid mass of concrete work extending from the Illinois to the Iowa shore. No one of the four can be segregated from the other three without destroying all four. So far as the government is concerned, they are all to deepen the channel of the Mississippi river for 60 miles, including the Des Moines rapids, and are all for the benefit of navigation on a navigable stream. The Power Company owns all the shore lands from the dam above to quite a distance on both sides of the river, and therefore it is the Power Company which has the riparian right under the Iowa statute, as maintained by the Iowa Supreme Court in the cases hereinbefore cited. And it is for the national Congress and it alone to enact legislation for the improvement of navigation on this river, and its discretion or wisdom is to be questioned by no party and by no court. Legislation by Congress is supreme. *Union Bridge v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126; *Gibson v. United States*, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996; *Eldredge v. Trezevant*, 160 U. S. 452, 16 Sup. Ct. 345, 40 L. Ed. 490; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782.

And it is for the executive and administrative officers of the general government to execute such laws without hindrance by any individual or by any court, state or national. The contemporaneous action by committees of Congress and administrative officers judicially noticed by this court all warrant the statement that this enterprise is one of a national character subject only to the legislation of Congress and made effective by government officers. There can be no logical answer made to the opinion of the court in the case of *Stockton, Attorney General of New Jersey, v. Baltimore & New York R. R.* (C. C.) 32 Fed. 9, in which the opinion was written by Justice Bradley, Associate Justice of the United States Supreme Court, when holding court on the circuit, in what is known as the *Arthur Kill Case*. It is to be regretted that the Supreme Court was not enabled to redetermine that case. The records show that the state of New Jersey filed this case in the Supreme Court on appeal, but later on with the leave of the court on motion of the state of New Jersey the appeal was dismissed. But this decision is entitled to great weight, because of the strong reasoning in the opinion, and because of the great learning of Justice Bradley, and

the still further fact that he it was who wrote the opinion concurred in by the entire court in the case of *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224. Justice Bradley's opinion in 32 Fed. 9, is cited with approval in *Luxton v. North River*, 153 U. S. 532, 14 Sup. Ct. 891, 38 L. Ed. 808.

In the case at bar the action in effect is to enjoin on final hearing the completion of the lock and dry dock for the use of the government, and restore the old and tortuous canal with its three locks and the canal with a depth of water of but five feet, and, if completed before final hearing, to abate not simply the dam, but the lock and dry dock and deepened channel as a nuisance.

The milldam acts have quite generally been held as constitutional as conferring the power of eminent domain. *Otis v. Ludlow*, 186 Mass. 89, 70 N. E. 1009, 104 Am. St. Rep. 563; *Burnham v. Thompson*, 35 Iowa, 421; *Occum v. Sprague*, 35 Conn. 496; *Todd v. Austin*, 34 Conn. 78; *Boston v. Newman*, 12 Pick (Mass.) 467, 23 Am. Dec. 622; *Hankins v. Lawrence*, 8 Blackf. (Ind.) 266; *Scudder v. Trenton*, 1 N. J. Eq. 694, 23 Am. Dec. 756. Although in the latter case the statute was sustained by giving the parties damage and action therefor without conceding that it had the right of eminent domain.

In the case of *Head v. Amoskeag*, 113 U. S. 9, 17, 5 Sup. Ct. 441, 28 L. Ed. 889, on writ of error to the Supreme Court of New Hampshire, the opinion collects the statutes of the various states and the decisions thereunder. The opinion recites the fact that no one of these many statutes has been held invalid, until since the year 1870, and then only in three states.

Hagerla's counsel in effect concede the constitutionality of the milldam statutes of most of the states, Iowa included, but claim that they are not an authority here because, as is insisted, the owner of the mill must submit to rates of toll as prescribed by public authority, and must serve all comers alike and without preference. The holding of the Iowa Supreme Court that milldam sites and overflows therefrom can be established by the power of eminent domain is binding on United States courts. *Hairston v. Danville*, 208 U. S. 598, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008. But the Iowa Code, section 1994, under which this proceeding was instituted, among other things, provides:

"The rights, powers and privileges conferred by this chapter shall be at all times subject to legislative control."

Hagerla makes no showing that his land to be submerged has any value other than the money value. The showing affirmatively made is that the Power Company will pay any award which may be judicially established. And this court will see to it that this is done. It therefore follows that to enjoin this work or to abate it as a nuisance will subject the Power Company to millions of dollars of expense, and deny the government the rights of an improved navigation. But to deny Hagerla his contention, and allow these improvements to go on and be operated, gives Hagerla full compensation, and harms him in no sense whatever. He has a plain, complete, and adequate remedy at law and is not entitled to relief in equity. The case of *New York*

City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, is in point on many questions in this case and decisive of them, and is of itself of sufficient authority for a holding adverse to Hagerla. To grant Hagerla the writ of injunction would be a holding that he could use the writ and dictate terms of a hundred or even a thousand more times in amount as to the value of his land. "While we do not mean to intimate that the plaintiff would make an extortionate demand, we do hold that equity will not place them in a position where they can enforce one." Justice Brewer speaking for the court in *New York v. Pine*, 185 U. S. 93, 98, 22 Sup. Ct. 592, 594 (46 L. Ed. 820), *supra*. The writ of injunction is not allowed as a club, but is only allowed in furtherance of good conscience, and to protect a party in a right for which a court of law does not furnish an adequate remedy.

The authorities, cases, statutes, reports of congressional committees, and acts of executive and administrative officers with reference to this dam, and kindred subjects, if reviewed, would fill a volume. This opinion will not be further extended, except to state:

[10] This case can be correctly decided on the following statement: Congress is supreme as to the plans and methods for the improvements of navigation on this river. Whether Congress acts wisely or unwisely, its acts are not to be challenged by any court, officer, or person. Congress could have provided for this dam and the lock and dry dock precisely as being built, and with a power house to light and operate the dry dock and lock, and pay the Power Company therefor out of the public treasury. Instead of doing that, payment is to be made by allowing the Power Company the momentary use of the overflow water. In the one case, as in the other, Hagerla's land is taken. So that this entire record presents the academic question as to how the government is to pay for an improved navigation for 60 miles. And the manner of payment does not concern Hagerla, provided he is paid the value of his land. That he will receive in money the full value of his land is not in doubt.

His bill of complaint and amendments should be dismissed with prejudice. Such will be the decree.

In re STIGER.

(District Court, D. New Jersey. January 27, 1913.)

1. ASSIGNMENTS (§ 48*)—"EQUITABLE ASSIGNMENTS"—ESSENTIALS.

To constitute an equitable assignment of an account receivable as security arising out of an unexecuted agreement to assign, there must have been a purpose to presently transfer all of the assignor's right, which would create an absolute indebtedness from the account debtor to the assignee, and not merely the creation of an obligation on the part of the assignor to make payment from the proceeds of the account.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 133; Dec. Dig. § 48.*

For other definitions, see Words and Phrases, vol. 3, pp. 2434-2437; vol. 8, p. 7652.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 155*)—EQUITABLE ASSIGNMENT—VALIDITY AGAINST TRUSTEE.

Petitioner sold material to bankrupt, who was a manufacturer, under an agreement that it should be secured by an assignment of accounts receivable. The goods were delivered, but there was a disagreement as to the assignment, and it was not executed until some time afterward and within four months prior to the bankruptcy. Petitioner knew the bankrupt's situation, and its testimony was to the effect that the assignment was to cover all accounts of bankrupt then outstanding and those that should be thereafter made, subject to a prior assignment to another creditor. It was also shown that bankrupt had no other resources from which to pay the current expenses of his business, and that he held and continued to collect the accounts and to use the proceeds in paying current bills. *Held*, that there was no such definite and specific agreement at the time of the sale as amounted to a present transfer even by equitable assignment, and that the assignment was voidable as against bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 155.*]

In Bankruptcy. In the matter of Augustus K. Stiger, trading as A. K. Stiger & Company and A. K. Stiger Manufacturing Company, bankrupt. On review of referee's order directing trustee to pay to D. C. Andrews & Company the sum of \$4,158.81, proceeds of certain book accounts on the ground that such accounts were assigned to it by parol. Reversed.

Nathan Bilder, of Newark, N. J., for trustee.

Sigmund Solomon and D. C. Myers, both of New York City, for petitioner.

RELLSTAB, District Judge. The question presented on this review is whether the occurrences between such company and the bankrupt on or about the 19th day of January, 1911, amounted to an assignment of bankrupt's book accounts then existing and subsequently created.

The referee found:

"That at the time of the sale of the merchandise by the petitioner to the bankrupt, the bankrupt, in consideration thereof assigned to the petitioner by a parol assignment operating in present his merchandise accounts then in existence and afterwards to be created, subject to a prior similar assignment to his bank, as security for the payment of such merchandise."

He predicated such finding "upon the facts in the case and the following authorities: *Union Trust Co. v. Bulkeley* (C. C. A. 6th Cir.) 18 Am. Bankr. Rep. 35, 150 Fed. 510 [80 C. C. A. 328]; *Tomlinson v. Bank of Lexington* (C. C. A. 4th Cir.) 16 Am. Bankr. Rep. 632, 145 Fed. 824 [76 C. C. A. 400]; *Williams v. Ingersoll*, 89 N. Y. 508."

The petitioner does not contend as pledgee of such accounts, and in its brief it asserts that:

"They are not attempting to enforce the transaction as an equitable lien, which fails for want of a delivery as a pledge. We are enforcing an actual assignment of certain choses in action."

The bankrupt, a manufacturer of buttons, was adjudicated a bankrupt in involuntary proceedings instituted against him, on the 8th day

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of June, 1911. In the petition presented to the referee claiming such book accounts or the proceeds, the petitioner based its right thereto upon a written agreement and accompanying assignment, bearing date the 17th day of February, 1911. After the filing of the trustee's answer to such petition, and on the day set for the taking of the testimony on the issues raised thereby, the petitioner sought and obtained permission to amend its petition; the petition as amended asserts that the assignment was made, not on the 17th day of February, 1911, the date of said written agreement and assignment, but on or about the 19th day of January, as already mentioned.

It is conceded that, if the petitioner's right to such book accounts depends upon the documents bearing such later date, it is not entitled thereto, as the consideration for such assignment, i. e., the sale and delivery of certain merchandise, took place several weeks prior thereto; and the agreement and assignment, assuming for present purposes that they cover a past transaction, were given to pay, or to secure the payment, of an antecedent debt, and therefore are invalid by the operation of the Bankruptcy Act. These documents, however, are said to be but confirmatory of the oral agreement previously entered into, and to put the same into legal form.

At the ancient common law, assignments, of things in action founded on personal covenants, were not recognized, and were not enforceable by the assignee either in his name or that of the assignor. The reason for this was that such an assignment destroyed the privity of contract then necessary to maintain an action at law. This theory was repudiated, however, at an early day by the Court of Chancery, which enforced such assignments in favor of the assignee. In more modern times the equitable rights of the assignee were recognized in courts of law, and he was permitted to enforce such assignments in an action at law, using the name of the assignor as plaintiff. By statute, the right to recover in cases of assigned choses in action in a court of law, in the name of the assignee, has been much enlarged. As a result of these changes many assignments which in former times were cognizable only in a court of equity are now enforceable at law. 3 Pomeroy's Eq. Jur. (3d Ed.) c. 8. In *Sullivan v. Visconti*, 68 N. J. Law, 543, 548, 53 Atl. 598, there is a concise, yet comprehensive, discussion by Justice (now Mr. Justice) Pitney, of the history of assignments of choses in action under the statute of New Jersey, and antecedent thereto, the laws of which state must furnish the test of the petitioner's rights in this case. *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945; *Loveland on Bank*. (4th Ed.) § 441. By section 19 of the act entitled "An act to regulate the practice of courts of law (Rev. 1903, 3 Comp. St. N. J. 4056):

"All choses in action arising on contract shall be assignable at law, and the assignee may sue thereon in his own name; but in such action there shall be allowed all set offs, discounts and defenses, not only against the plaintiff, but against the assignor before notice of such assignment shall be given to the defendant."

While the right to assign such choses in action is here given in comprehensive terms, and includes moneys to grow due on existing con-

tracts (*Sullivan v. Visconti*, *supra*), it does not make assignments of a part of a chose in action or of contingent interests and expectancies which have no present actual or potential existence, but rest in mere possibility only, enforceable in an action at law. *Sternberg & Co. v. L. V. R. Co.*, 78 N. J. Law, 277, 73 Atl. 39. This is the general rule laid down by the United States courts. *Mandeville v. Welch*, 18 U. S. 277, 5 L. Ed. 87; *Mitchell v. Winslow*, 17 Fed. Cas. 527. But both such kinds of assignment are clearly cognizable in a court of equity. In both legal and equitable assignments, however, it is essential that the parties contemplate an assignment; and, while at law the mere agreement to assign is unenforceable, in equity such enforcement may be had as between the parties and others having notice thereof, upon the fundamental principle that equity will regard that as done which it was agreed should be performed—not merely what the chancellor may conclude should have been done, but what he finds the parties agreed to do, and which, through neglect or intervening causes dehors the agreement, was not done. Such agreement may be implied as well as expressed, but in case of an alleged assignment of a chose in action which, it is said, arises by implication, the implication must necessarily and exclusively point to an assignment, and not to a mere designation of a fund or assets out of which a payment is to be made. One who sells property has a right to dictate the terms upon which he will part with it. He may sell it on the credit of the debtor. He may insist upon security. If he insists that it was sold on the last-mentioned terms, and he fails to establish an actual transfer of the chose in action said to constitute the security, before he can obtain it or the proceeds thereof, on the ground of equitable assignment, he must show either an express agreement to so assign, or that the circumstances attending such sale necessarily imply a present intention to transfer, directly applying to the chose in question. Failing to do either, he will not be entitled to a decree to turn over to him such chose or its proceeds, but only a judgment for the amount of his claim, such as is pronounced in an action at law.

[1] Where enforcement of an agreement to assign is sought, it is essential that there was a purpose to presently transfer all that the assignor had or was to obtain in the funds or accounts which are the subject of the transaction. The sure criterion is whether the transaction between the parties, if assented to by the debtor of such alleged assignor, creates an absolute personal indebtedness payable by him to such alleged assignee, or whether it creates merely an obligation by such assignor to make payment out of that particular debt. If the former, an equitable property in the debt, and not a mere right of action against such primary debtor, passes to such assignee, and an equitable assignment is effected. 3 Pomeroy's Eq. Jur. § 1280. That a present appropriation of the fund or property is essential to an equitable lien or assignment is the rule in the courts of the United States and the state of New Jersey. The following are a few of the cases holding such doctrine: *Wright v. Ellison*, 1 Wall. (68 U. S.) 16, 17 L. Ed. 555; *Christmas v. Russell*, 14 Wall. (81 U. S.) 69, 20 L. Ed. 762; *Trist v. Child*, 21 Wall. (88 U. S.) 441, 22 L. Ed. 623; *Smedley*

v. Speckman, 157 Fed. 815, 85 C. C. A. 179, 19 Am. Bankr. Rep. 694; Bower v. Hadden Bluestone Co., 30 N. J. Eq. 171, affirmed Lyon v. Bower, 30 N. J. Eq. 340; Lanigan Adm. v. Bradley & Currier Co., 50 N. J. Eq. 201, 24 Atl. 505; Board of Education v. Duparquet, 50 N. J. Eq. 234, 24 Atl. 922; Weaver v. Atlantic Roofing Co., 57 N. J. Eq. 547, 40 Atl. 858; Seyfried v. Stoll, 56 N. J. Eq. 187, 38 Atl. 955.

In Wright v. Ellison, *supra*, it was held that:

"To constitute an equitable lien on a fund there must be some distinct appropriation of the fund by the debtor. It is not enough that the fund may have been created through the efforts and outlays of the party claiming the lien."

In Christmas v. Russell, *supra*, it was held that:

"A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund even in equity. To make an equitable assignment there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the party meant to be provided for, even where the circumstances do not admit of its immediate exercise. If the holder of the fund retain control over it, as ex gr., power on his own account, to collect it or to revoke the disposition promised, this is fatal to the thing as an equitable assignment."

In Smedley v. Speckman, *supra*, a case in this circuit, the Court of Appeals, by Judge Gray (157 Fed. page 819, 85 C. C. A. page 183), said:

"This testimony falls far short of evidencing the absolute appropriation by the assignor of the fund sought to be assigned, which is a fundamental requisite of a valid assignment, nor is there any evidence of that surrender by the assignor of all control over the fund that the law requires."

In Lanigan v. Bradley & Currier Co., *supra*, V. C. Pitney followed Trist v. Child, *supra*, and declared (50 N. J. Eq. page 206, 24 Atl. page 506) upon the authority of that case that the test was:

"Does the contract or arrangement in question authorize the depository of the fund to pay it directly to the creditor or party claiming as assignee, without the further intervention of the debtor or party originally entitled to it?"

He also distinguished equitable assignments from promises to pay out of a particular fund, saying that the distinguishing feature of such latter class was "that the party does not part with the control of the fund, but his promise is consistent with its being paid to and received by him."

In Weaver v. Atlantic Roofing Co., *supra*, it was said by V. C. Grey (57 N. J. Eq. page 554, 40 Atl. page 861) that the essential requisite of such an assignment was "that the assignor should presently strip himself of his interest in the fund or in some part thereof."

What shall amount to the present appropriation which constitutes an equitable assignment is a question of intention, to be gathered from all the language construed in the light of the surrounding circumstances. Pomeroy's Eq. Jur. § 1282. It is not necessary that the assigned indebtedness or chose in action shall be actually in being; if it exists potentially—that is, if it will in due course of things arise

from the contract entered upon—it passes by equitable assignment enforceable as soon as it is in esse. *Id.* §§ 1283–1288. Where the assignment is absolute in form, it will not be construed as a mere covenant to pay out of the fund because the assignor therein agrees to act as agent of the assignee in collecting the money and to pay the same over to him. *Cogan v. Conover Mfg., Co.*, 69 N. J. Eq. 809, 64 Atl. 973, 115 Am. St. Rep. 629.

[2] Turning to the particular facts in this case, and which are said to show an equitable assignment: The merchandise constituting the consideration for the alleged assignment was sold in two lots, on January 31 and February 4, 1911, respectively. This merchandise was raw material, and was worked up by the bankrupt into manufactured product, upon the sale of which some of the book accounts claimed by the petitioner were created. Prior to January of that year the petitioner was a creditor of the bankrupt to an amount exceeding \$6,000, for the payment of which an extension of two years was given. Such extension was a part result of negotiations that took place between the bankrupt of the one part, and the petitioner and the National Butchers' & Drovers' Bank of New York, another large creditor, of the other part. Another result was that the bankrupt's business was to be managed by one Charles O. Thompson, under the supervision of the bank and petitioner. Some time about the middle of January, after such new management had taken place (the exact time not being fixed), the purchase of raw material was discussed between either the bankrupt or his said manager, and Alfred E. Whitehouse, the managing member of the petitioner's firm, resulting in an agreement that petitioner would sell the bankrupt raw material, if it were secured against loss. None of the three witnesses to such agreement (Whitehouse, Thompson, and Stiger) attempted to give the actual language used at the time of such discussion; but it is apparent that the petitioner was unwilling to sell without security, and that the bankrupt intended that his accounts receivable, existing and to be created, were to be the petitioner's security, subject to the prior assignment thereof to the said bank, who had advanced, and was to advance, from time to time, the moneys necessary to meet the pay rolls and other business expenses. So far as the testimony discloses, no formal words of transfer in *presenti* were used on such occasions, nor any that a writing formally evidencing such agreement was to be executed; but the subsequent conduct of the parties, rather than any testified-to express words, shows that a more formal agreement was contemplated by them. The letter of January 19, 1911, from the petitioner to bankrupt, recites:

"In confirmation of 'phone conversation with your Mr. Stiger to-day we have sold you about thirty tons of Tumaco ivory nuts at 5% cents per pound, against your sixty days' note and as collateral security a private assignment of sufficient outstanding accounts receivable to keep the above covered."

The letter of February 7, 1911, following the last sale of merchandise, states:

"We had expected to hear from you to-day with the form of assignment agreement, and if you have not given this matter your attention we must

kindly ask that you do so immediately, as we would like to have this matter put in shape in accordance with the terms of sale."

Whitehouse, in answer to the question, "What was done in reference to putting the talk into the form of an agreement?" said:

"When we had the merchandise ready for delivery, I drew up a form of assignment which I submitted to Stiger and Thompson, and there were some objections to its form, and they arranged to have another assignment drawn up, and there was considerable talk as to that. Then an assignment was submitted to me and I made some corrections or suggestions, and finally we had one drawn up which was mutually satisfactory."

And further, with reference to the same subject, he testified, in response to petitioner's counsel, as follows:

"Q. Was that letter of January 19th answered by Mr. Stiger, do you know?
A. I can't answer that; I don't know.

"Q. That January 19th letter was an agreement had between you at the time? A. Yes.

"Q. And it was on that agreement that you started to deliver the goods?
A. Yes.

"Q. The actual drawing and signing of the paper was up between you from that date until February 17th? A. Yes.

"Q. Because of changes made by both of you in the papers? A. Yes.

"Q. On January 19th, or prior, when you had this talk, was there anything said then about their sending a statement of accounts? A. I don't think the details of it were thrashed out.

"Q. They were discussed in the lawyer's office when the paper was signed?
A. Discussed prior to that. I drew up a form of agreement covering the details and submitted it to them, and they submitted something else, and finally we got to their lawyer's office, and this was the result.

"Q. What you are certain of is that prior to January 19th you refused to sell them unless they secured you with outstanding accounts? A. Yes."

Though the subsequently executed written agreements cannot, for the reasons already advanced, be relied upon as the basis of petitioner's right to such accounts, the fact that they were made after considerable negotiations concerning their terms may be resorted to, together with the testimony of what took place when the prospective sale and security were discussed and that intervening, and the conduct of the parties in relation thereto, in determining how the matter of security stood at the time of the sales of such merchandise. Two differently phrased agreements of assignment, one emanating from each, neither of which was satisfactory to both, were drawn before the agreement and assignment in evidence were executed. What these rejected agreements contained, and what the points in difference between the parties were, does not appear; but that they were vital must be assumed, else how can the "considerable talk" that ensued between the submissions of the two rejected agreements be accounted for, as well as the rejection of the agreements which, presumably, expressed the real understanding of the respective parties? If the points in controversy did not relate to matters essential to the establishment of such an equitable assignment, it was within the power of the petitioner to establish them. Its failure to do so leaves the court to draw but one inference, viz., that these differences prove that at the time of the alleged bargain the minds of the parties had not definitely met, and that no present transfer of the book accounts took place.

Petitioner being forced to rely upon the oral agreement made before the goods were delivered, the burden of proof is on it to show that by such agreement an assignment in praesenti was perfected, and that the goods subsequently delivered were sold in pursuance of that agreement. It is not necessary that such agreement should be expressed in as apt words as would be looked for in a formal document having such purpose in view. Equity looks at the final intent and purpose rather than the form. *Hurley v. Atchison, T. & S. Ry.*, 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729. And if it appears that a completed transfer of the book accounts as security for such sales was then intended, a court of equity will enforce it as of that time, even though a more formal expression of such assignment was contemplated and subsequently perfected. *McDonald v. Daskam*, 116 Fed. 276, 53 C. C. A. 554, 8 Am. Bankr. Rep. 543. But if at the former time the terms of the security were not fully determined, some being left open for further consideration, and such terms were not settled until after the sale and delivery of the goods, no such assignment results which either a court of law or equity will enforce. The whole conduct of the parties, from the time they first talked of security until the written agreement was formally executed, shows that the scope or extent of such security was not fixed until after the sales were made and the prohibitive period of four months had begun. However, aside from the question whether, as a matter of fact, a definite agreement to assign accounts was reached at a time before the four months' period began, it is perfectly apparent from the testimony that at no time was it agreed that the bankrupt should part with either his title to such accounts or his control over them. Nothing upon his books of account indicates that, at the time the deliveries of such goods were made or the notes given therefor, any of the accounts then existing were held in trust for the petitioner. No individuation of the book accounts ever took place. All are claimed to have been assigned for the benefit, first, of the bank, and, second, the petitioner. No other assets were available to continue the business, and, if the business was to continue as contemplated, the current expenses had to be met from their proceeds. Whitehouse's testimony in this particular is illuminating:

"Q. And you were unwilling to extend any further credit except upon security? A. Yes.

"Q. Now, what did Thompson and Stiger say to that? A. They agreed to give us security.

"Q. What kind of security was talked about? A. Assigned accounts.

"Q. Any specific accounts mentioned? A. All accounts over and above those assigned to the National Butchers' & Drovers' Bank for pay roll.

"Q. They were going to assign everything to you? A. Everything.

"Q. How were they going to pay their rent? A. I don't know.

"Q. How were they going to pay current bills? A. I don't know.

"Q. How did you expect the concern would be able to continue business if they assigned all accounts to you with the exception of those assigned to the bank? A. They were assigned as security.

"Q. Well, was that discussed in any way? A. Was what discussed?

"Q. The question of the continuation of the business if all accounts except those assigned to the bank went to you? A. Why, no."

The bankrupt's conduct in relation to such accounts, from the time of such alleged assignment until they were taken charge of by the receiver appointed in this cause, was one of absolute ownership and control. He collected them and used the proceeds thereof in paying current bills, and this was done by him, not contrary to any proven understanding between him and the petitioner, but of necessity in exact accordance therewith. This control by the bankrupt over such accounts, as heretofore shown, is fatal, as a matter of law, to the petitioner's contention that the effect of the oral agreement between the parties was to transfer such accounts to it.

The finding of the referee that there was "a parol assignment operating in praesenti" is not sustained by the evidence; and, as the invoking of the law by him is predicated upon such a finding of facts, it is unnecessary to consider the cases cited by him; but as *Union Trust Co. v. Bulkeley*, supra, is the main reliance of both the referee and the petitioner, and as the conclusion here reached might otherwise appear to be in direct conflict therewith, it may be advisable to note that in such case it was found as an explicit fact that there was a completed assignment of the book accounts there drawn into question. Furthermore, that in that case, unlike the one at bar, nothing is disclosed that shows that, in the state according to the laws whereof the agreement there considered was tested, the retention by the alleged assignor of control of the subject of the transfer made the transfer invalid as an assignment. In fact, in the Circuit Court of Appeals no reference is made to the bankrupt's appropriating to his own purpose the proceeds of the accounts; and while the District Court refers to such use, in neither was the effect of such use by the bankrupt considered as a factor upon the question whether an assignment was effected. The case of *Christmas v. Russell*, supra, which, as heretofore noted, makes the retaining of control over the fund by the bankrupt, with power on his own account to collect it or to revoke the disposition promised, fatal to equitable assignment, was not mentioned.

The order of the referee is reversed.

MIDDLETON v. P. SANFORD ROSS, Inc.

(District Court, S. D. Georgia, E. D. February 24, 1913.)

1. MASTER AND SERVANT (§ 107*)—DEATH OF SERVANT—SAFE PLACE—DANGER FROM WORK OF OTHER LABORERS.

While a master is bound to furnish a reasonably safe place where all the workmen engaged in the work may labor, yet, having done so, the master is not bound to anticipate and assume liability for damages that result from the negligence of other laborers on the work rendering the place unsafe and resulting in the death of one employed on the work whether they are fellow servants in a strict sense or not, especially where the deceased had a better opportunity than the master to perceive the danger and avoid it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 217*)—DEATH OF SERVANT—ASSUMED RISK.

Where decedent while working at the reinstallation of an engine on a dredge was struck and killed by a timber which was being pulled from beneath the engine, and decedent saw the exertion of power from an engine to pull out the timber and must have known that the work was dangerous, and could easily have removed himself to a safe place, he assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

At Law. Action by Annie Middleton against P. Sanford Ross, Incorporated. On demurrer to petition. Sustained.

Osborne & Lawrence and Edmund H. Abrahams, all of Savannah, Ga., for complainant.

Garrard & Gazan, of Savannah, Ga., for defendant.

SPEER, District Judge. This is an action brought by Annie Middleton for the death of her husband. P. Sanford Ross, Inc., was engaged in rebuilding one of its dredges at a wharf at the foot of Barnard street, in the Savannah river. The work was being done under the direction of the defendant company, and workmen of various trades were engaged. Among these was a machinist, the late husband of the plaintiff, who was in the service of John Rourke & Sons. Middleton was working at the reinstallation of the engine. It was necessary to house over the dredge, and upright posts had been installed along its side and on the deck at intervals of about 20 feet apart. In the process of construction beams were laid crosswise the dredge. All this was done to make what is known as the "hog frame." There were on the top of the uprights connecting timbers running fore and aft, and on these the cross-beams were laid. About 20 feet aft of the spot where the engines were being reinstalled and where Middleton was at work there were two of these uprights and a cross-beam lying athwart the dredge. Nothing was completed. The cross-pieces had not been permanently placed and bolted. A steam hoisting engine with derrick and fall attached was on the dock. The derrick was movable, and swung over the dredge. In the course of the work, it became necessary to remove a stick of timber on which the engine was resting. This timber was 14 feet by 14 feet and 25 inches in length. The wire cable was run from the derrick boom and fastened around the timber underneath the engine, but was not fastened to the middle of the timber. When the power was applied and the timber brought above deck, one end sagged down, and the shorter end projected upward. While doing this work, this timber got loose from the control of the men engaged in handling it. It struck the cross-beam, knocked the same from its position, and in falling it inflicted a blow upon Middleton from which he died. While working on the dredge, Middleton was not engaged in the actual work of removing the timber. This was being done by other servants and employés of defendant. When the work of removing the timber from beneath the engine commenced, Middleton walked from the place where he was engaged, and was standing on the side of the dredge about 15 or 20 feet away in what, it is alleged,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was apparently a safe place. It is further alleged that this was a safe place. This did not turn out to be true, however, because there he received the blow from which his death resulted.

The grounds of negligence are that defendant failed to provide a safe place of work on board the dredge; that it failed to fasten both ends of the cross-beam before the removal of the piece of timber; that it failed to warn Middleton of this failure to fasten and bolt the ends of the cross-beam; that it permitted the cross-beam to lie on the top of the upright post without fastening or support of any kind; that it negligently and carelessly removed the timber from beneath the engine; that it failed to fasten the cable in the middle of this timber and equalize the weight so as to prevent the slipping thereof (however, no slipping is alleged); that it failed to provide a safe means of removal of the timber from beneath the engine bed; that it failed to provide a safe method of controlling the weight of the timber after it was brought above the deck of the dredge and to adopt proper precautions to prevent it striking the cross-beam; that it allowed the stick of timber to which the hawser was attached to strike such cross-beam.

[1] There are several difficulties in the way of the plaintiff's right to recover which are suggested by the demurrer, the argument thereon, and subsequent reflection. It is, of course, true that the owner of the dredge was under obligations to furnish a reasonably safe place where all the workmen engaged in its construction might work. Having done this, the master is not unreasonably called upon to anticipate and become liable for damages which resulted from the negligence of laborers on the work, whether they were in a strict sense fellow servants or not. This is particularly true where, as in this case, the deceased had even more opportunity than the master to perceive the danger and would have avoided it even if he had stayed on the spot where he was obliged to work himself.

[2] The description of the dredge and its condition as presented in the plaintiff's declaration makes this perfectly clear. Any one can see that the 12-inch beam superimposed on the stringers running fore and aft the dredge was not fastened down. Any one could see, and it is not denied that the deceased did see, the exertion of power put forth by means of the donkey engine, the derrick and fall rope to pull out the timber from under the engine and to remove it to another place. There is no denial that the deceased had the opportunity to see and know these facts. They must have been obvious to him. That there was risk about it is true, but it was a risk which he, in the very nature of the undertaking, had assumed. The dredge was in process of construction. The conditions were changing with the progress of the work. Most of the instrumentalities were ponderous, and, if not handled by other workmen with care, were likely to be destructive.

The rule announced under these conditions may be found in the case of *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440. The pertinence of the precedent may be readily gathered from the following language of Mr. Justice Gray, speaking for the court:

"This court is of the opinion that the Circuit Court erred in not rendering judgment for the defendant on his demurrer to the plaintiff's evidence. There was no evidence tending to prove any negligence on the part of the firm of

which the defendant was a member, or of their superintendent, or of the foreman of the gang of carpenters. The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows."

Speaking further of the stick of timber which in that case caused the injury, the learned justice says:

"If it was at the time insecure, it was either by reason of the risks ordinarily incident to the state of things in the unfinished condition of the building, or else by reason of some negligence of one of the carpenters or bricklayers, all of whom were employed and paid by the same master, and were working in the course of their employment at the same place and time, with an immediate common object, the erection of the building, and therefore, within the strictest limits of the rule of law upon the subject, fellow servants, one of whom cannot maintain an action for injuries caused by the negligence of another against their common master."

In addition to this, while the duty of construction and provision of a suitable place for work is upon the master, the duty of operation and of protection from negligent use is the servant's. This was fully set forth in the case of *Kreigh v. Westinghouse* (C. C. A. 8th Circuit) 152 Fed. 120, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684, decision rendered by Sanborn, Hook, and Adams. There, too, a derrick was in use, and its negligent operation, as in this case, was alleged to have produced the injury.

"The rule of safe place is inapplicable to this case. The duty of construction and provision is the master's. The duty of operation and protection from negligent use is the servant's. The duty of so using a reasonably safe place and of so operating a reasonably safe machine that neither the place nor the machine shall become dangerous by their negligent use or operation is the duty of the servants to whom the use or operation is intrusted, and it is not any part of the positive duty of the master. The duty of caring for the safety of a place or of machinery in cases in which the work which the servants are employed to do necessarily changes the character of the place or of the machinery as to safety as the work progresses is the duty of the servants to whom the work is intrusted, and it is not the duty of the master"—citing *American Bridge Company v. Seeds*, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041.

The case last cited seems very instructive on this topic. There a bridge was in process of construction. There as here, a swinging load was attached to a snub line. The court holds:

"There is no duty imposed upon a master to anticipate breaches of duty on the part of his servants, but he may lawfully reckon the natural and probable results of his actions upon the supposition that his servants will obey the law and faithfully discharge their duties. The legal presumption is that they will do so, and this is the only practicable basis for the measurement of the acts, rights, or remedies of mankind"—citing many cases.

The court continues:

"The independent voluntary act of the foreman who gave the reckless signal which sent the iron chords against the plaintiff and knocked him off the bridge was a breach of his duty incapable of anticipation. * * * It is the duty of the master to use ordinary care to furnish reasonably safe machinery and instrumentalities with which his servants may perform their

work, and a reasonably safe place in which they may render their service, and this duty may not be so delegated by him that he may escape liability for its breach. Nevertheless, this duty has its rational and legal limit. It does not extend to the guarding of the safety of a place or of a machine against its negligent use by the servants. The risk that a safe place will become unsafe, or that safe machinery will become dangerous, by the negligence of the servants who use them, is one of the ordinary risks of the employment which the servants necessarily assume when they accept it. It is a risk of operation and not of construction or provision, and the duty to protect place and machinery from dangers arising from negligence in their use is a duty of the servants who use them, and not that of the master who furnishes them."

It is true that the question of negligence is generally for the jury, but, where but one inference can reasonably be drawn from the evidence, the question of negligence or no negligence is one of law for the court. *District of Columbia v. Moulton*, 182 U. S. 579, 21 Sup. Ct. 840, 45 L. Ed. 1237, and cases cited.

While the court has sincere sympathy for the widow who has been so distressingly bereft of her husband, and doubtless of her means of support, by this accident, our judgment must be controlled by the principles stated. In short, the case does not seem to differ from one where a home builder might have made contracts with various persons to erect his house. Bricklayers, carpenters, roofers, an engineer we will say who runs a gasoline engine and a rip saw, and others are engaged in the structure. The fellow laborers, whether fellow servants or not, negligently handle the various instrumentalities used in the changing and progressing construction, and one is hurt. In such a case the injury is not that of the owner. The proximate cause is the negligence of the fellow laborer. Whether he is in strict law a fellow servant or not it matters not.

The demurrer must be sustained.

UNITED STATES v. NIPISSING MINES CO.

(District Court, S. D. New York. May 14, 1912.)

1. TAXATION (§ 382*)—EXCISE TAX ON CORPORATIONS—ALLOWANCE FOR DEPRECIATION.

In determining the net income of a corporation for a given year on which it is subject to excise tax under Act Aug. 5, 1909, c. 6, § 38, subd. 3, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 947), the corporation is entitled to a "reasonable allowance" for depreciation of its property, which, if the question of the amount of tax due is litigated, is to be determined as a question of fact on the evidence.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 633; Dec. Dig. § 382.*]

2. TAXATION (§ 382*)—EXCISE TAX ON CORPORATIONS—ALLOWANCE FOR DEPRECIATION.

Under such provision, a mining corporation engaged in extracting ore from its mines is entitled to an allowance for depreciation equal to the value in place of the ore extracted and disposed of during the year.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 633; Dec. Dig. § 382.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by the United States against the Nipissing Mines Company to recover additional corporation excise tax under Tariff Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 947). Verdict directed for defendant.

Henry A. Wise, U. S. Atty., and Addison S. Pratt and Frank M. Roosa, Asst. U. S. Attys., all of New York City.

Richard T. Greene and George F. Hurd, both of New York City, for defendant.

LACOMBE, Circuit Judge (directing verdict). [1] This statute provides for a deduction of all losses actually sustained within the year, including reasonable allowances for depreciation of property, if any. That is within the second subdivision of section 38. The circumstance that in the third subdivision of section 38, where the form of making the return is provided for, the same words are repeated with a slight modification requiring a separate statement of any amounts *allowed* for depreciation of property, does not in my opinion change the meaning of the words used in the second subdivision of the paragraph. The word "allowed" refers to an allowance by the Commissioner of Internal Revenue, and his allowance or disallowance ends the matter unless some case is made out, upon the strength of which a party may come into court to test the reasonableness of the allowance or disallowance by the Commissioner. The suggestion that there can be no allowance for depreciation unless such depreciation is entered in the books of the company, recorded from time to time, seems to me without force. The books may be very badly kept, kept in such a way as will in the end bring them into trouble and difficulty; but this act does not provide any penalty for bad bookkeeping. It simply provides that 1 per cent. of the net profit of the various corporations shall be turned over to the government, and provides that in finding out that net profit there shall be a reasonable allowance for depreciation.

[2] Now, the testimony here seems to me entirely reasonable, and certainly it is not contradicted, that the value of the ore as it lies in the ore beds is as stated by the witness to be 31.1 cents. The government does not controvert the testimony by other witnesses, nor does it dispute the expert's method of calculating. This unit of value, 31.1 cents, multiplied by the total amount of ore that was removed during the year, indicates in dollars the amount by which the total assets of this company were depleted through the operation of the mine during that year. It seems to me to be a reasonable allowance for depreciation within the meaning of the statute. Certainly so much value has been eliminated from the property of the company forever. Granting the proposition that such is a reasonable allowance for the depreciation, upon the figures here there is no net profit remaining, which would indicate that the government's claim for \$8,534.68 should be dismissed, and that a verdict should be directed in favor of the defendant for the counterclaim, being the amount taxed, which it paid, \$5,188.62, with an exception to the government on each of these rulings.

If the evidence had shown that the unit value 31.1 cents is too high, there would be some net profit despite the depreciation; but the case

must be determined on the testimony. It makes no difference that, in filling up the form of return under the direction of the revenue officers, this claimed allowance was called "return of capital," which it certainly is *not*, instead of "depreciation of deposits," which it clearly is.

If the known value of an ore bed were exactly \$2,000,000, and exactly \$500,000 were taken out of it each year, in four years there would be nothing left. It is difficult to say why it may not reasonably be said that the ore bed suffers each year a depreciation of \$500,000, just as \$10,000 piece of machinery with a life of 10 years suffers a depreciation of \$1,000 each year. As I read the statute, Congress intended to allow all reasonable depreciations to be deducted from the gross profits to find the net; and the reasonableness of any deduction asked for depends upon the nature of the claim on which it is based, not upon the amount of dollars it may aggregate. Nor is it apparent why it should make any difference that one cannot tell with reasonable certainty the total value of the deposit so long as the value of the amount removed in any one year can be ascertained with sufficient accuracy. Nor is it apparent why the problem is altered in any way by the circumstance that the property was bought at a very high or at a very low price, or that the capitalization of the company which owns it is large or small.

Verdict directed for defendant for \$5,188.62.

CROWN FEATURE FILM CO. v. LEVY et al.

(District Court, S. D. New York. October 21, 1912.)

1. COPYRIGHTS (§ 82*)—INFRINGEMENT—COMPLAINT—OWNERSHIP.

A complaint for infringement of a copyright, merely alleging that complainant's assignor was the sole and exclusive owner and proprietor of the copyrighted productions, was insufficient without an allegation of the facts showing how complainant became proprietor and his right to sue.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 72, 73; Dec. Dig. § 82.*]

2. COPYRIGHTS (§ 82*)—INFRINGEMENT—BILL.

A bill for alleged infringement of a copyrighted photograph must show that the photograph was a copyrightable work.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 72, 73; Dec. Dig. § 82.*]

3. COPYRIGHTS (§ 82*)—INFRINGEMENT—EXISTENCE OF COPYRIGHT.

In a suit to restrain the infringement of certain alleged copyrighted photographs, an allegation that plaintiff's assignor filed two complete copies of the photographs did not show compliance with the provision of the statute requiring registration by depositing two complete copies of the best edition thereof then published.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 72, 73; Dec. Dig. § 82.*]

Suit by Crown Feature Film Company against Morris M. Levy and another, doing business under the firm name and style of Feature Film Company. On demurrer to bill. Sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Isaac B. Owens, of New York City, for complainant.
Samuel F. Frank, of New York City, for defendants.

MAYER, J. The defendants have demurred, urging that the bill fails in the following particulars:

"(1) There is nothing to show that the person claiming copyright had the said right or how he acquired it.

"(2) There is nothing to show that the photograph is a copyrightable work.

"(3) It fails to show compliance with the copyright statute.

"(4) It fails to allege facts showing infringement."

The fourth ground is not tenable, and since the argument that ground has been abandoned, as appears in defendants' replying memorandum.

[1] First. Complainant states merely that its assignor was "the sole and exclusive owner and proprietor of certain photographs entitled 'St. George and the Dragon, Part 1,' * * * and of all rights and privileges thereunder and therein in and to the United States and the territories thereof." There is no allegation that Powers was the author, or that there was any author or producer in the United States or elsewhere, or how, if Powers was not the author, he became the proprietor. I think, under the present act even more strongly than heretofore, complainant must show his title not merely by an allegation that he is the proprietor, but by setting forth facts which show how he became proprietor and why he has the right to bring the action. While *Bosselman v. Richardson*, 174 Fed. 622, 98 C. C. A. 127, and *Ford v. Charles E. Blaney Amusement Co. (C. C.)* 148 Fed. 642, arose under the previous law, yet they are in principle applicable to the case here under consideration.

[2] Second. I am inclined to think that defendants are right in their contention that the bill is demurrable because there is nothing to show that the photograph is a copyrightable work.

[3] Third. The allegation that Powers filed "two complete copies of said photographs" does not satisfy the requirement of the statute, which, among other things, is that registration shall be made by depositing "two complete copies of the best edition thereof then published." The bill must show strict compliance with the requirements of the Copyright Law, and, if the failure so to do appears on the face of the bill, then the bill fails to state a cause of action under the statute.

The demurrer is sustained, with leave to the complainant to amend the complaint within 20 days upon the payment of \$10 costs.

In re MITCHELL et al.

(District Court, E. D. New York. February 13, 1913.)

BANKRUPTCY (§ 136*)—WITHHELD ASSETS—RECOVERY.

Evidence held to justify an order requiring one of the members of a bankrupt firm to pay over or properly account for \$1,000 drawn from the firm's assets and paid to his wife, or show cause why he should not be

punished for failure to do so, but insufficient to sustain a similar order against the other members of the firm.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Thomas H. Mitchell and Edward R. Mitchell, individually and as members of the firm of Thos. H. Mitchell & Brother. Petition to review an order requiring the bankrupts to pay over \$1,000 as property belonging to the firm. Modified and affirmed.

Strauss & Singer, of New York City, for trustee.

Judson G. Wells, of New York City, for bankrupts.

CHATFIELD, District Judge. Application has been made to compel two bankrupts to pay over \$1,000 obtained on or about August 15, 1911, by the wife of Thomas H. Mitchell, one of the bankrupts, on a check of the bankrupt firm, given to her that day to be cashed.

It appears that the mother of the two bankrupts who had advanced considerable money to them in order to carry on the business, sent a check dated August 14, 1911, drawn on a bank in the state of Pennsylvania, where she then was, for the sum of \$1,000, to the bankrupts as a loan. This check was deposited and the firm's check for \$1,000 drawn on the same bank, but the firm's check was not cashed until Thomas H. Mitchell obtained information by telegram that his mother's check was good.

Upon the 31st day of October, 1911, an involuntary petition was filed, and adjudication was had upon December 1, 1911. The transaction was therefore within four months of the date of the petition, but no claim has been made that the wife of the bankrupt Thomas H. Mitchell kept the \$1,000, and the record shows that Thomas H. Mitchell testified previously that the money was turned over by her to him and used in paying various bills to firm creditors and in purchasing goods. The assets of the bankrupts were sold, and some of their books seem to have disappeared at the time of sale. The trustee alleges that the books in his possession contained no record showing payment of this \$1,000. Whatever books there were went into possession of the trustee, and could not be produced by the bankrupts. One of the bankrupts, Edward R. Mitchell, returned to Pennsylvania after filing an answer to this application, and has been there since that time. The other one, Thomas H. Mitchell, was then living in Brooklyn; but his wife and children were not then here, and neither of the bankrupts ever appeared personally for examination upon this application. Their attorney appeared and interposed the answers which recite the foregoing, with a denial that the bankrupts now have any money or property, and alleging that Thomas H. Mitchell had used the sum in question for the firm's benefit.

The issues raised were sent to a special commissioner, who reports that on the reference parts of the testimony of the two bankrupts, at the first meeting of creditors, were read by the trustee to show that the \$1,000 was in the hands of the bankrupts, and other parts read by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

bankrupts' attorney to show that Thomas H. Mitchell alone had the \$1,000 and used it as stated.

The special commissioner states that Thomas H. Mitchell was unable to name a single person or amount so paid out, and the books of the firm were not introduced to substantiate his theory. The special commissioner concludes that a transaction like the telegram was so unusual as to indicate need for cash and could not be forgotten. He also concludes that, in ordinary course, payments would have been by check, and the method pursued shows some irregular motive.

He gives no weight to the answering affidavit, which states two payments from the check in question for firm obligations. The testimony introduced also shows a payment to the judgment creditors whose levy precipitated bankruptcy, and the statement is made that, because of attachments and possible levies, it was unsafe for the bankrupts, even three months before bankruptcy, to put this money in the bank, and so they cashed the check as soon as possible. The special commissioner says:

"I do not believe he paid this money out to creditors, and, as this is the only explanation offered, I think the bankrupts have wholly failed to account for this sum of \$1,000, and that the same has been and is now being withheld from the trustee in bankruptcy."

But if Thos. H. Mitchell's statement is to be believed in every respect except as to the one question of using the money to pay debts, why should the line be drawn there? The bankrupts, when examined at the first meeting, were trying to uphold a mortgage to their mother, given preferentially to secure some \$7,000 in loans, of which this \$1,000 was a part. But aside from this and from their admissions, there is nothing to show that Mrs. Thomas H. Mitchell has not retained the \$1,000 which she obtained from the bank. If the statement of the bankrupts as to the firm's use of the money is not to be believed, and if the money was concealed at the time, then the story that this woman cashed the check and turned it over to the bankrupts is unworthy of belief and she should account therefor. She has never testified nor been proceeded against.

On either theory there is no evidence that Edward R. Mitchell at any time had the \$1,000 or any part thereof, or that it was concealed for his benefit, and there is no testimony that the books or stock of the bankrupts, after August 15, 1911, showed the withdrawal or disappearance of such a sum for the purpose of secreting it, or for any other purpose.

The result is that, on the testimony, the special commissioner has decided that the testimony of Thomas H. Mitchell has not been worthy of belief, that the \$1,000 was traced into the hands of him or his agent, i. e., his wife, and that for the failure to properly account therefor, or to appear and testify, he should be held to have failed to explain, by a credible story, the use made by him of the \$1,000. To this extent the findings of the special commissioner should be upheld. There is grave doubt whether Thomas H. Mitchell has any funds left, and his conduct and failure to keep proper books showing such transactions as this one relating to the \$1,000 will probably prevent a discharge, but

the entire record justifies an order that he pay over or properly account for the \$1,000 in question, or show cause why he should not be punished for failure so to do.

BURNS & DICKEY v. TITZELL et al.

(District Court, S. D. Georgia, E. D. February 20, 1913.)

EQUITY (§ 35*)—JURISDICTION—NATURE OF BILL—ANCILLARY PROCEEDINGS.

Where receivers appointed in a federal court had possession of a fund on which complainants claimed a lien under the state law for labor and materials furnished, and, after filing of a bill to restrain the receivers from paying over the fund to other parties without subjecting the same to complainants' lien, the receivers paid into the registry of the court more than \$3,000 to settle complainants' claim when it should be finally ascertained, the bill was properly filed in the nature of an ancillary proceeding, and was not demurrable for want of equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 99-102; Dec. Dig. § 35.*]

Bill by Burns & Dickey against J. C. Titzell and others to restrain receivers of the Atlanta, Birmingham & Atlantic Railroad Company from paying over a fund on which complainants claimed a lien for labor and materials under state law. On motion to dismiss for want of equity jurisdiction. Overruled.

Max Isaac, of Brunswick, Ga., for complainants.

D. C. Barrow, of Savannah, Ga., and Alexander Akerman, of Macon, Ga., for defendant J. C. Titzell.

SPEER, District Judge. In this case, which the court took under advisement yesterday, I have reached the conclusions following:

This bill was filed to restrain certain receivers of the Atlanta, Birmingham & Atlantic Railroad Company from paying over a fund to other parties upon which the complainants claimed a lien for labor and material furnished, which lien is allowed by the laws of Georgia.

A temporary restraining order was granted and the case set down for a hearing. The respondent, J. C. Titzell, desiring to use the fund which the restraining order had in that way impounded, came into court and made plain the righteousness of the complainants' claim. The justice of the demand, and its accuracy was not disputed. The respondents then, in order to be relieved of the effect of the restraining order, paid into the registry of the court something more than \$3,000 to settle the claim of the complainants when it should be finally ascertained. The bill is demurred to, on the ground that there is no equity, that there was an adequate remedy at common law; the usual grounds of such demurrers to bills in equity. The court is of the opinion, however, that there was, *prima facie*, equity in the bill. But for the bill it is probable that complainants would have lost their right to payment from the fund in the hands of the receivers. The receivers themselves are already the officers of the court of equity. It is true that the bill upon which they were appointed was filed in the Northern District of Georgia and in the Circuit Court, as it formerly

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

existed, but that court has been abolished by law, and the jurisdiction of the cause was transferred to the District Court. An ancillary bill had been filed here, and in a sense this court has jurisdiction of the cause through that ancillary bill. In this way the applications of the complainants may be treated, I think, in the nature of interventions *pro interesse suo*. This is a common procedure by which parties who hold a claim against a fund in court may come in, set up and seek to have adjusted their rights. But, if there was any defect in the equity of the cause, it has been cured by the act of the respondents in coming before the court, and paying into its registry the sum upon which the lien it is claimed attaches. In that way, the jurisdiction, in the opinion of the court, is sufficiently established, and we should not drive the complainants back to their remedy at common law, but in accordance with the trend of modern jurisprudence on this subject and particularly the new rules of the Supreme Court of the United States we should proceed in the speediest way to have the rights of the parties adjusted. What could be more speedy or satisfactory than to proceed here now on the pleadings and proof and determine whether or not the complainants are entitled to their claim which has actually been paid into the hands of the court to be subject to its decree.

For these reasons, I overrule the motion to dismiss, and direct that the cause proceed.

In re JAMAICA SLATE ROOFING & SUPPLY CO.

(District Court, E. D. New York. February 7, 1913.)

1. BANKRUPTCY (§ 136*)—CONCEALMENT OF ASSETS—CONTEMPT PROCEEDINGS.

Where, in proceedings against two of the individual owners of a bankrupt corporation for contempt for failure to account for the proceeds of a note, it appeared that defendant K. took up the note and relieved his codefendant from payment therefor, K. having furnished evidence of the existence and whereabouts of the note, the contempt proceeding against H. should be dismissed, since, if any claim vested in the trustee as against H., it could be disposed of in a separate action against him, as no punishment for contempt in failing to turn over the note could be inflicted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233-235; Dec. Dig. § 136.*]

2. BANKRUPTCY (§ 136*)—CORPORATIONS—DIRECTORS—WITHHELD ASSETS.

Where certain directors of a bankrupt corporation were ordered to return \$822.94 alleged to have been wrongfully received by them from the corporation, they were not entitled to set off against such amount and claim of another corporation controlled by them, against the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Jamaica Slate Roofing & Supply Company. Proceeding to punish W. B. Hambright and Joseph Kellow for misappropriation of the bankrupt's funds. Dismissed as to defendant Hambright, and Kellow and wife adjudged in contempt in failing to turn over or account for certain funds.

See, also, 200 Fed. 460.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

M. S. Schoenbaum, of Jamaica, N. Y., for trustee.

Robert McC. Robinson, of New York City, for Joseph Kellow and Elizabeth P. Kellow.

CHATFIELD, District Judge. The two individual owners of the bankrupt corporation have been ordered to pay or account for \$822.94, which it is admitted they received from a sale of part of the assets of the bankrupt prior to the filing of the petition. As to this sum, Joseph Kellow now asserts that he personally received the entire amount, and offers vouchers, receipts, and pay roll accounts for the month of November, 1911, totaling \$1,374.49. He makes affidavit that these moneys were paid out by him for bills and labor for the bankrupt during that month, and that he has neither concealed nor retained any of the sum.

He claims that the Jamaica Slate Roofing & Supply Company had on hand, on November 1, \$101.11; that it received on November 3d, in cash, \$222.94, making a total of \$324.05, from which it expended, upon the 4th of November, \$122.64, and upon the 9th and 11th of November, \$161.90; that the bankrupt received, upon the 14th of November, from W. B. Hambright, \$450, and expended upon the 17th, for slate and traveling expenses, \$430.50, and upon the 18th, for wages, \$192.25; that it also received, on the 17th of November, \$495 (as proceeds of a note for \$500 given by Hambright), and expended, from the 20th of November to the 29th, the sum of \$367.20. According to these figures, the total amount received in November was \$1,419.05, and the total paid out, \$1,374.49, leaving a balance in bank and in cash of \$44.56.

The trustee attacks this account by pointing out that Hambright has testified that the \$822.94, paid by him, was paid upon the 20th of November. It further appears that \$367.20 of the payments shown by Kellow were subsequent to that date. The trustee also points out that a number of the charges were against Joseph Kellow personally, and that one item, for \$110.80, purports to have been paid by a man named Carman. Inasmuch, however, as this item, which was paid upon the 27th day of November, is only credited by Kellow for the sum of \$10.80, it is evident that he may have contributed that much, or it may indicate the total unreliability of the account submitted.

[1] It is evident that, if the \$500 note was discounted by Tony Weiss for \$495, upon November 17th, and that \$430.50 was used upon that day, while upon the following day \$192.25 wages were paid, then the proceeds of this note were used in the business. And if Joseph Kellow thereafter took up the note and relieved Hambright from payment therefor, the situation is as the court previously outlined the matter, viz., that the Kellows have furnished evidence of the existence and whereabouts of the note, and, if any claim vests in the trustee as against Hambright, that can be disposed of in a separate action against him, and no punishment for contempt in failing to turn over this note can be inflicted.

As to the item of \$822.94, which the Kellows were ordered to pay back because of their use of the property of the bankrupt in acquiring stock in the new corporation valued by them at that amount, the rec-

ords show repayment by the Kellows of \$597.94; they having deducted \$225, received by the trustee upon what is known as the Whiton contract. They allege that the new corporation, the Jamaica Slate, Slag & Metal Roofing Company, finished this contract, which has been assigned to Hambright for that purpose, at a greater cost than the contract price and that therefore the net amount realized should be credited to the Kellows.

[2] This argument is fallacious, in that the Kellows are bound to repay this amount of money, viz., the \$225, individually, and if the Jamaica Slate, Slag & Metal Roofing Company as a corporation is entitled to recover from the trustee in bankruptcy, the right thereto must be shown by proper corporate action, and the Kellows, as individuals, cannot take advantage without assignment to themselves and without any proof whatever except a mere statement of the alleged fact of some balance due another person, i. e., the corporation doing the work.

The difficulties in this case have to a large extent been caused by the action of the Kellows, showing entire obliviousness to their proper conduct as stockholders or officers in a corporation.

Upon the present motion, therefore, Joseph Kellow and Elizabeth Kellow should be adjudged in contempt in failing to turn over or properly account for the sum of \$225 and the further sum of \$455.74, and should be freed from punishment for contempt in failing to turn over the \$500 note.

In re ZIMMERMAN et al.

(District Court, E. D. Wisconsin. February 18, 1913.)

BANKRUPTCY (§ 397*)—RIGHTS OF BANKRUPTS—EXEMPTIONS—MEMBERS OF PARTNERSHIP—STATE STATUTES—"TOOLS AND IMPLEMENTS."

Wis. St. 1898, § 2982, subd. 6, allows a debtor to take as exempt certain specifically enumerated items of property, including a horse, with no limitation as to value save as to a wagon, plow, and other farming utensils including tackle for teams and stock in trade of any mechanic, miner, merchant, trader, or other person used or kept for carrying on his trade or business, not exceeding \$200 in value. *Held* that, where the members of a firm become bankrupt, they were each entitled to select, under subdivision 6, a horse regardless of value, and a wagon, sleigh, tackle, etc., of value not exceeding \$200, the fact that such items were used in the business of the firm not warranting a conclusion that they constituted "tools or implements" within subdivision 8, and also \$200 in value of tools and implements under such subdivision.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 678; Dec. Dig. § 397.*

For other definitions, see Words and Phrases, vol. 8, pp. 7000-7005.]

In Bankruptcy. In the matter of bankruptcy proceedings of John H. Zimmerman and Furness W. Libby, bankrupts. On petition to review a referee's order allowing exemptions to the bankrupt. Reversed, with directions.

F. V. McManamy, of Oshkosh, Wis., for bankrupts.

Williams & Williams, of Oshkosh, Wis., for creditors.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GEIGER, District Judge. The bankrupts, copartners, applied for allowance of exemptions under the Statutes of Wisconsin, § 2982. Under subdivision 6 of this section, the debtor is allowed, specifically, certain enumerated items of property, with no limitation as to value save as to a "wagon, * * * plow * * * and other farming utensils, including tackle for teams, not exceeding two hundred dollars in value." By subdivision 8 are exempted "the tools, implements and stock in trade of any mechanic, miner, merchant, trader or other person used or kept for carrying on his trade or business, not exceeding two hundred dollars in value."

Each of the bankrupts claimed as exempt certain property, the one a horse, valued at \$125; a delivery wagon, a set of harness, a sleigh and blankets, valued at \$51.50; a computing scale and a register, the latter used in the business and valued at \$175; also household furniture valued at \$200. The other claimed one horse, valued at \$125; a harness, wagon, sleigh, and blankets, valued at \$46.50; certain quantity of seed valued at \$181.95. Each bankrupt also claimed certain insurance policies, not now considered.

The trustee allotted to the bankrupts, jointly, the two horses, two sets of harness, wagons, and sleighs, but refused to recognize their claims to implements, tools, or stock in trade. The referee, however, held that each bankrupt was entitled to an exemption to the amount of \$200 in value, holding that, as all of the property belonged to the partnership, the special exemptions claimed, such as horses, wagons, etc., were part of the tools and implements, and that neither was entitled to any specific exemptions in these different articles; that the bankrupts may select "from the special articles designated, or the stock in trade or both, to the amount of \$200 each, and no more."

I think that under subdivision 6, above mentioned, each bankrupt was entitled to select, as specifically exempt, the items coming within its terms—a horse, regardless of value; and wagon, sleigh, tackle, etc., of a value not exceeding \$200. *Knapp v. Bartlett*, 23 Wis. 68, 99 Am. Dec. 109; *In re Friederick* (D. C.) 95 Fed. 284; *In re Friedrich*, 100 Fed. 284, 40 C. C. A. 378; *Spikes v. Burgess*, 65 Wis. 428, 27 N. W. 184. The mere fact that such specific items of property may have been used by him in the conduct of a business does not warrant treating them as "tools or implements" if they are not ordinarily and fairly to be treated as such. This is obviously true of a horse. As indicated in *Cunningham v. Brietson*, 101 Wis. 382, 77 N. W. 740, if a debtor chooses, in lieu of stock in trade valued at \$200, to select "tools and implements" of like value, he may do so. Indeed, no one could complain because no one could suffer. But here he is deprived of the benefits of the specific exemptions awarded by subdivision 6, by compelling him to include the items of property therein enumerated in his selection under subdivision 8.

The conclusion is that each bankrupt was entitled to claim specific exemptions under subdivision 6, and also exemption of tools and implements or stock in trade of the value of \$200 under subdivision 8; and the referee's order is reversed, with direction to allow the same accordingly.

THE CONINGSBY.

(District Court, S. D. Georgia, E. D. February 18, 1913.)

ADMIRALTY (§ 36*)—LIBEL—STEVEDORES' WAGES—COUNTERCLAIM—INJURY TO SHIP.

Where stevedores, having contracted to unload a ship, found that the cargo had become so compact that it was difficult to unload it and undertook to use dynamite for the purpose, to which the master objected, whereupon it was agreed that there should be no injury to the ship, but injury occurred, the master was entitled to set off the damage so caused against the stevedores' libel for unloading compensation.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 327-334; Dec. Dig. § 36.*]

In Admiralty. Libel for stevedores' wages against the steamship Coningsby, in which the owner filed a cross-libel for injury to the ship. Exception to cross-demand overruled.

John E. Hartridge, of Jacksonville, Fla., and Adams & Adams, of Savannah, Ga., for libelant.

Kay, Dogget & Smith, of Jacksonville, Fla., and Garrard & Meldrim, of Savannah, Ga., for respondent.

SPEER, District Judge. This is a libel brought by stevedores for their pay for unloading a ship. The ship was loaded with kainit. By some means the cargo had become so compacted that it was difficult to unload it, and the stevedores undertook to use dynamite for that purpose. Surely an exceedingly high explosive, the careful use of which would necessarily be demanded. The master, with some apparent reason, objected to the use of the dynamite, and an agreement, more or less binding, was given that there should be no injury to the ship. It is claimed by the master of the ship that the dynamite was so carelessly used that the ship was injured to an extent more than setting off the claim of the libelants for unloading. Now, while the authorities cited by Mr. Adams in his argument are doubtless illuminative, still there is a strong trend from those technicalities which prevent the trial in one proceeding of all controversies closely connected with the principal matter in issue. I think that the manner of unloading by the use of powerful explosives is auxiliary to the main contract. The law, it seems, would presume that no such explosive agency would be utilized. Certainly it was used, and hence for the purpose of this argument we must conclude that the ship was injured. When the stevedore brings libel to recover payment for labor, he can be very readily, and logically, I think, met with the proposition: True, you did unload my ship, but you did it in such a manner as to injure or destroy it. Let us suppose that the dynamite had been so prompt and effective in its operation that, while it elevated the cargo, it also blew out the bottom. If, then, the stevedores should bring suit for removing the cargo, surely a set-off for removing the bottom would be auxiliary, and an apparently proper defense. While I have great admiration for the opinions of the learned proctor who has argued that dynamite is an expeditious and harmless instrumentality for dis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

charging a compacted cargo, and that any casualty resulting from its use can only be redressed in a separate and independent proceeding, I find some difficulty in assenting to his conclusions.

On account of this difficulty, I must overrule the exception.

In re MANNESCHMIDT.

(District Court, E. D. New York. February 13, 1913.)

BANKRUPTCY (§ 326*)—BREACH OF CONTRACT—SET-OFF.

Where a subcontract for work on certain school buildings by the bankrupt entitled the main contractor to complete the job in case of the bankrupt's inability to perform and to use for that purpose any materials and tools left on the work by the bankrupt, and the contractor suffered loss from having to complete the work, the bankrupt's claim for materials and tools used or converted and for any loss thereof by negligence could be set off against the contractor's claim for damages.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

In Bankruptcy. In the matter of Jacob Manneschmidt, Jr. Claim by the bankrupt's trustee to recover the value of certain tools and other property left by the bankrupt on certain contract work and appropriated or lost by the general contractor. Referred to referee.

Phillips & Avery, of New York City, for Bottsford-Dickinson Co. Maerkle, Darius & Maerkle, of New York City, for trustee.

CHATFIELD, District Judge. This case presents, according to the affidavits, a claim against the main contractor on two school buildings for certain materials and tools which a subcontractor (the bankrupt) testifies he had previously taken to and left at the work and which went into the possession of the main contractor when the bankrupt was forced to stop work, shortly before the petition was filed.

The trustee claims that, under the contracts, title to the material had not passed from the bankrupt, and that the tools and property (not to be used on the contract) must be accounted for by the main contractor. Some of these have been stolen while the property was in the possession of the main contractor, and he is charged by the trustee with responsibility for the value of these also.

Under the contracts the main contractor had the right to complete and to use for that purpose any materials and tools left on the job. It is alleged that the main contractor has suffered a great loss from having to complete the work. If so, then any claim for materials and tools used (even if conversion resulted) and for any loss by negligence would be a set-off to his claim if allowed. This should be passed upon by the referee.

If no claim is presented, then a flat question of fact arises, and the main contractor must account for those articles which the trustee may be able to prove were taken possession of by the main contractor, and which he did not have the right to use. The question of whether title

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to specific articles passed, when they were taken to the job, cannot be answered properly now. The issues will be referred to the referee as referee, if proof of claim brings up the question, and as special commissioner with respect to other issues presented.

In re DOWIE.

(District Court, S. D. New York. December 11, 1912.)

1. BANKRUPTCY (§ 391*)—NONDISCHARGEABLE DEBT—JUDGMENT—STAY.

A judgment on a nondischargeable debt should not be stayed pending bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637-655; Dec. Dig. § 391.*]

2. BANKRUPTCY (§ 424*)—NONDISCHARGEABLE DEBT—TORTS—JUDGMENT FOR COSTS.

A judgment for damages for slander not being dischargeable in bankruptcy, a judgment against plaintiff for costs in such action partakes of the same character and is not dischargeable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 818; Dec. Dig. § 424.*]

3. EXECUTION (§ 425*)—EXECUTION AGAINST PERSON—TORTS.

A judgment in any action for a pure tort, as in an action for slander, can be enforced by an execution against the person.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 775; Dec. Dig. § 425.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Oliver Dowie. On motion to vacate an order staying proceedings on a judgment for costs recovered against the bankrupt in an action by him for slander. Granted.

Mortimer W. Solomon, of New York City, for bankrupt.
Herbert H. Gibbs, of New York City, for judgment creditor.

HOLT, District Judge. This is a motion to vacate an order staying proceedings upon a judgment for costs recovered against the bankrupt by a defendant whom the bankrupt sued for slander.

[1-3] A judgment on a debt which is not dischargeable should not be stayed pending bankruptcy proceedings. It has been held that a judgment to recover damages for slander is not dischargeable (*National Surety Co. v. Medlock*, 19 Am. Bankr. Rep. 654, 2 Ga. App. 665, 58 S. E. 1131; *McDonald v. Brown*, 10 Am. Bankr. Rep. 58, 23 R. I. 546, 51 Atl. 213, 58 L. R. A. 768, 91 Am. St. Rep. 659), and, in my opinion, a judgment for costs in such an action, recovered by a defendant against the plaintiff, partakes of the same character. A judgment in such an action, or in any action for a pure tort, either in favor of the plaintiff or the defendant, can be enforced by an execution against the person.

The stay enjoining the enforcement of the judgment against the bankrupt is vacated.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BARBER ASPHALT PAVING CO. v. NORTHERN OHIO TRACTION & LIGHT CO.

(Circuit Court of Appeals, Sixth Circuit. March 4, 1913.)

No. 2,243.

1. LIMITATION OF ACTIONS (§ 32*)—TORTS—WHAT LAW GOVERNS.

An action against a street railway company for a tortious injury to a city pavement, requiring a paving contractor to repair the same under its contract with the city, was within the Ohio four-year statute of limitations (Gen. Code Ohio, § 11224).

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 143-145; Dec. Dig. § 32.*]

2. SUBROGATION (§ 11*)—CONTRACT—REPAIRING PAVEMENT—INDEMNITY.

A traction company having agreed in its franchise to keep its tracks in repair, plaintiff paving company made a bid for laying an asphalt pavement on the street with a guaranty to keep the pavement in good repair at all times for a period of ten years. The paving company prepared the foundation for the car tracks, but, this proving insufficient to sustain the track and equipment, the pavement was broken as the result thereof, and plaintiff was required to make extensive repairs under its guaranty. *Held*, that such guaranty was not a contract of indemnity imposing a secondary liability only on the paving company, so as to entitle it, on being compelled to pay for such repairs, to subrogation to the city's right to recover against the traction company for so constructing its road as to cause the defects in the pavement.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 4; Dec. Dig. § 11.*]

In Error to the Circuit Court of the United States for the Northern District of Ohio; William L. Day, Judge.

Suit by the Barber Asphalt Paving Company against the Northern Ohio Traction & Light Company. Decree for defendant, and plaintiff brings error. Affirmed.

Gann, Peaks & Townley, of Chicago, Ill., and Albert H. Feibach, of Cleveland, Ohio (Morris M. Townley, of Chicago, Ill., of counsel), for plaintiff in error.

Rogers & Rowley, of Akron, Ohio, and Ford, Snyder & Tilden, of Cleveland, Ohio (S. G. Rogers, of Akron, Ohio, and D. H. Tilden, of Cleveland, Ohio, of counsel), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. In 1897 the city of Akron, hereafter called the city, entered into contract with plaintiff in error, hereafter called the Paving Company, for the improvement by the latter of a portion of Howard street in Akron, from curb to curb, with stone curbing and asphalt pavement, under a guaranty that the pavement should at all times during the period of 10 years be "in as perfect condition as the day it was laid," and that at the end of the period the pavement should "show 75 per cent. of the original thickness called for in the contract." There was at the time a double track street rail-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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way extending through this portion of Howard street, the railroad then being operated by the predecessor of defendant in error, hereafter styled the Traction Company, under a franchise which required the railway company and its successors and assigns to "in all instances, construct, operate and maintain, and keep in repair its said railroad." In 1899, which was two years after the paving contract was made, the city granted a further franchise to the Traction Company's predecessor, which provided that the railway tracks should be "so constructed as that the upper surface of the rails thereof at all times should conform to the grade of the streets in which the same were laid." The paving was completed in 1897, and the Paving Company seems to have complied with its contract to keep the pavement in repair, making such repairs each year, until and including the year 1903. In 1904 it refused to make further repairs, claiming that those demanded by the city were induced by breakages of the pavement caused by defects in the foundations under the street car tracks, resulting from the failure of the street railway company to keep its road in repair; it being alleged that, after the paving was done and with the city's permission, cars had been used which were too heavy for the track foundations. The city accordingly repaired the pavement, and brought suit against the Paving Company for reimbursement. This court held on review that the Paving Company was not relieved from its guaranty by the fact that the pavement was broken because of insufficient railway track foundations, nor because of the renewal of the grant to the railway company, nor because heavier cars were used by the latter; but that all these facts must be presumed to have been within the contemplation of the parties when the paving contract was made. 171 Fed. 29, 96 C. C. A. 271. The city finally recovered of the Paving Company upwards of \$7,000. Thereupon the Paving Company paid the judgment, and brought this suit against the Traction Company for reimbursement.

The petition in the instant suit alleged the franchise obligation existing when the paving contract was made to keep the street railway in repair; also the requirement of the 1899 franchise that the upper surface of the rails at all times conform to the grade of the street, and the Traction Company's assumption of those obligations; set up the paving contract of 1897, alleged that "as a part of said contract this plaintiff agreed with said city of Akron to insure the maintenance of said asphalt pavement for a period of 10 years from the date of its construction, and furthermore promised, in the event said pavement should become out of repair during said period, to make the necessary repairs to said pavement so as to keep the same in a good condition of repair during all of said time," and that at the time the paving contract was made plaintiff "was aware of the obligation imposed by said franchises upon said street railway company with respect to the maintenance and repair of its system of street railway," and that plaintiff "entered into said contract with said city * * * relying upon said street railway company and its successors to keep and perform its obligations in the premises." It will be noted that the general agreement to keep the street railway in repair was the only franchise obligation actually existing when the paving contract was made. The

petition further alleged the failure of the Traction Company to comply with its duty to keep the railway in repair, in that "the foundation, ties and rails of said street railway were of insufficient construction for the street railway traffic upon said street; that said rails were permitted to become loose and that said ties and foundation were insufficient to support the same"; that the excessive vibration of the rails and ties caused the top of the rails to sink below the grade of the street; that the asphalt surface of the pavement near the rails and ties was thereby broken, permitting the accumulation of rainwater along the rails, and its infiltration through the binder course of the pavement, thus permitting the freezing of and injury to the pavement. The Traction Company or its predecessor was alleged to be primarily liable to the city for such damage, and the Paving Company to be secondarily liable to the city for the repairs. It was asserted that the plaintiff, having been required to make the repairs, "should now be subrogated to the rights of the city of Akron as against the defendant herein." The petition was demurred to, the causes which are pertinent here being (a) that the action was barred by the four-year statute of limitations, and (b) that the facts stated constituted no cause of action against the Traction Company. The demurrer was sustained and the suit dismissed.

The plaintiff plants its action squarely upon the ground of subrogation alone; and upon the theory stated that the Traction Company was "primarily liable" to the city for the injury to the pavement caused by that company's failure to properly maintain its tracks; that the plaintiff's obligation to the city was "secondary" only to that of the Traction Company; that the obligation of the latter to keep its tracks in repair was, as between it and the Paving Company, superior to the latter's obligation to keep the pavement in repair; that plaintiff was thus in legal effect merely a guarantor or insurer of the performance by the Traction Company of its obligation to the city, its relation being strictly analogous to that of an insurer of goods during transportation in reliance upon the contract of the carrier to safely carry the goods, or that of a tenant under obligation to repair as against third persons whose negligence makes such repairs necessary; that the Paving Company having satisfied the city's demand, on account of an injury occasioned, as alleged, exclusively by the misconduct of the Traction Company, the Paving Company is entitled to such remedies as the city would have had against the Traction Company, had it elected to sue that company.

[1] We may dismiss all question of defendant's liability to plaintiff for a tortious injury to the pavement not based upon contract between the Traction Company and the city, for the reason, if for no other, that any action for tort which the city may have had was barred by the four-year statute of limitations. Gen. Code of Ohio, § 11224.

[2] Plaintiff's alleged right of subrogation is thus limited to the enforcement of the Traction Company's contract obligations to the city. If it be conceded that the Paving Company's obligation to keep the pavement in repair was merely secondary to that of the Traction Company to keep its tracks in repair—in other words, that the former's obligation was only one of insurance or indemnity with respect to the

obligation of the latter—the right of subrogation would seem clear. But we think the premises relied upon are fatally unsound. The petition, it is true, alleges that plaintiff agreed with the city to “insure the maintenance of said asphalt pavement”; but we do not understand this to mean that such was the actual language of the contract, but only that such is claimed to be the legal effect of the premises otherwise stated in the petition. In the brief of plaintiff in error it is assumed that this court “may take judicial notice of the record of the former case in this court,” viz., the case between the city and the Paving Company. Turning then to the record in the former case, we find that the only language which may be even plausibly thought to sustain the idea of a contract of indemnity is that found in the guaranty, the substance of which we have already stated, except that the Paving Company (to use the language of the petition in the instant case) “furthermore promised that in the event said pavement should become out of repair during said period, to make the necessary repairs to said pavement so as to keep the same in a good condition of repair during all of said time.” We find nothing in the petition in the present case, or in the record of the former case, indicating an intention or understanding on the part of either of the three parties concerned that the plaintiff was to be merely an insurer of the Traction Company’s obligation to the city. There is in fact much to the contrary. The paving specifications required bids “covering periods of five, ten and fifteen years guaranty.” The 10 years guaranty proposed by the plaintiff was accepted. The Paving Company took it upon itself “to prepare the foundations and to warrant the work as set out in the specifications and proposals, irrespective of what may occur by reason of any underground work or repairs made prior to the laying of said pavement.” As shown by the petition in the present suit, it knew of the existence of the railway tracks in the street, and, as held by this court in the former case, was bound to anticipate such use as was actually made of the tracks subsequent to the paving contract. As said in the opinion of Judge Warrington, speaking for this court in the former case:

“Foundations for the car tracks appear from the testimony to have been laid by the street car company, while the paving company was engaged in its work upon the improvement. Indeed, the paving company furnished and mixed the materials for the track foundations; and it does not appear to have made any objections to the foundations as laid. With the knowledge the paving company thus obtained of the foundations, and its apparent acquiescence in their sufficiency, it proceeded to construct the pavement foundations and to place the asphalt surface thereon throughout the length and breadth of the improvement, including the spaces between the street car rails.”

This statement is borne out by the record of the former case. Indeed, we understood plaintiff’s counsel on the argument practically so to concede. No suggestion of mere indemnity or insurance anywhere appears. The allegation that, when the paving contract was made, plaintiff knew of the railway company’s obligation to keep its tracks in repair, and entered into the contract in reliance upon that obligation, justifies no legal presumption that its bid was less on that account. But, were it so, the plaintiff’s contract did not thereby become one of indemnity alone. The Traction Company had no benefit

from it, and it is not alleged that even the city or the Traction Company knew that the alleged liability of the latter was in the mind of any one. The petition in the present suit, and the record in the former case, are consistent only with the idea that the plaintiff sold its pavement to the city, and as incidental to the sale, and as necessary to its accomplishment, made the guaranty in question. The respective obligations of the Traction Company and the Paving Company toward the city were not necessarily legally identical. The city's measure of damages for breach of the respective obligations was not necessarily the same. Under these circumstances, it is difficult to see how the obligation of either the Traction Company or the Paving Company can be said to be, as to the other, "primary" in character, except that that of the Traction Company was prior in time. But we think this insufficient to make the Paving Company's obligation secondary, and that of the Traction Company superior, within the meaning of the law of subrogation. The existence of such superior obligation is necessary to the existence of the right invoked.

The theory of insurance or indemnity as applied to the case presented is in our opinion strained and unnatural. We see no satisfactory analogy between the plaintiff's status and that of an insurer of a cargo burned during transportation, as in *Hall v. Railway Company*, 13 Wall. 367, 20 L. Ed. 594, where the insurer palpably stood in the position of a surety, "stipulating that the goods shall not be lost or injured in consequence of the peril insured against." The case of *Owensboro, etc., Ry. Co. v. Paving Co.* (Ky.) 107 S. W. 244, 14 L. R. A. (N. S.) 1216, relied upon by the Paving Company, is readily distinguished from the case before us, in that in the *Owensboro Case* the paving company had built the railway tracks for the Railway Company, and upon disagreement arising as to which of those companies was under obligation to the city to repair, the traction company took an assignment from the city of the paving company's agreement with the latter; and the repairs were thereafter made by the paving company, under agreement with the traction company, whereby the latter deposited the cost of the repairs, and suit directly between the railway company and the paving company was provided for to determine which of the two was liable as against the other.

Under the case here presented, the city (as is now conceded) could have sued either the Traction Company or the Paving Company. But neither was, we think, under superior obligation to the other, and neither, if compelled to comply with its agreement, had any equity for reimbursement from the other. It would have been entirely fair and equitable for the Paving Company to have obtained, in connection with its paving contract with the city, a right of assignment from the latter of any right of action it might have against the Traction Company for breach of its franchise agreement. By such arrangement the city would presumably have been benefited. But this was not done, and without it we think no right of action has accrued to the Paving Company.

In our opinion the demurrer was properly sustained and the judgment of the Circuit Court dismissing the suit is affirmed.

JAY WAI NAM et al. v. ANGLO-AMERICAN OIL CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. February 17, 1913.)

No. 2,134.

SHIPPING (§ 138*)—DAMAGE TO CARGO—LIABILITY—FAULT OR ERROR IN MANAGEMENT OF VESSEL.

A tank steamer was divided by bulkheads into two rows of tanks for the carriage of oil, which were also cleaned and used for dry cargo on return trips. A main pipe connected with a pump ran through each tier of tanks, having a valve in each tank which permitted the oil to be pumped therefrom. When other cargo was stowed in the tanks, these valves were left open. On a voyage from China the vessel took on coal at a Japanese port, and, to trim the ship, it became necessary to empty a water ballast tank by means of the pump, using the main pipe. An officer was directed to close the valves in the other tanks, which was done by means of a spindle from the deck, but the valves in two tanks had become jammed or had been screwed too tight when opened, and did not close properly, allowing the water to flow in through the pipes, and injure libellant's goods stowed therein before it was discovered. *Held*, that the jamming of the valves was not sufficient to render the vessel unseaworthy at the commencement of the voyage as they were readily closed when the trouble was discovered; that the damage to libellant's cargo was not referable to any want of care in its protection or custody within the meaning of section 1, Harter Act Feb. 13, 1893, c. 105, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946), but, as it resulted from negligence in trimming the ship, was due to a fault or error in the management of the vessel within the meaning of section 3, for which the owner was not liable.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. § 138.*]

Appeal from the District Court of the United States for the First Division of the Northern District of California; John J. De Haven, Judge.

Suit in admiralty by Jay Wai Nam and others, copartners, doing business under the name of Ti Hung Lung & Co. against the Anglo-American Oil Company, Limited, owner of the British steamship Appalachee. Decree for respondent, and libellants appeal. Affirmed.

William Denman and Denman & Arnold, all of San Francisco, Cal., for appellants.

Edward J. McCutchen, Ira A. Campbell, and Page, McCutchen, Knight & Olney, all of San Francisco, Cal., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. Besides the alleged want of seaworthiness of the vessel in question, the only real question in this case is whether the damage sustained by the merchandise of the appellants which was shipped at Hongkong to San Francisco on the appellee's steamship Appalachee is properly referable to a lack of care in its proper protection and custody by the officers of the ship, or to their fault or error in the management of the vessel.

It appears that the Appalachee is a "tank" ship, engaged in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs 1907 to date, & Rep'r Indexes

transportation of oil from this country to the Orient, returning with general cargo to San Francisco. Her cargo space is divided into 16 tanks by means of athwart-ship bulkheads and a center longitudinal bulkhead. Her machinery and boilers are located in the after part of the vessel, and immediately forward of the boilers is a cofferdam for carrying salt water ballast to trim her. In the extreme forward part of the vessel are dry cargo holds, and immediately abaft those compartments is the pumproom, in which is located the machinery for discharging the oil cargo, the cofferdam, and fans to ventilate the tanks when carrying dry cargo. The tanks are located eight on each side of the center line of the vessel, and respectively numbered, starboard and port, 1 to 8. Two eight-inch pipes, one on each side of the vessel, run along its bottom from the discharging pumps in the pumproom to the cofferdam, to which they are connected by a four-inch pipe with a nonreturn valve. Valves are fitted in each tank to the main line pipe, and are operated by spindles located on deck. To discharge oil from the tanks the valves are opened by means of a ratchet used to turn the spindles, and the oil is drawn through the main line pipe and forced out of the vessel through a discharge line by means of the pumps. When oil cargoes are carried, the tank valves are closed except during discharge. When dry cargoes are to be carried, the tanks are steamed, cleaned, and whitewashed to eradicate the smell and taint of oil, and, when cargo is stored in the tanks, the valves are kept open and periodically fresh air is forced into the tanks by means of the fan located in the pumproom. Previous to the voyage on which the damage in question occurred, the Appalachee had discharged a cargo of oil at Hankow and Shanghai, China, and at the latter port the tanks had been steamed, washed, and whitewashed, and ceiling boards laid on the bottom preparatory to loading a dry cargo for San Francisco. From Shanghai the ship went to Iloilo, Philippine Islands, and there took on sugar, which was stored in tanks Nos. 3, 4, 5, and partly filling No. 6; this certificate as to the then condition of those tanks having been made by a master mariner and marine surveyor appointed by Lloyd's agent to make such survey:

"Iloilo, P. I., 29th April, 1907.

"I hereby certify that I have this day surveyed the holds of the S/S 'Appalachee' numbered 3, 4, 5 and 6 (Port and Starboard), and found them in the following condition, viz.: Clean, and well lime washed, free from petroleum smell, and in good and fit condition to carry perishable cargo.

"Chas. James Kerr, Master Mariner & Marine Surveyor."

From Iloilo the vessel proceeded to Hongkong, and there completed her cargo with general merchandise, stowing it in tanks Nos. 1 and 2, and in the remaining space in No. 6, that of the appellants being stored in Nos. 1 and 2, the then condition of Nos. 1 and 2 being certified to as follows:

"Lloyd's Register of British & Foreign Shipping.

"Head Office, 71 Fenchurch Street, London, E. C.

"Port Hongkong, 11th May, 1907.

"This is to certify that I have surveyed the Nos. 1 & 2 Tanks of the British Tank screw steamer 'Appalachee' of London, No. 1056 in the Register

Book, after carrying petroleum in bulk and found same cleaned, limewashed and free from smell, and that I have transmitted to the Committee of Lloyd's Register of British and Foreign Shipping, London, a report stating that all repairs recommended by me have been completed to my satisfaction, and the requirements of the Society's Rules fulfilled, and that I have recommended that she be continued as classed, being fit to carry dry and perishable cargo.

Jno. Lambert, Surveyor to Lloyd's Register."

The testimony of the chief engineer of the ship appears from the record to have been very frank, and is clear to the effect that the vessel and all of its machinery was in first-class condition at Hongkong and when leaving that port with the appellants' goods on board, and there was other testimony to the same effect. The valves in starboard tanks 1 and 2, in which was the merchandise of the appellants, were open and had been open since the vessel's departure from Iloilo, for the purpose of ventilation by means of the fan. The record shows that at Hongkong the cofferdam was filled with ballast water, and that the ship there also took on a certain quantity of coal—not sufficient to complete its voyage to San Francisco, but quite sufficient for its voyage to the intermediate port of Moji, Japan, where it contemplated and did take on a full supply of coal, pursuant not only to the custom of the ship, but also in accordance with the express understanding of the parties as evidenced by the following provision of the bills of lading covering the appellants' shipment, viz.:

"That the said vessel shall have liberty to take in coal or other necessary supplies at any intermediate port," etc.

The ship left Hongkong May 12, 1907, on her voyage to San Francisco by way of Moji, at which latter place it arrived May 18th, and there immediately commenced coaling, the coal being stored in her regular bunkers and in tanks Nos. 7 and 8. Shortly after commencing coaling at Moji, and on the same day, for the purpose of trimming the ship, her captain gave orders for the emptying of the ballast water from the cofferdam. As that had to be done by means of the pumps through the main line pipe, it was, of course, necessary to close the valves of the various tanks in order to prevent the flooding of them by the ballast water. Accordingly the first mate, in carrying out the captain's order, directed the third officer to close the valves, which he reported to have done, whereupon the pumping of the ballast water was commenced by direction of the first mate, shortly after which it was discovered by sounding that the ballast water was flooding the appellant's merchandise in starboard tanks 1 and 2 by reason of the fact that the valves in those tanks had not been closed as reported to the first officer. The pumping was thereupon immediately stopped and the carpenter summoned, who discovered that the valves in those tanks had been jammed or screwed too tight when opened, and evidently had not responded to the working of the ratchet on deck. The carpenter thereupon screwed the valves down, after which the pumping of the ballast water from the cofferdam was resumed, and the water also removed from tanks 1 and 2. The action is for damages thus done to the appellant's merchandise.

The contention that the ship was not seaworthy when she left Hong-

kong is based solely upon the fact that the valves in starboard tanks 1 and 2 were jammed or screwed too tight when opened for ventilation. We think that circumstance is far too trivial upon which to sustain the contention. The evidence shows without conflict that the carpenter when summoned readily and quickly closed the valves, and that there was nothing substantially the matter with them. This is quite clearly shown by the following excerpt from the direct and cross examination of the chief engineer; and there is nothing to the contrary:

"Mr. Page: Q. What happened after you started in to pump out the cofferdam? A. I was called there, and informed there was water in the tanks, and that they could not open the valves of the two tanks that the water was in.

"Q. Did you find out what was the matter? A. Yes, sir; they were jammed hard up.

"Q. What valves were those, what tanks? A. No. 1 and No. 2 tanks.

"Q. Was anything done? A. I found out what was the matter, and they were made workable, shut down, and I believe they pumped the water out. * * *

Cross-examination:

"Mr. Denman: Q. You say that your attention was called to the fact that there was water in 1 and 2 holds, and that you examined the valves and found them hard open? A. Yes, sir.

* * * * *

"Q. As a matter of fact, all you had to do was to screw down those 1 and 2 valves, and then go right to work continuing your pumping on the cofferdam? A. They pumped 1 and 2 out first.

"Q. How long did it take to do that? A. I have no recollection how long; not long, I should think.

"Q. A couple of hours? A. No, sir; half an hour.

"Q. What did you do more, screw down those valves? A. Screwed down those valves and pumped out the cofferdam."

"The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport," said the Supreme Court in the case of *The Silvia*, 171 U. S. 462, 464, 19 Sup. Ct. 7, 8 (43 L. Ed. 241). The open condition of the valves in the tanks in which was stored the merchandise of the appellants did not of itself cause the damage to the appellant's goods; on the contrary, those valves were opened and kept open for the very purpose of affording the merchandise proper ventilation, so that there was nothing in their condition at all affecting the fitness of the ship to carry the goods which she undertook to transport. When the trim of the ship or any condition of the sea or weather required the use of the pipes with which the valves were connected for water, thus necessitating the closing of the valves in order to prevent damage to the cargo, it was manifestly the duty of the officers of the ship to close the valves, just as it was the duty of the officers of the ship to put the iron shutters over the glass covers of the portholes in the case of *The Silvia*, *supra*.

In the case of *The Mexican Prince* (D. C.) 82 Fed. 484, 488, Judge Brown, in answering a contention that an obstruction of a similar valve rendered the ship there under consideration unfit, said:

"But, even if the alleged obstruction of No. 3 valve existed on leaving Rio, that would not constitute unseaworthiness; for, however it arose, the ob-

struction, if any, was accidental, of the most temporary character, and sure to be removed by suction upon the first test made with the pumps, and as well as by the exercise of reasonable diligence on any special occasion calling for care during the voyage. It would have been thus removed or else discovered in time to avert damage had the pump test been applied, as required by the owners' rules, either on the day of sailing or on the next morning, before the valves of No. 2 were opened. Reasonable prudence certainly required an actual test of the valves before opening No. 2 valves, considering the great mass of water that was to be sent through the pipes; and the master's order 'to make sure that the valves were shut' perhaps imported this. If the pump test was not applied, the full 16 turns up and down should have been given as the only other means of detecting an obstruction. Either of these means was sufficient. Both were neglected; and, after the water was started, no sounding of the other tanks by the pumps was made, as might easily have been done. The cause of the damage, therefore, was negligence in the use of the means of safety provided by the owners and a neglect to observe their written orders in that regard, and not any omission by the owners to provide for all the requirements of a seaworthy ship, and to put her in seaworthy condition. In other words, the fault arose wholly in the 'management of the ship' at a port of call and subsequent thereto. It arose during the voyage, and not from anything the owners did or omitted to do, or any lack of diligence by them, to make the ship seaworthy at the commencement of the voyage."

The closing of the valves involved in the present case should, of course, have been done before undertaking to pump the ballast water out of the cofferdam, and could readily have been done, as shown by the evidence, but for the negligence of the ship's officers.

The evidence shows that it took about 3½ days to coal the ship at Moji. The captain and first mate at first testified that the pumping of the ballast water out of the cofferdam was commenced, and the consequent damage to the appellant's goods done, just about the time the ship finished coaling and was preparing to sail for San Francisco, whereas it later appeared that as a matter of fact such pumping was commenced and damage done during the first half of the first day of coaling. And it is insisted by the proctors for the appellant that such testimony of the captain and first mate was willfully false, and that, as a consequence, their entire testimony should be disregarded. Let that be done, and the remainder of the record presents the real question in the case, which is, we repeat, whether the damage done to the merchandise of the appellants is properly referable to a lack of care in its proper protection and custody by the officers of the ship, or to their fault or error in the management of the vessel. In other words, whether the damage in question falls within the first or the third section of Act Cong. Feb. 13, 1893, commonly known as the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]); those sections reading as follows:

"Section 1. That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

"Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The proctors of the respective parties are agreed that the Supreme Court has held that the question which of these two sections is to govern must be determined by the primary nature and objects of the acts which caused the loss.

First, then, what was the act which caused the damage in the present case? Obviously the pumping of the ballast water out of the ballast tank into the main pipe. By reason of the neglect of the officers of the ship, before doing so, to close the valves of the tanks in which the appellants' merchandise was stored, the water entered the tanks and did the damage. Plainly the act done, to wit, the pumping of ballast water, is ordinarily, if not always, directly connected with the management of the ship. In this particular instance the direct object, according to the evidence, of pumping the water overboard, was properly to store the coal and trim the ship for the completion of her voyage to San Francisco. The words "navigation" and "management," within the meaning of the Harter Act, said the Supreme Court in *The Silvia*, supra, "might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words."

In *The Glenochil* (1896) Prob. 10, after the arrival of the vessel in port and while she was unloading, the engineer, in order to stiffen the ship, let water into the ballast tank, and did it so negligently that the water got to and injured the cargo. The damage was held to result from fault in the management of the vessel within section 3 of the Harter Act, and the shipowner was held exempt. That decision was expressly approved by the Supreme Court in *The Germanic*, 196 U. S. 589, 597, 25 Sup. Ct. 317, 49 L. Ed. 610, the court at the same time pointing out the limitation of the section adopted by the court in *The Glenochil*, and sanctioned by the Supreme Court in *Knott v. Botany Mills*, 179 U. S. 69, 74, 21 Sup. Ct. 30, 32 (45 L. Ed. 90), to faults "primarily connected with the navigation or the management of the vessel and not with the cargo."

In *The Germanic* the Supreme Court proceeded to declare the law to be:

"If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and, if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss."

It is obvious from the record in the case in hand that the purpose in pumping the ballast water overboard had nothing whatever to do with getting the appellants' merchandise or any other part of the cargo ashore, but, on the contrary, was for the purpose of taking on coal and properly trimming the ship to carry the whole cargo to San Francisco, and hence we conclude that the act which caused the damage in question related directly to the management of the ship, and that the failure of her officers to take the precaution to see that the valves in the tanks in which the appellants' merchandise was stored were closed before commencing the pumping of the ballast water, while gross negligence, was negligence for which the shipowner was not responsible by reason of the third section of the Harter Act.

The judgment is affirmed.

UNITED STATES v. KANSAS CITY SOUTHERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. January 24, 1913. Rehearing Denied March 29, 1913.)

1. MASTER AND SERVANT (§ 17*)—EMPLOYMENT—REGULATION—INTERSTATE COMMERCE—HOURS OF SERVICE LAW—BURDEN OF PROOF—PRIMA FACIE CASE.

In an action by the United States against an interstate carrier for violating the Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415, 1416 [U. S. Comp. St. Supp. 1911, pp. 1321, 1322]), the burden is on the government to establish that defendant had required or permitted its employes to remain on duty longer than 16 hours, and this, being conceded, made a prima facie case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. § 17.*]

2. MASTER AND SERVANT (§ 17*)—EMPLOYMENT—REGULATION—HOURS OF SERVICE LAW—DEFENSES—PLEADING.

Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415, 1416 [U. S. Comp. St. Supp. 1911, pp. 1321, 1322]) prohibits an interstate carrier from requiring or permitting employes to remain on duty longer than 16 consecutive hours, but provides that the act shall not apply in case of casualty or unavoidable accident or the act of God, nor where the delay was the result of a cause not known to the carrier, or officer or agent in charge of the employe at the time when the employe left the terminal, and which could not have been foreseen. *Held*, that the ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cuses embodied in the proviso are separate and affirmative defenses which must be specially pleaded and established by the carrier.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. § 17.*]

3. MASTER AND SERVANT (§ 17*)—HOURS OF SERVICE LAW—VIOLATION—PLEADING.

In an action for violating the Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415, 1416 [U. S. Comp. St. Supp. 1911, pp. 1321, 1322]), evidence in support of a defense that the delay was caused in part by a broken shaker rod and leaky flues of the engine would be considered, though not pleaded, where it appeared that by common consent of court and counsel the case was tried as though such alleged defects were embraced within the issues.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. § 17.*]

4. MASTER AND SERVANT (§ 13*)—INTERSTATE CARRIERS—HOURS OF SERVICE LAW—CONSTRUCTION.

The Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415, 1416 [U. S. Comp. St. Supp. 1911, pp. 1321, 1322]), limiting the employment of servants engaged in interstate commerce to 16 hours, being highly remedial, should be liberally construed, though it is penal in the sense that a penalty is provided for its violation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

5. MASTER AND SERVANT (§ 13*)—EMPLOYMENT—REGULATION—HOURS OF SERVICE LAW—CONSTRUCTION.

Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415, 1416 [U. S. Comp. St. Supp. 1911, pp. 1321, 1322]) limits the employment of operatives engaged in interstate commerce by a carrier to 16 hours, but provides that the act shall not apply in case the delay is the result of a cause not known to the carrier at the time the employé left the terminal or one which could not have been foreseen. *Held*, that the act did not imply that what was not actually foreknown could not, in contemplation of law, have been foreseen, the carrier being held to as high a degree of diligence and foresight as is consistent with the object of the act and the practical operation of the railroad; and hence all the usual causes of delay incident to operation are not, standing alone, valid excuses, but the carrier must further show that such delays could not have been foreseen and prevented by the exercise of the high degree of diligence demanded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

6. MASTER AND SERVANT (§ 17*)—CONTRACT OF EMPLOYMENT—REGULATION—HOURS OF SERVICE LAW—OPERATION OF TRAINS—DELAY—DEFENSE—QUESTION FOR JURY.

In an action by the government against an interstate carrier for violating the Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415, 1416 [U. S. Comp. St. Supp. 1911, pp. 1321, 1322]), defendant claimed that the delay was the result of a cause not known at the time the employé left a terminal, and that it could not have been foreseen, specifying that it resulted from the poor steaming qualities of the coal, leaky flues of the engine, and defective shaker rod. There was no proof of any defect in the coal, which was the same kind that the company had been using for years, and which had been duly inspected. The flues leaked, but when the leaking began was not shown. It was proved, however, that the engine had been twice reported by the engineer for repairs, together with two reports on the same day, but following distinct trips, that the shaker rod was defective and should be repaired. It also appeared

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that throughout the trip at least as far as B. the train dispatcher was aware of the progress of the train, at which station the conductor, by lightening his train a little more than half, assumed that he could reach the division 14 miles away in less than an hour, but, by reason of the defective condition of the engine, was unable to do so, using an hour and 45 minutes to cover the distance. *Held*, that such facts did not show, as a matter of law, that the delay was the result of a cause not known to the carrier before the employé left the terminal and which could not have been foreseen.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. § 17.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by the United States against the Kansas City Southern Railway Company for violation of the Hours of Service Law. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

William J. Gregg, U. S. Atty., of Muskogee, Okl., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C.

James B. McDonough, of Ft. Smith, Ark. (S. W. Moore, of Kansas City, Mo., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. This suit was brought against the Kansas City Southern Railway Company to recover penalties for violation of the act of Congress of March 4, 1907, known as the "Hours of Service Law." Chapter 2939, 34 Stat. 1415, 1416 (U. S. Comp. St. Supp. 1911, pp. 1321, 1322). The complaint is in five counts, in each of which the maximum penalty of \$500 is prayed. In these several counts it is charged that five employés of defendant, a conductor, engineer, fireman, and two trainmen, were required and permitted to remain on duty for a period of 17 hours and 5 minutes, or 1 hour and 5 minutes in excess of the maximum of 16 hours provided by law. These violations are alleged to have been committed in connection with the running of one of defendant's freight trains between Mena, Ark., and Stilwell, Okl., on May 10 and 11, 1910. At the trial the following admission was made by defendant:

"It is admitted there was an hour and 35 minutes overtime for the engineer and fireman; the others were a few minutes less, but we admit they were in the employ over 16 hours, as claimed by the government."

By its answer, as amended, defendant pleaded that the admitted delays were occasioned principally by coal that would not steam properly, although alleged to have been procured from mines producing good steaming coal, and to have been inspected before purchase. Additional causes of delay pleaded were the meeting of other of defendant's trains, switching, and cleaning fires. It is alleged that these causes were unknown and could not have been foreseen by the defendant, its officers, agents, or employés, at the time the train left the Mena terminal. Although the answer contained no such averments, evidence

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was admitted tending to show that a shaker rod connected with the grates of the engine, whereby these grates can be cleaned while the train is in motion, did not work properly, and that this made it necessary to clean the grates with a rod while the train was stationary; also, that the flues of the engine leaked, which caused a failure of steam.

It being conceded that the employes named had remained on duty for a longer period than 16 consecutive hours, substantially as charged, the defendant railway assumed the burden of discharging itself from liability therefor by seeking to bring itself within the following provision of the act:

"Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident, or the act of God, nor where the delay was the result of a cause not known to the carrier, or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen."

The train in question left Mena 45 minutes later than its stated time; it reached Poteau still behind time, and there took on coal and water; it next proceeded to Spiro, where 30 minutes were consumed in cleaning the fire grates, and 35 minutes more in meeting other trains; at Gans, the next station specified, an hour was lost in meeting train No. 51; between Sallisaw and Windsor an hour and 10 minutes were lost because of the alleged failure of the engine to steam properly; at Windsor there was a delay of 50 minutes occasioned by meeting two other trains; the distance from Sallisaw to Bunch is 19 miles, and the time consumed in making this distance, exclusive of the 50 minutes lost at the intermediate station of Windsor, was 3 hours and 10 minutes. This slow time is charged principally to engine failure. From Bunch to Stilwell, the terminal, the distance is 14 miles; there then remained 57 minutes within which to make this distance within the 16-hour limit. The conductor, acting upon his own initiative, or the direction of the train dispatcher, reduced his tonnage by a little more than one-half and proceeded with the remaining cars to Stilwell. Because of further alleged engine failures an hour and 45 minutes were consumed in making this distance, and 30 minutes more elapsed before the crew were released. The following additional delays were encountered in the earlier stages of the trip: Twenty-five minutes for meeting an extra train; at Poteau, 30 minutes for weighing cars of lumber, 30 minutes for luncheon, and 20 minutes for taking on coal and water; at Panama, 15 minutes for switching and setting out cars. It is conceded that these additional delays were usual to operation and that defendant is entitled to no time credit therefor. It is claimed, however, that the 30 minutes consumed in cleaning fires at Spiro was due to the broken or bent condition of the shaker rod, which prevented the grates from being cleaned while the train was in motion, and that this, together with the engine failures due to leaking flues and poor steaming coal, was the proximate cause of the subsequent delays in meeting other trains; that the slow progress between stations was because of the faulty condition of flues and fuel. The court

below was of opinion that the railway company had fully established its defense and directed a verdict in favor of the defendant.

[1-3] The burden was upon the government to establish that the defendant had required or permitted its employes to remain on duty longer than 16 hours; this, being conceded, made a prima facie case. The excuses embodied in the proviso are separate and affirmative defenses (*C. B. & Q. R. Co. v. U. S.*, 115 C. C. A. 193, 195 Fed. 241), which must be pleaded in the answer; and the burden is upon the defendant to sustain such allegations. Counsel for the railway company recognized this rule by the particularity with which they pleaded a latent defect in the coal, both at the outset and later by amendment, and also by assuming the burden of proof. If reliance was placed upon defects in the engine, such as a broken shaker rod and leaky flues, these defects should have been pleaded. The government should have been advised of the defenses it would be required to meet. The answer contains no such specific averments, and a general denial was insufficient for the purpose. It is contended, however, that court and counsel, by common consent, tried the case as though such alleged defects were embraced within the issues, and it is probably true that the record does not disclose any sufficiently specific objection to their consideration. Therefore, they will be treated as though set out in the answer.

Of a closely analogous statute—the Safety Appliance Law—the Supreme Court, in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, loc. cit. 17, 25 Sup. Ct. 158, 161 (49 L. Ed. 363) has said:

"The primary object of the act was to promote the public welfare by securing the safety of employes and travelers, and it was in that aspect remedial, while for violations a penalty of \$100, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs; that rule not requiring absolute strictness of construction. (Citing cases.)

"Moreover, it is settled that, though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the Legislature." *United States v. Lacher*, 134 U. S. 624 [10 Sup. Ct. 625, 33 L. Ed. 1080]."

[4] This law was passed to meet a condition of danger incidental to the working of railroad employes so excessively as to impair their strength and alertness. It is highly remedial, and the public, no less than the employes themselves, is vitally interested in its enforcement. For this reason, although penal in the aspect of a penalty provided for its violation, the law should be liberally construed in order that its purposes may be effected. *United States v. Kansas City Southern Ry. Co.* (D. C.) 189 Fed. 471; *United States v. St. Louis Southwestern Ry. Co. of Texas* (D. C.) 189 Fed. 954. The recovery is by a civil action, and the rules governing civil procedure apply. *St. Louis Southwestern Ry. Co. v. United States*, 106 C. C. A. 136, 183 Fed. 770.

[5] The trial court, in sustaining defendant's motion for a directed verdict, indicated the view that the railway company was held to the exercise of ordinary care in anticipating causes of delay that might in-

terfere with observance of this law. This also is the position of defendant in error, and we are asked to apply the rule of construction adopted with respect to the Twenty-Eight Hour Law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1911, p. 1341]); which was enacted to prevent cruelty to animals by long confinement without rest while in transit by railroad. It is there provided that the carrier shall not confine domestic animals in cars for a longer period than 28 hours, without unloading them for rest, water, and feeding, unless prevented by causes "which cannot be anticipated or avoided by the exercise of due diligence and foresight." The carrier is liable for a penalty only when it "knowingly and willfully" fails to comply with the provisions of the law. This court has held that the words "knowingly" and "willfully" are designed to describe the attitude of a carrier, which, having a free will or choice, either intentionally disregards the statute, or is plainly indifferent to its requirements. *St. Louis & S. F. R. Co. v. United States*, 94 C. C. A. 437, 169 Fed. 69; *St. Joseph Stockyards Co. v. United States*, 110 C. C. A. 432, 187 Fed. 104. At all times the carrier has been held to the exercise of due diligence and foresight. The degree of such diligence, foresight, and care required depends largely upon the object aimed at and the situation presented; and whether the defendant has discharged the full duty laid upon it is to be determined from the facts and circumstances in each case.

The act under consideration does not employ the words "knowingly" and "willfully." The carrier is made liable if it requires or permits any employé to be or remain on duty in violation of stated provisions. This case then falls within that class where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong. *Armour Packing Co. v. United States*, 82 C. C. A. 135, 153 Fed. 1, 14 L. R. A. (N. S.) 400; s. c. 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; *Chicago, St. P., M. & O. Ry. Co. v. United States*, 90 C. C. A. 211, 162 Fed. 835. By the terms of the proviso the carrier is excused "where the delay is the result of a cause not known * * * at the time said employé left a terminal, and which could not have been foreseen." Not merely which was not foreseen, but which *could not have been* foreseen. The phrase "by the exercise of due diligence and foresight" is not present. Counsel argue that by leaving out this phrase Congress intended to limit the liability of the carrier; that it meant to imply that what was not actually foreknown could not, in contemplation of this law, have been foreseen. We cannot assent to this interpretation. Clearly Congress did not intend to relieve the carrier from responsibility in guarding against delays in a matter deemed to be of such importance. By this act it sought to prevent railroad employés from working consecutively longer than the period prescribed, as completely and effectively as could be accomplished by legislation. To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at, and the practical operation of its railroad. Conformably to this view it has been uniformly held by the courts that, ordinarily, delays in starting trains

by reason of the fact that another train is late; from side-tracking to give superior trains the right of way, if the meeting of such trains could have been anticipated at the time of leaving the starting point; from getting out of steam or cleaning fires; from defects in equipment; from switching; from time taken for meals; and in short from all the usual causes incidental to operation—are not, standing alone, valid excuses within the meaning of this proviso. The carrier must go still farther and show that such delays could not have been foreseen and prevented by exercise of the high degree of diligence demanded.

[6] But three substantial matters of defense are presented for our consideration, the steaming qualities of the coal, the leaky flues of the engine, and the defective shaker rod, which is said to have made necessary the cleaning of grates at Spiro and to have occasioned a number of subsequent delays.

It is shown that the coal came from an approved source; that it was inspected and bore no evidence of defect. It does not appear to have given trouble on any other occasion. It was the same kind of coal that the company had been using for years on that division. The engineer did not notice any defects in it. The entire testimony adduced to impeach the quality of the coal is meager and indefinite. The most that can be claimed is that the engine did not steam properly, and therefore the court must conclude that the fuel contained some latent defect. This falls short of carrying the burden imposed upon the defendant. Such a contention, if indulged, would go far toward rendering the law inoperative. In the absence of any proof to the contrary, and much positive proof in its favor, the presumption must be that the coal was good. The failure to make steam is much more reasonably to be assigned to the poor condition of the engine itself. Its leaking flues are particularly urged upon our attention.

There is evidence that the flues of this engine leaked at some point on this trip, or, at least—as shown by the engineer's report—reached Stilwell in a leaky condition; but this would be no defense unless it appears that such a happening could not reasonably have been foreseen and prevented. Here, again, the testimony is indefinite and unsatisfactory. It is not shown when the leaking began. An attempt was made to prove inspection of the engine at Mena. This was confined to Billingsley, the engineer. His statement shows that his examination was a cursory one; in fact, insufficient to inform him whether the flues were stopped up or clear of cinders. At most he only opened the fire-box doors and looked in. He stated a general practice of examining the engine, and that it was the duty of the fireman to look after the flues. Whether he did so on this occasion does not appear. The fireman did not testify. The record shows that on April 17th and 19th, but two days apart, and less than a month prior to the happenings under consideration, the flues of this same engine were reported for examination, generally, and for leaks, under the heading "Repairs Needed." The engineer testified that when an engine gets old its flues will leak, and that the necessity for frequent repair of this nature indicates that they are beginning to fail. To meet the requirements of this law a railroad company must be held to a high degree of care to maintain

its equipment in good condition for service. The proof of diligence in this case is far from being conclusive in favor of defendant.

It appears that the grates of the fire box are freed from cinders and clinkers by shaking while the train is in motion, and during stops by means of a poker, which is carried for that purpose. When the fire is not burning well, it is customary to clean the grates while waiting at stations. At Spiro 30 minutes were consumed in cleaning fire, but whether the broken shaker rod prevented this from being done while the train was moving is not stated. This is, perhaps, left to be inferred. The engineer's report at the close of the trip contains this statement, "Reach rod to front gates broken." In his testimony the engineer says that the rod was broken some time on this trip, but does not know at what point. Later in the day, on May 11th, he took the same engine from Stilwell back to Spiro, and made another report asking further repairs to this same rod, which was then bent and out of use. As we have seen, no adequate inspection of this engine at Mena was shown. We have two engineer's reports on the same day, but following distinct trips, requesting repair to this reach rod. Under such circumstances, we may well doubt whether this appliance was in good condition when the trip started, and, if so, whether its derangement was not one of the ordinary incidents of operation which should have been anticipated. In the absence of any testimony fixing the time when this rod was broken, and that its defective condition occasioned the delay at Spiro for cleaning fire, we cannot hold that this defense, if it be one, was conclusively established.

The train dispatcher, throughout the trip, at least as far as Bunch, was fully aware of the progress this train was making and what trouble it was in. The conductor and crew were subject to his control. In traveling from Sallisaw to Bunch, a distance of 19 miles, 3 hours and 10 minutes had been consumed. At the latter station, by lightening his train a little more than one-half, the conductor, acting presumably, or at least constructively, under the orders of the train dispatcher, assumed that he could reach Stilwell—14 miles away—in less than an hour. The condition of engine and flues was then well known. The court below thought this was a reasonable exercise of discretion, but there is no provision that such discretion can supersede the mandate of the law. Economical reasons alone will not suffice.

The rule of law is well settled that it is only when all reasonable men, in the exercise of a fair and impartial judgment, would draw the same conclusions from the facts which condition the issue, that it is the duty of the court to withdraw that question from the jury. We do not think this record discloses such a situation. The case should have been submitted to the jury, under appropriate instructions, to determine whether the defendant had taken sufficient precaution to see that its engine was in proper condition when it started, and whether the delays which occurred were the result of causes which could not have been foreseen by exercise of the necessary diligence and foresight.

The judgment below must be reversed, and the case remanded for a new trial in accordance with these views.

CHICAGO, B. & Q. R. CO. v. RICHARDSON.

(Circuit Court of Appeals, Eighth Circuit. January 2, 1913.)

No. 3,785.

1. MASTER AND SERVANT (§ 139*)—INJURIES TO SERVANT—RAILROADS—COLLISION—NEGLIGENCE—PROXIMATE CAUSE.

Defendant railroad company had a dispatcher's order known as No. "31" to reverse the rights of trains, which if used must be signed by the conductor receiving it, and prevents the forward movement of the train until the agent has wired the dispatcher that the conductor has signed the order and the dispatcher has wired back the word "complete." It also had an order known as No. "19" which was exactly the same as "31," except that, when received, it was repeated back to the dispatcher and then delivered to the conductor and engineer without any information going to the dispatcher from the operator that the conductor has signed for the order. The railroad company for some months had been in the habit of using "19" orders and attempted to reverse the rights of certain trains on the day of the accident by sending to an operator one of these orders. On the arrival of one of the trains, the conductor and engineer both asked him if he had orders, and, he answering in the negative, having forgotten that he had received a "19" order for the train, a clearance was given, and a collision ensued, resulting in injury to plaintiff, an expressman and baggage agent on the train. *Held*, that the negligence of the operator in failing to deliver the order, and not the negligence of the railroad company, if any, in using a "19" instead of a "31" order, was the proximate cause of the collision.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 275, 282, 289, 296; Dec. Dig. § 139.*]

2. NEGLIGENCE (§ 62*)—PROXIMATE CAUSE.

An injury which is not the natural consequence of an act or omission, and that would not have resulted but for the interposition of a new and independent cause, is not actionable.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76-79; Dec. Dig. § 62.*]

3. MASTER AND SERVANT (§ 198*)—INJURIES TO SERVANT—RAILROAD EXPRESS AND BAGGAGE AGENT—TELEGRAPH OPERATOR—"FELLOW SERVANTS."

Where a railroad express and baggage agent was injured in a collision resulting from the negligence of a local telegraph operator in failing to deliver orders to the conductor of the train, both were servants of the railroad company in the operating department and were fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 493-514; Dec. Dig. § 198.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 86 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

4. MASTER AND SERVANT (§ 253½*)—INJURIES TO SERVANT—FELLOW SERVANTS—NOTICE.

Where plaintiff, a railroad express and baggage agent, was injured in a collision due to the negligence of a local telegraph operator in failing to deliver orders to the conductor of plaintiff's train, and no written notice of the time, place, and cause of the injury was given the railroad company within 60 days, and the action was not brought within 2 years after the occurrence of the accident, the railroad company was not liable under Rev. St. Colo. 1908, § 2061, abolishing the fellow-servant rule, but providing that no action for the recovery of compensation for injury or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

death by reason of the negligence of a fellow servant could be maintained unless written notice, etc., was given to the employer within 60 days and action commenced within 2 years.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 253½.*]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by John H. Richardson against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

Harry B. Tedrow, of Boulder, Colo. (Charles W. Franklin, E. E. Whitted, and Robert H. Widdicombe, all of Denver, Colo., on the brief), for plaintiff in error.

Horace N. Hawkins, of Denver, Colo., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and W. H. MUNGER, District Judge.

CARLAND, Circuit Judge. Richardson sued the Railroad Company for the purpose of recovering damages for personal injuries which he received on March 11, 1906. He recovered a judgment, and the Railroad Company has brought the case here on writ of error. The facts upon which the liability of the company depends are as follows:

On March 11, 1906, the Chicago, Burlington & Quincy Railway Company was operating a line of road extending from Denver, Colo., to Akron, in said state. Among the trains which said company operated upon said line of road was a train known as No. 14, which left Denver daily at 1:15 o'clock p. m. for the East. Richardson rode in the baggage car, and his duties were to work up express, check up waybills, check up express matter, stamp the waybills with the route stamp, check up the United States mail and keep a record of that, take the checks of the baggage, send a return sheet of all baggage received out of Denver, and put off baggage. He performed duties both for the Railway Company and the Adams Express Company. He was employed directly, however, by the Adams Express Company, and received his pay from it.

About 88 miles east of Denver on said line of road is the town of Brush, at which town the Railway Company maintained an office, station agent, and operator. The next station east of Brush is Pinneo, distant 10 or 12 miles from Brush. At Pinneo, the Railway Company maintained a telegraph operator, day and night. The next point beyond Pinneo is the side track of Xenia, which is between 6 and 8 miles east of Pinneo. Next east of Xenia, and about 6 or 7 miles therefrom, is the town of Akron, where there is a regular office, agent, and operator. The regular meeting place scheduled by time card for passenger train No. 14, going east, and passenger train No. 1, going west, was Xenia, where there was nothing but a side track and no telegraph office. There was a general rule of the Railway Company in effect that trains east bound were superior to trains of the same class

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

west bound. The terms "superior" trains and "inferior" trains had a definite, established, and customary meaning, and the general rule referred to meant that an "inferior" train must keep clear of the time of the "superior" train, and as applied to the facts of the present case meant that train No. 14, being east bound and hence the "superior" train, was not obliged to pay any attention to the west-bound trains so long as it confined itself to its own schedule on the time card. Under this practice it was incumbent upon the west-bound or "inferior" train to arrive at the regular time card meeting place and be upon the side track before the leaving time of the "superior" train at that particular point.

On the day in question, No. 14, going east, and No. 1, going west, were scheduled to meet at Xenia at 4:25 o'clock p. m. If No. 1 did not have sufficient time to do that, it would have been obliged to stay at Akron, for in the absence of special orders No. 14 would have the right upon reaching Xenia and not meeting No. 1 to proceed on its own schedule past Xenia to Akron or further, passing No. 1 on some side track where it would be awaiting No. 14's arrival. On this particular day, No. 14 was practically on time. Brush was a regular stopping place for No. 14 and where the conductor of that train was obliged to register, and, in addition to that fact, the semaphore was displayed, indicating to the crews of all trains that there were orders there for some train or trains and making it imperative for each train to stop and its conductor to inquire whether such orders were for him. No. 14 stopped at Brush, and the conductor went into the depot to register. In the meantime, express matter, baggage, and so forth, was being taken from the train. The conductor inquired of one Overstreet, who was the agent in charge of the railway station, what orders he had, if any, for No. 14, and in reply to his inquiry received two clearance cards, one for himself and one for his engineer, Hardy. These clearance cards read:

"I have no orders for your train. This does not interfere with or countermand any orders you may have received."

For months prior to the date in question, No. 14 when it reached Brush received an order which gave the west-bound passenger train No. 1 the right of way over the east-bound passenger train No. 14 between Akron and Brush. Upon being given the clearance cards, the conductor asked Overstreet how No. 1 was, and Overstreet answered that he did not know; that he had not heard. Just at this moment, the engineer, Hardy, came into the depot and inquired of the conductor, "How is No. 1?" to which the conductor replied, "I don't know," repeating to Hardy what Overstreet had said. The conductor thereupon handed to Hardy the clearance card which Hardy was to receive, and started for the door, inquiring again of Overstreet as he went how No. 1 was, but did not hear Overstreet's answer to this last question. Hardy went into the waiting room and inquired of Overstreet how No. 1 was running, and Overstreet told him he had not heard from No. 1; the dispatcher was using the wires. One Edison, an agent for a Denver transfer company, who frequently went as

far east as Brush on No. 14 and returned therefrom in the line of his duties, alighted at Brush on this particular Sunday, walked into the depot, and inquired of Overstreet about No. 1, upon which train he was to return to Denver, and was told by Overstreet that he had not heard from No. 1; that the dispatcher was using the wires.

Having their clearance cards, Hardy boarded his engine, the conductor gave his signal for departure, and train No. 14 proceeded eastward out of Brush. During all this time while train No. 14 was at Brush and before it had arrived there, there was in the depot at that place an order for train No. 14, reversing the rights of trains Nos. 14 and 1 between Akron and Brush, making train No. 1 the "superior" and train No. 14 the "inferior" between those two points.

It had been the practice of the Railway Company prior to the day in question, when the order reversing the rights of these trains was sent to Brush for delivery to train No. 14, to send a duplicate thereof to Akron for delivery to train No. 1. On March 11, 1906, this practice was observed, and the conductor and engineer of train No. 1 received the duplicate order at Akron. The form number of the order mentioned was "19" and the order was addressed to the conductor and engineer of train No. 1, and read: "Number 1, Eng. 2711, has right over Number 14, Akron to Brush * * * [Signed] C. L. E.," which were the initials of C. L. Eaton, superintendent of the Railway Company at McCook, Neb. The order spoken of was equivalent to telling the conductor and engineer of train No. 1 that train No. 14, which had become "inferior," must stay at Xenia until they arrived there. This order not having been delivered to the conductor and engineer of train No. 14, it did not stay at Xenia, but passed by that point, as, under the orders which its crew had, it was bound to do. Each train, following the orders that it had, met in a head-on collision some 3 miles west of Akron, resulting in personal injury to Richardson.

At the trial, counsel for Richardson maintained that the Railroad Company was negligent in using an order known as form No. "19" instead of an order known as No. "31," to reverse the rights of these trains. The two orders read precisely alike, but the difference was that a "31" order must be signed by the conductor who received it and his train could not proceed until the agent had wired the train dispatcher that the conductor had so signed it and the dispatcher had wired back the word, "Complete." A No. "19" order, when received by the operator at any particular station from the train dispatcher, is repeated back to the dispatcher, and then delivered to the conductor and engineer of the train, without any information going to the dispatcher from the operator that the conductor has signed the order. The rules of the Railway Company provided for both forms of orders, but no rule provided when one should be used in preference to the other. It had been the practice of the Railway Company for some time, at least months, to use a No. "19" order to reverse the rights of the particular trains in question. The evidence showed that a No. "19" order was just as effective for the purpose mentioned as a No. "31" order, if delivered.

In the view we take of the case, we shall assume for the purpose of decision that there was evidence from which the jury might find that Richardson was an employé of both the Railway Company and Express Company at the time he received his injuries, and that the facts appearing at the trial would make the defendant Railroad Company liable for any damages for which the evidence might show the Railway Company responsible.

The court, upon the question of negligence, charged the jury as follows:

"If you find from the evidence that the Chicago, Burlington & Quincy Railway Company permitted its train dispatcher on March 11, 1906, and for some time prior thereto, to use on said railroad the form of order known as form No. '19' for the purpose of restricting the superiority which train No. 14 had over train No. 1, and that the use of said form was a dangerous practice and one which was liable in the event of forgetfulness of an operator to cause a collision, and that said Railway Company knew, or in the exercise of ordinary care could or would have known, that a collision was liable to occur from the use of such form of order, then and in that event the use of form No. '19' for such a purpose was negligence on the part of the Railway Company."

Upon the question of proximate cause, the court charged the jury as follows:

"The court instructs the jury that a verdict for the plaintiff cannot be rendered in this case unless you first find from the evidence that the cause of the collision of the two trains was the failure of the Railway Company to send a '31' order instead of a '19' order to Brush to restrict the rights of No. 14 between Akron and Brush."

[1] In so charging the jury, the court eliminated from the case all questions of negligence except the using of order No. "19" to reverse the rights of trains Nos. 1 and 14. The object sought by the trial, however, was not to ascertain whether it is better railroading to use order No. "31" to reverse the rights of trains, but to ascertain if the Railway Company had been guilty of any negligence which was the proximate cause of Richardson's injuries. At this point we must not confound negligence with proximate cause. Assuming that the finding of the jury, that the Railway Company was negligent in using a No. "19" order under the circumstances mentioned, is supported by the evidence, it by no means follows that this negligence was the proximate cause of the injuries received by Richardson. Order No. "19," from the time it left the hands of the train dispatcher to the time it arrived at Brush, had been the proximate cause of no injury. If delivered, it could not have been the proximate cause of any injury. At Brush, however, the course of the order was interrupted by an independent cause, namely, the failure of Overstreet, the agent, to deliver the same to the conductor and engineer of train No. 14. There was nothing in the order which caused or invited the negligence of Overstreet. The question then is clearly presented whether the use of order No. "19" by the train dispatcher, or the failure to deliver said order to the conductor and engineer of train No. 14 by Overstreet, the agent at Brush, was the proximate cause of the collision of trains Nos. 1 and 14.

In *Milwaukee & St. Paul Railway Company v. Kellogg*, 94 U. S.

469, 475 (24 L. Ed. 256) Mr. Justice Strong, in delivering the opinion of the court, said:

"The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In *Atchison, etc., Railway Co. v. Calhoun*, 213 U. S. 1, 7, 29 Sup. Ct. 321, 322 (53 L. Ed. 671), Mr. Justice Moody, in delivering the opinion of the Supreme Court, said:

"Few questions have more frequently come before the courts than that whether a particular mischief was the result of a particular default. It would not be useful to examine the numerous decisions in which this question has received consideration, for no case exactly resembles another, and slight differences of fact may be of great importance. The rules of law are reasonably well settled, however difficult they may be of application to the varied affairs of life. In this case undoubtedly the plaintiff's injury was traceable to the original negligence, in the sense that it would not have occurred if the plaintiff had not been separated from his mother. Nevertheless, that negligence may not be the cause of the injury, in the meaning which the law attributes to the word 'cause' when used in this connection. The law, in its practical administration, in cases of this kind, regards only proximate or immediate and not remote causes, and in ascertaining which is proximate and which remote refuses to indulge in metaphysical niceties. Where, in the sequence of events between the original default and the final mischief, an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. *Insurance Co. v. Tweed*, 7 Wall. 44; 52 [19 L. Ed. 65]."

[2] In *Little Rock & M. R. Co. v. Barry*, 84 Fed. 944, 950, 28 C. C. A. 644, 650 (43 L. R. A. 349), Judge Sanborn, in delivering the opinion of this court, said:

"An injury that is not the natural consequence of an act or omission, and that would not have resulted but for the interposition of a new and independent cause, is not actionable. *Railway Co. v. Elliott*, 12 U. S. App. 381, 386, 5 C. C. A. 347, 350, 55 Fed. 949, 952 [20 L. R. A. 582]; *Finalyson v. Milling Co.*, 32 U. S. App. 143, 151, 14 C. C. A. 492, 496, 67 Fed. 507, 512; *Railway Co. v. Bennett's Adm'r*, 32 U. S. App. 621, 16 C. C. A. 300, 69 Fed. 525; *Railway Co. v. Callaghan*, 12 U. S. App. 541, 550, 6 C. C. A. 205, 210, 56 Fed. 988, 993; *Railway Co. v. Moseley*, 12 U. S. App. 601, 609, 6 C. C. A. 641, 646, 57 Fed. 921, 926; *Insurance Co. v. Melick*, 27 U. S. App. 547, 557, 12 C. C. A. 544, 550, 65 Fed. 178, 184 [27 L. R. A. 629]."

In *Cole v. German Savings & Loan Society*, 124 Fed. 113, 115, 59 C. C. A. 593, 595 (63 L. R. A. 416) Judge Sanborn, in delivering the opinion of this court, said:

"An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An

injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury. A natural consequence of an act is the consequence which ordinarily follows it—the result which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. *Chicago, St. P., M. & O. Co. v. Elliott*, 55 Fed. 949, 952, 5 C. C. A. 347, 350, 20 L. R. A. 582; *Railway Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256; *Hoag v. Railroad Co.*, 85 Pa. 293, 298, 299, 27 Am. Rep. 653.”

In *American Bridge Co. v. Seeds*, 144 Fed. 605, 609, 75 C. C. A. 407, 411 (11 L. R. A. [N. S.] 1041), Judge Sanborn, in delivering the opinion of this court, said:

“There is no duty imposed upon a master to anticipate breaches of duty on the part of his servants, but he may lawfully reckon the natural and probable result of his actions upon the supposition that his servants will obey the law and faithfully discharge their duties. The legal presumption is that they will do so, and this is the only practicable basis for the measurement of the acts, rights, or remedies of mankind. *Little Rock & Memphis R. R. Co. v. Barry*, 84 Fed. 944, 950, 28 C. C. A. 644, 650, 43 L. R. A. 349; *Cole v. German Sav. & Loan Soc.*, 59 C. C. A. 593, 599, 124 Fed. 113, 119, 63 L. R. A. 416.”

Judge Cooley, in his work on Torts (vol. 1 [3d Ed.] p. 99), uses the following language:

“It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded; and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not the remote, cause. The explanation of this maxim may be given thus: If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety. To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile. A writer on this subject has stated the rule in the following language: If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action.” *Teis v. Smuggler Mining Co.*, 158 Fed. 260, 264, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893.

Under the decisions above quoted and the undisputed facts in evidence, the negligence of Overstreet, the agent at Brush, in failing or refusing to deliver order No. “19,” which he had, to the conductor and engineer of train No. 14, was the proximate cause of the collision, and there is no evidence upon which the jury would be warranted in find-

ing to the contrary. The finding of the jury that the use of order No. "19" instead of order No. "31" was the proximate cause could have been based upon nothing but a guess or speculation, for the reason that, in order for the jury to find that the use of order No. "19" was the proximate cause, they would have been obliged to find not only that the negligence of Overstreet was not the proximate cause, but that no person connected with the execution and delivery of order No. "31," had it been used, would have been negligent. The jury was not authorized to speculate or guess that, if order No. "31" had been used, no person connected with its execution and delivery would not have been negligent. *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Great Northern Ry. Co. v. Johnson*, 176 Fed. 328, 99 C. C. A. 618; *Missouri, K. & T. Ry. Co. v. Foreman*, 174 Fed. 377, 98 C. C. A. 281.

The case was tried to the court below upon the theory that there was evidence of negligence on the part of the Railway Company in two particulars, namely: (a) The negligence of Overstreet, the agent at Brush, in failing to deliver order No. "19" to train No. 14, which was then at Brush; and (b) the failure of the train dispatcher to send a No. "31" order instead of a No. "19" order.

At the close of the plaintiff's evidence, counsel for the Railroad Company moved for a nonsuit, for the reason that the proximate cause of the accident was the failure of the station agent at Brush, Overstreet, to deliver to the conductor of train No. 14 order No. "19," or, stated in another way, the giving by Overstreet to the conductor of the clearance card, and that if Richardson was an employé of the Railway Company at this time then the accident was caused by his fellow servant, and no written notice was served by the plaintiff as provided by section 2061, Revised Statutes of Colorado 1908, and that the action had not been brought within two years from the occurrence of the accident, as provided by that section.

At the close of all the testimony, counsel for the Railroad Company moved for a directed verdict, based on the reasons theretofore assigned for a nonsuit, and again stated his position with reference to the proximate cause of the accident. After denying the motion for a directed verdict, the court, when it came to charge the jury, confined them by the instructions given to the question as to whether the Railway Company was or was not negligent in using a No. "19" order to reverse the rights of trains Nos. 1 and 14; the court saying:

"The complaint further charges that the Railway Company was guilty of negligence in not enforcing such an order; so your inquiry is confined, not to a failure on the part of the Railway Company in not making or promulgating such rules, but it is confined to the question as to whether or not it was negligence on its part in not enforcing rule as to order No. '31' which it did make and promulgate—enforcing it—enforcing the use of it under the conditions and circumstances which you find existed in this particular case."

Counsel for the Railroad Company also excepted to that portion of the charge of the court which submitted the question of proximate cause to the jury.

Being of the opinion that the negligence of Overstreet, the agent at Brush, was the proximate cause of the injuries to Richardson, the liability of the Railway Company for such negligence necessarily arises. This question was directly raised by the motion for a directed verdict, above mentioned, and ruled upon adversely to the Railroad Company. While the trial court did not submit the case to the jury upon the theory that Overstreet was negligent, still, as the liability of the Railway Company for such negligence would necessarily arise if a new trial is granted, we ought to express an opinion on that phase of the case.

[3] We are clearly of the opinion that Overstreet, the operator and agent at Brush, and Richardson, were both servants of the Railway Company in the operating department, and therefore were fellow servants. *Railway Co. v. Baugh*, 149 U. S. 384, 13 Sup. Ct. 914, 37 L. Ed. 772; *Northern Pac. Ry. Co. v. Dixon*, 194 U. S. 338, 343, 24 Sup. Ct. 683, 48 L. Ed. 1006; *Northern Pacific Ry. Co. v. Dixon*, 139 Fed. 737, 71 C. C. A. 555; *Deye v. Lodge & Shipley, etc.*, 137 Fed. 480, 483, 70 C. C. A. 64; *Illinois Central R. Co. v. Bentz*, 99 Fed. 657, 40 C. C. A. 56; *Railway Company v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Clifford v. Old Colony R. R. Co.*, 141 Mass. 564, 6 N. E. 751; *Sherman v. Rochester & Syracuse R. Co.*, 17 N. Y. 153; *St. Louis, etc., Ry. Co. v. Needham*, 63 Fed. 107, 110, 111, 112, 11 C. C. A. 56, 25 L. R. A. 833; *Quebec Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. Ed. 656; *Northern Pac. Ry. Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Northern Pac. Ry. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994; *Texas & P. Ry. Co. v. Bourman*, 212 U. S. 541, 29 Sup. Ct. 319, 53 L. Ed. 641; *O'Connor v. Railway Co.*, 137 Fed. 505, 70 C. C. A. 87; *Florence & C. C. Ry. Co. v. Whipps*, 138 Fed. 13, 17, 70 C. C. A. 443.

[4] We are also of the opinion that the failure to give the notice specified in the motion for a directed verdict relieved the Railway Company of any liability under the laws of Colorado for the negligence of a fellow servant. *Lange v. Union Pacific R. Co.*, 126 Fed. 338, 62 C. C. A. 48; *Simerson v. St. Louis & S. F. R. Co.*, 173 Fed. 612, 97 C. C. A. 618; *Denver & R. G. R. Co. v. Wagner*, 167 Fed. 75, 92 C. C. A. 527; *Otis Elevator Co. v. Cliff*, 200 Fed. 922, recently decided by this court.

For the error in submitting the question of proximate cause to the jury, and in refusing to direct a verdict for the Railroad Company, the judgment below must be reversed, and the case remanded to the District Court, with direction to grant a new trial.

And it is so ordered.

ELWOOD GRAIN CO. v. ST. JOSEPH & G. I. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. January 10, 1913.)

No. 3,715.

1. CARRIERS (§ 35*)—CONTRACT—VALIDITY—DETERMINATION—TIME.

In a suit to recover from a railroad company a certain sum per car which the railroad company had contracted to pay to an elevator company on all grain received by the elevator from stations on the line of the railroad company and unloaded into the elevator in order to induce the construction of the elevator, the validity of the contract as against the provisions of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1911, p. 1309]) and Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1288]) should be determined as of the date of the performance of the service sued for and not as of the date of the making of the contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94; Dec. Dig. § 35.*]

2. CARRIERS (§ 32*)—INTERSTATE COMMERCE—ELEVATOR CHARGE.

A contract by an interstate railroad company to pay an elevator company \$1.75 per car on all grain received from stations on its line of railroad and passing through the elevator, not allowed to all elevators in general, nor covered by a published and filed rate schedule, was void.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action by the Elwood Grain Company against the St. Joseph & Grand Island Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

John E. Dolman, of St. Joseph, Mo., for plaintiff in error.

R. A. Brown, of St. Joseph, Mo., for defendant in error.

Before ADAMS and SMITH, Circuit Judges, and WILLARD, District Judge.

PER CURIAM. The plaintiff in error, who was the plaintiff below, seeks to recover from the defendant \$1.75 a car for unloading 5,000 cars of grain at the plaintiff's elevator at Elwood, Kan.

The contract, so far as material in this case, is as follows:

"Whereas, Harroun Brothers, a copartnership of St. Joseph, Missouri, composed of A. L. Harroun, W. H. Harroun and A. M. Harroun, are desirous of locating and building a grain elevator of large capacity near the station of Elwood in the state of Kansas, on the line of the St. Joseph & Grand Island Railway Company as a commercial enterprise for private gain and profit, and whereas said railway company, a corporation created, organized and existing under and by virtue of the laws of the states of Kansas and Nebraska, believes through its board of directors and authorized agents that such an enterprise would be of great advantage to its business as a common carrier and is desirous of having said Harroun Brothers locate and build said grain elevator at said point: Now, therefore, these articles of agreement made and entered into this 3d day of May, 1899, by and be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tween the St. Joseph & Grand Island Railway Company, party of the first part, and said Harroun Brothers, parties of the second part, witnesseth:

"(1) Cost and Construction of Plant.

"Said parties of the second part in consideration of the agreements and covenants hereinafter named and entered into by said party of the first part, by the said party of the first part to be kept and performed, hereby agree that, at or as soon after the execution of this agreement as may be feasible and convenient, they will purchase a real estate site at or near said station of Elwood adjoining property owned at or near said point by said party of the first part, provided that good and lawful title thereto can be secured, and that they will erect on such site without unnecessary delay a grain elevator and that they will maintain and operate the same on said site so purchased or to be purchased upon the terms and conditions hereinafter set forth. Said elevator shall contain all modern improvements for cleaning, handling and transferring grain, with a storage capacity of not less than three hundred and fifty thousand (350,000) bushels, and with a handling capacity of eight (8) cars per hour.

"Operations of Plant as to Loading of Cars to be Under Instructions of First Party.

"After said elevator shall have been completed, as above provided, and its operation shall have been commenced said parties of the second part hereby agree to unload promptly all cars set to said elevator by said first party for such purposes and to load all cars set to said elevator by the first party for the purpose of being loaded thereat with such quantity of grain and to such extent in weight as the said party of the first part may direct by its instructions to be issued to the said parties of the second part from time to time.

"To so Use Plant so as to Benefit Grain Shipping Interest of First Party.

"Said parties of the second part further agree in consideration of the covenants and agreements herein contained, by the said party of the first part to be kept and performed, so to conduct and operate said elevator that the grain carrying business of said first party will be materially benefited thereby and to use all opportunities arising from the operation of said elevator for building up and strengthening the grain shipping interests along the line of said first party's railway. * * *

"(2) (b) Said party of the first part also agrees to allow said second parties, free of charge, a six months' transit privilege on all grain stopped at said elevator for cleaning or storage purposes, or for inspection, and to protect, on all such grain so stopped, the same through rate of freight as would have been applied had no such stop been made, excepting from this provision, however, the necessary switching charges, as hereinafter provided in paragraph 'd.' * * *

"First Party Pays Second Party \$1.75 Per Car.

"(e) Said party of the first part agrees to pay said second parties the sum of one dollar and seventy-five cents (\$1.75) per car on all grain received by said second parties from stations on its line of railway and unloaded into said elevator. * * *

"(5) This contract shall be in force and effect from August 1, 1899, for the full term of twenty (20) years, except it may be abrogated by the mutual consent of the parties hereto at an earlier date. At the end of twenty years either party may terminate the same by giving a six months' notice in writing to the other of a purpose so to do."

The contract contained other provisions relating to switching, demurrage, construction of tracks, and free passes to certain employes of Harroun Bros., which are not, however, important in this case. It will be noticed that the contract was made on May 3, 1899, and be-

fore the passage of the Elkins Act, February 19, 1903 (32 Stat. 847, c. 708 [U. S. Comp. St. Supp. 1911, p. 1309]). The cars in question were all unloaded after the passage of the Hepburn Act, June 29, 1906 (34 Stat. 584, c. 3591 [U. S. Comp. St. Supp. 1911, p. 1288]). Payments were made under the contract at the rate of \$1.75 per car until the passage of the Elkins Act. After that time an allowance was made at the rate of $1\frac{1}{4}$ cents per hundredweight, which increased the payment to about \$7 or \$8 per car. A witness for the plaintiff testified that this allowance was for the same service as was the allowance of the \$1.75 mentioned in the contract. Later the allowance was changed to $\frac{3}{4}$ of a cent per hundredweight.

All of the grain originated at points in Nebraska on the defendant's road, and was billed to St. Joseph, Mo., which is on the opposite side of the Missouri river from Elwood, Kan. It was all billed on a through rate, and after remaining in the elevator for a period ranging from 20 days to 3 months it was shipped out of the elevator on the through rate. Practically all of it was owned by the plaintiff.

[1] Whether or not this contract was valid when it was made we shall not stop to inquire. If when the service was performed it violated any of the provisions of the Elkins Act or of the Hepburn Act, it was void, and no recovery can be had thereon. *Louisv. & Nash. R. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Phil., Balt. & Wash. R. R. Co. v. Schubert*, 224 U. S. 603, 614, 32 Sup. Ct. 589, 56 L. Ed. 911.

[2] The question then is this: Were such a contract to be made now, would it be valid? That this was a service performed "in connection with the receipt, delivery, elevation and transfer in transit, ventilation or icing, storage and handling of property transported" in interstate commerce, is apparent. That this allowance of \$1.75 per car gave the plaintiff an advantage over other owners of elevators similarly situated who transferred their own grain through such elevators in interstate commerce is also apparent. It is not pretended that this allowance was open to all such other owners of elevators. It is not pretended that this allowance was ever published in the tariffs of the defendant.

Under these circumstances, the case is ruled by *Chic. & Alton R. R. Co. v. Kirby*, decided by the Supreme Court of the United States, May 27, 1912 (225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033). In that case, among other things, it was said:

"The declaration in substance avers that the plaintiff in error knowing the anxiety of the shipper for quick transportation, and that the horses were to enter the horse sale to be held late in the month, did, on January 24, 1906, contract and agree to carry a car, rented by defendant in error, loaded with horses, for the consideration of \$170.60 over its own rails from Springfield to Joliet, Ill., and there deliver so that it would be carried by a fast stock train known as the 'Horse Special,' over the M. C. Railroad, through to New York. Said Horse Special was run but three times each week, and was due to leave Joliet the following morning. It is then alleged that the defendant in error, as directed by the railroad company, delivered and loaded his horses on the afternoon of the 24th; but that the company did not promptly carry and deliver the same to the said fast stock train on the morning of the 25th, as it had guaranteed to do, having failed to make con-

nection with that train; and that, as a consequence, the car was forwarded by a later and much slower train, and the horses were delivered in New York 48 hours after they would have arrived had they been carried by the Horse Special, as the plaintiff in error undertook. As a result of this prolonged transportation, the horses did not reach New York in time to be put in proper condition for the horse sale, whereby the defendant in error sustained damages, aggregating several thousand dollars. * * *

"The single federal question arises upon the validity of the contract to so carry these horses as to deliver them at Joliet to be carried through to New York by the Horse Special, leaving Joliet on the 25th of January.

"That the railroad company had established and published through joint rates and charges upon car load shipments of live stock to New York is not disputed. The rates furnished the defendant in error were the regularly published rates. Those rates and schedules did not provide for an expedited service, nor for transportation by any particular train. Neither was Kirby required to pay any other or higher rate for the promised special service, by which his car was to be carried so as to be attached to the fast stock special and carried by it to New York. * * *

"The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time, or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the action had been for the common-law carrier liability, evidence that there had been no unreasonable delay would be an answer. But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.

"For such special service and higher responsibility it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done.

"The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence.

"An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such a contract relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation. * * *

"The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train was to give an advantage or preference not open to all and not provided for in the published tariff."

The plaintiff insisted at the trial that:

"These tariffs did not cut any figure in the case, none in the world. They cannot change this contract by putting a tariff into effect on something that does not affect the merits of the case."

And in its brief in this court it says:

"If therefore the contract is a valid one, the railway company cannot refuse to publish the charge in its schedules and then seek to annul it under the pretext that under section 6 of the Interstate Commerce Act [Act Feb. 4, 1887, c. 104, 24 Stat. 380 (U. S. Comp. St. 1901, p. 3158)] it cannot pay the same, because it is not specified in its tariff."

Upon this point the Supreme Court in the Kirby Case, above cited, said:

"That the defendant in error did not see and did not know that the published rates and schedules made no provision for the service he contracted for is no defense. For the purpose of the present question he is presumed to have known. The rates were published and accessible, and, however difficult to understand, he must be taken to have contracted for an advantage not open to others. *Railway Co. v. Mugg*, 202 U. S. 242 [26 Sup. Ct. 628, 50 L. Ed. 1011]."

In *Union Pacific R. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 32 Sup. Ct. 39, 56 L. Ed. 171; s. c., 178 Fed. 223, 101 C. C. A. 583, the allowance there held valid was open to all elevators, and it was published in the tariffs of the railroad company.

The judgment of the court below is affirmed, with costs.

UNITED STATES v. COMET OIL & GAS CO. et al.

COMET OIL & GAS CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. January 30, 1913.)

Nos. 3,696, 3,697.

1. INDIANS (§ 16*)—INDIAN LANDS—GAS LEASE—BOND.

Where a gas lease of Creek Indian lands provided that the lessee should sink one well within 12 months, and on failure to do so the Secretary of the Interior might declare the lease void after 10 days' notice, except that the lessee might have the privilege of avoiding the exercise of such right by the Secretary for 5 years by paying in addition to the advance royalties the sum of \$1 per acre, the lessee, never having indicated a desire to exercise such privilege after notice of the Secretary's election to terminate the lease for failure to sink the well as provided, was not liable in an action on the bond for such stipulated sum.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.*]

2. INDIANS (§ 16*)—INDIAN LANDS—GAS LEASE—ROYALTIES.

Where a gas lease provided for advanced annual royalty of 15 cents per acre per annum for the first and second years, 30 cents per acre per annum for the third and fourth years, and 75 cents per acre per annum for the fifth and each succeeding year thereafter, and the Secretary of the Interior canceled the lease November 30, 1909, because of the lessee's failure to pay the third year's advanced royalty, which was due April 18, 1909, the government was entitled to recover the entire year's advanced royalty for 1909, and not merely a proportionate part thereof.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 45; Dec. Dig. § 16.*]

In Error to the Circuit Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action at law by the United States against the Comet Oil & Gas Company and the Federal Union Surety Company. A demurrer to the petition was sustained in part and overruled in part (187 Fed. 674), and both parties bring error. Reversed and remanded, with directions.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 202 F.—54

Wm. J. Gregg, U. S. Atty., of Tulsa, Okl. (J. C. Denton, Asst. U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

J. H. Huckleberry, of Muskogee, Okl., for Comet Oil & Gas Co.

Robert J. Boone, of Muskogee, Okl. (George C. Butte and S. H. Lattimore, both of Muskogee, Okl., on the brief), for Federal Union Surety Co.

Before ADAMS and SMITH, Circuit Judges, and WILLARD, District Judge.

SMITH, Circuit Judge. On April 18, 1907, George Wolf, a full-blood Creek Indian, executed and delivered to the Comet Oil & Gas Company an oil and gas mining lease for 15 years of his allotment of 160 acres of land in Oklahoma in the form prescribed by the Secretary of the Interior. On July 6, 1907, the Comet Oil & Gas Company, as principal, and the Federal Union Surety Company, as surety, executed and delivered to the United States their bond in the sum of \$2,000 conditioned that:

"If the above-bounden Comet Oil & Gas Company shall faithfully carry out and observe all the obligations assumed in said indenture of lease by it, and shall observe all the laws of the United States, and regulations made, or which shall be made thereunder, for the government of trade and intercourse with Indian Tribes, and all the rules and regulations that have been, or may be, lawfully prescribed by the Secretary of the Interior under sections 19 and 20 of the act approved April 26, 1906, relative to leases executed by allottees of the Five Civilized Tribes, in Oklahoma, then this obligation shall be null and void; otherwise to remain in full force and effect."

August 26, 1907, the Secretary of the Interior approved said bond and lease. The lease contained the following provisions:

"And the party of the second part further agrees and binds itself, its heirs, successors, and assigns, to pay, or cause to be paid to the said agent (the United States Indian agent, Union Agency, Indian Territory), for lessor, as advanced annual royalty on this lease, the sums of money as follows, to wit: Fifteen cents per acre per annum, in advance, for the first and second years; thirty cents per acre per annum, in advance for the third and fourth years, and seventy-five cents per acre per annum, in advance for the fifth and each succeeding year thereafter of the term for which this lease is to run; it being understood and agreed that said sums of money so paid shall be a credit on the stipulated royalties; and further, that should the party of the second part neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable, the Secretary of the Interior, after ten days notice to the parties, may declare this lease null and void, and all royalties paid in advance shall become the money and property of the lessor.

"The party of the second part further covenants and agrees to exercise diligence in the sinking of wells for oil and natural gas on the lands covered by this lease, and to drill at least one well thereon within twelve months from the date of the approval of the bond by the Secretary of the Interior, and should the party of the second part fail, neglect, or refuse to drill at least one well within the time stated, this lease may, in the discretion of the Secretary, be declared null and void, after ten days notice to the parties: provided, that the lessee shall have the privilege of delaying operations for a period not exceeding five years from the date of the approval of the bond to be furnished in connection herewith, by paying to the United States Indian agent, Union Agency, Indian Territory, for the use and benefit of the lessor, in addition to the required annual advanced royalty, the sum of one dollar per acre per annum for each leased tract remaining undeveloped,

but the lessee may be required to immediately develop the tracts leased, should the Secretary of the Interior determine that the interests of the lessor demand such action."

"And it is mutually understood and agreed that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Creek Nation, and that this lease, or any interest therein, shall not, by working or drilling contract or otherwise, or the use thereof, directly or indirectly, be sublet, assigned, or transferred without the consent of the Secretary of the Interior first obtained, and that should it or its sublessees, heirs, executors, administrators, successors, or assigns violate any of the covenants, stipulations, or provisions of this lease, or any of the regulations, or fail for the period of sixty days to pay the stipulated royalties provided for herein, then the Secretary of the Interior, after ten days from notice to the parties hereto, shall have the right to avoid this indenture of lease and cancel the same, when all the rights, franchises, and privileges of the lessee, its sublessees, heirs, executors, administrators, successors, or assigns hereunder, shall cease and end without resorting to the courts and without further proceedings, and the lessor shall be entitled to immediate possession of the leased land and the permanent improvements located thereon."

The Comet Oil & Gas Company paid the advanced royalty of 15 cents per acre for the first and second years, but failed to pay the advanced royalty of 30 cents per acre, amounting to \$48, for the third year, and never drilled any well.

November 30, 1909, the Secretary of the Interior canceled the lease: First, because of the failure to pay the third year's advanced royalty; and, second, because of the failure to pay the dollar an acre per annum for two years for failure to sink a well amounting to \$320.

This suit was subsequently brought to recover these sums of \$48 and \$320, or a total of \$368.

The court sustained a demurrer to the petition as to the \$320. *United States v. Comet Oil & Gas Co.* (C. C.) 187 Fed. 674. Thereupon the defendants answered, the case was submitted upon an agreed statement of facts, and the court rendered judgment against both defendants for \$28.90, being the advanced royalty from the 18th day of April, 1909, to the 30th day of November, 1909, with interest, and for costs.

The United States sued out a writ of error, and the Comet Oil & Gas Company and the Federal Union Surety Company did likewise.

[1] The lease provided that the lessee should sink one well for oil and gas within 12 months, and upon its failure so to do the Secretary of the Interior might declare the lease void after 10 days' notice. It then provided that the lessee might have the privilege of avoiding the exercise of this right by the Secretary of the Interior for five years by paying in addition to the advance royalties the sum of \$1 per acre. The Comet Oil & Gas Company never in any way indicated any desire to obtain this privilege. The conferring upon it of the privilege in no way bound the company to avail itself of this option. The contract provided for ten days' notice of the intention of the Secretary of the Interior before he could declare the lease void, and during this period it was doubtless within the right of the Comet Oil & Gas Company to announce its purpose to avail itself of this privilege; but the con-

tention of the government would convert what the contract called a privilege into an obligation.

This view finds considerable support in the authorities. *Snodgrass v. South Penn Oil Co.*, 47 W. Va. 509, 35 S. E. 820; *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, 43 S. E. 101; *Glasgow v. Gas Co.*, 152 Pa. 48, 25 Atl. 232; *Van Etten v. Kelley*, 66 Ohio St. 605, 64 N. E. 560; *Brooks v. Kunkle*, 24 Ind. App. 624, 57 N. E. 260.

It is contended that by its terms the lease was subject to the rules and regulations theretofore and thereafter adopted in relation thereto by the Secretary of the Interior, but no such rule or regulation materially changing this construction has been called to our attention.

It is concluded that the ruling on demurrer ought to be affirmed.

[2] The government insists that the Comet Oil & Gas Company, and its surety are liable for the whole amount of the advance royalty for the third year, or \$48, and the defendants insist that they are not liable at all for the third year's advance royalty.

The court apportioned this royalty. The Secretary of the Interior had power to have declared this lease void because of the failure to drive one well within 12 months of the approval of the bond, but neither had the well been driven nor the advance royalty for the third year paid in November, 1909, and the Secretary of the Interior canceled the lease for both reasons.

While these royalties are styled in the lease "advanced royalties," they constitute guaranteed minimum rent. *Thornton on Oil & Gas* (2d Ed.) § 221. The case therefore presents the question whether the Secretary of the Interior could on November 30, 1909, declare the lease canceled for nonpayment of the guaranteed minimum rent, then recover for rent due in advance on April 18, 1909, and, if he could recover at all, could he recover for the entire year from April 18, 1909, to April 18, 1910, or only the reasonable value of the use of the premises up to the time of the eviction?

Without a special provision in the lease or by statute rent can never be apportioned with respect to time.

In *Dexter v. Phillips*, 121 Mass. 178, 23 Am. Rep. 261, Gray, Chief Justice, said:

"It is a general rule of the common law, followed in chancery, that sums of money, payable periodically at fixed times, are not apportionable during the intervening periods. It is accordingly well settled, both at law and in equity, except when otherwise provided by statute, that a contract for the payment of rent at the end of each quarter or month is not apportionable in respect of time."

In *Perry v. Aldrich*, 13 N. H. 343, 38 Am. Dec. 493, the same rule is laid down, citing numerous English and American authorities commencing with Lord Coke and including Chancellor Kent.

In *Jones v. Carter*, 15 Meeson & Wellsby, 718, cited by the surety company, it is simply held by the Court of Exchequer that it being for the landlord to insist upon or waive a forfeiture for breach of condition by the lessee, under the well-known doctrine of election, if one bring suit in ejectment he irrevocably elects to declare a forfeiture and cannot sue for rent falling due subsequent thereto.

This being true, the question at once arises: Was the government entitled to recover all or none of the third year's rent?

In *Werner v. Padula*, 49 App. Div. 135, 63 N. Y. Supp. 68, it was held that a provision in a lease, that, in case of total destruction of the leased building by fire or otherwise, the rent should be paid up to the time of such destruction and from thenceforth the lease should come to an end, did not, in case of a total destruction of the building after rent in advance became payable but long before the rent was earned, authorize an apportionment of such rent, but that under the covenant the landlord was entitled to the whole installment of rent payable in advance before the destruction. This case was affirmed in the Court of Appeals of New York by the unanimous vote of all the judges sitting. *Werner v. Padula*, 167 N. Y. 611, 60 N. E. 1122; *McAdam on Landlord & Tenant* (4th Ed.) 511, 995, 1028, 1032, 1361. In *Gugel v. Isaacs*, 21 App. Div. 503, 48 N. Y. Supp. 594, the plaintiff leased to the defendant premises commencing May 1, 1894, at \$250 a month payable in advance except the last three months were to be paid in advance on February 1, 1897. October 15, 1895, the Board of Education of New York started condemnation proceedings, and on February 3, 1897, the title vested under them in the city of New York. The plaintiff brought suit for \$750, being the amount stipulated to be paid in advance on February 1st. The defendant wanted to apportion and offered to allow judgment for \$21.66, being the pro rata rent including February 3d; but the court held the plaintiff was entitled to judgment for the entire \$750 which became due on February 1st. This was affirmed by the Court of Appeals. *Gugel v. Isaacs*, 162 N. Y. 636, 57 N. E. 1111. In *Bernstein v. Heinemann*, 23 Misc. Rep. 464, 51 N. Y. Supp. 467, it was expressly held that, under a lease which provided for payment monthly in advance, the lessor could recover the whole month's rent, although he had dispossessed the tenant during the month for the nonpayment in advance. See *Giles v. Comstock*, 4 N. Y. 270, 53 Am. Dec. 374; *Astor v. Turner*, 11 Paige (N. Y.) 436.

"The eviction does not affect arrears of rent, but only that accruing after the eviction: and the rule is the same although the rent is payable in advance, and the eviction occurs before the expiration of the period in respect to which the rent is claimed." *McAdam on Landlord & Tenant* (4th Ed.) 1435.

There seems to be no doubt that the United States was entitled to judgment on the agreed statement of facts against both the defendants for the full third year's advance royalty or for \$48, together with interest thereon at 6 per cent. per annum from the 18th day of April, 1909, and the costs of this action, and the case is reversed and remanded, with directions to set aside the judgment heretofore entered and enter judgment in accordance with this opinion.

BUCHSER v. MORSS et al.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,151.

HUSBAND AND WIFE (§ 252*)—"COMMUNITY PROPERTY"—LAND ACQUIRED UNDER HOMESTEAD LAWS.

When a patent has been issued by the United States to a homestead entryman, the land becomes subject to the laws of descent and distribution of the state, and under the law of Washington as settled by decision a government homestead acquired by a husband is community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 895; Dec. Dig. § 252.*

For other definitions, see Words and Phrases, vol. 2, pp. 1343, 1344; vol. 8, p. 7608.]

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Suit in equity by John R. Buchser against John W. Morss, Alfred G. Morss, Annie Buchser, Hans R. Buchser, Roland H. Buchser, and Hillman A. Buchser. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 196 Fed. 577.

David Herman, of Spokane, Wash., for appellant.

John Salisbury, for appellee Annie Buchser.

W. W. Zent, for other appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellant, who was the complainant in the court below in a suit to quiet title, alleged in his bill that in 1887 he married a widow who had three children; that in June, 1897, he and his family settled upon 160 acres of public land under the homestead law, and that on December 17, 1903, he received the patent therefor; that with money derived from the sale of timber standing on the homestead he purchased another 160 acres of land; that in September, 1911, his wife died, leaving surviving her the aforesaid three children, who were the parties defendant to the bill; that the defendants claimed an undivided one-half interest in all of the lands described in the complaint on the ground that the same was community property of the appellant and of their mother; that, in fact, all of said lands were the sole and separate property of the appellant. A demurrer to the bill was sustained for want of equity, and the bill was dismissed.

The appellant's contention is that a homestead acquired by an entryman under the homestead laws of the United States is the separate property of the entryman, and that lands purchased with the proceeds of a sale of timber cut from said homestead is likewise his separate property. The Supreme Court of the state of Washington has uniformly held that land in that state acquired under the homestead laws

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the United States is the community property of the entryman and his wife. *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; *Ahern v. Ahern*, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. Rep. 912; *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005; *Hall v. Hall*, 41 Wash. 186, 83 Pac. 108, 111 Am. St. Rep. 1016; *Cunningham v. Krutz*, 41 Wash. 190, 83 Pac. 109, 7 L. R. A. (N. S.) 967; *Krieg v. Lewis*, 56 Wash. 196, 105 Pac. 483, 26 L. R. A. (N. S.) 1117. It is of no assistance to us to refer to Missouri, Louisiana, and California cases, such as *Wilkinson v. American Iron Mountain Co.*, 20 Mo. 122, *Rouquier's Heirs v. Rouquier's Executors*, 5 Mart. N. S. (La.) 98, 16 Am. Dec. 186, and *Noe v. Card*, 14 Cal. 577, holding that a royal grant or gift to either of the two spouses did not enter into the community of acquisitions and gains which under the Spanish law resulted from the mere fact of marriage, for if, indeed, land acquired under the homestead or pre-emption laws of the United States is to be classed among gifts from the government, the Supreme Court of Washington has rejected the doctrine that such property may not be made community property.

But it is urged that the question is not to be determined by the law of the state, but by the law of the United States, and that the state law is powerless to control the plain provisions of the homestead laws of the United States which give the title to the homestead entryman as his separate property, and in support of that contention the appellant cites *Hall v. Russell*, 101 U. S. 503, 25 L. Ed. 829, *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152, and *McCune v. Essig*, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237. Those cases, however, do not sustain the contention. They are all cases in which the court was called upon to construe the land laws, and the rights of settlers thereunder, prior to the time when the right to the title had matured under the settlement. They have no relation to the question which is presented in this case, which is the question of the authority of a state Legislature to make community property of land which has passed from the United States to the homestead entryman. In *Hall v. Russell* all that was decided was that under Donation Act Sept. 27, 1850, c. 76, 9 Stat. 496, the title to the grant did not vest in the settler before the conditions had been fully performed, and that an unmarried man who had settled upon a half section of public land in Oregon, and after residing thereon less than a year died, had no devisable interest in the land, and that on his death his heirs, not by inheritance, but by the terms of the act, became qualified grantees, with the right to continue the residence and settlement, and to acquire title. In *Bernier v. Bernier* it was held that, where a homestead entryman dies a widower and without having acquired a patent, the right to complete the proofs and acquire the patent passes, under Revised Statutes, § 2291 (U. S. Comp. St. 1901, p. 1390), to all his children equally. And in *McCune v. Essig* it was held that, upon the death of the homestead entryman before final proof, the right to complete the proof and obtain the patent was given by the homestead law to the surviving widow, and not to the widow and children, under the community property laws of the state of Washington. In

that case the question before the court was not one of the descent of property, but one of the construction and application of the homestead laws of the United States, which laws expressly gave to the widow the right to complete the settlement in compliance therewith, and to receive the title. In other words, the court held that the widow became, under the facts and the law applicable thereto, the grantee of the land from the United States, and that all the right of her husband was extinguished by his death.

The principle which governs the present case is found in *Wilcox v. M'Connel*, 13 Pet. 498-516 (10 L. Ed. 264):

"We hold the true principle to be this: That whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

So in *Bernier v. Bernier*, 147 U. S. 246, 13 Sup. Ct. 245, 37 L. Ed. 152, the court said:

"The object of the sections in question was, as well observed by counsel, to provide the method of completing the homestead claim, and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate."

But counsel for appellant claim that the course of decision of the Supreme Court of Washington upon this subject has not been uniform, but has been inconsistent, and that that court has held mineral claims, coal lands, and land acquired under the Timber and Stone Act to be separate property, citing *Gardner v. Port Blakely Mill Co.*, 8 Wash. 1, 35 Pac. 402; *Phoenix Min. & Mill Co. v. Scott*, 20 Wash. 48, 54 Pac. 777; *James v. James*, 51 Wash. 60, 97 Pac. 1113, 98 Pac. 1115; and *Guye v. Guye*, 63 Wash. 340, 115 Pac. 731, 37 L. R. A. (N. S.) 186. But those decisions do not affect the binding force of the other decisions of that court by which it has been uniformly held that lands acquired under the homestead law are community property. The distinction in these classes of cases is based expressly upon the ground that under the homestead and pre-emption laws but one entry is allowed to a family, and it must be made by the head of the family, and the family is required to live on the land and make a certain amount of improvements thereon before final proof can be made that those laws were framed ostensibly for the benefit of the family, that the intent of Congress in passing those acts was to induce men with families to settle upon and make their homes upon the public lands, whereas, in the case of a purchase of land under the Timber and Stone Acts, no settlement or residence upon the land is required, and the entryman is required to take an oath that he has not applied to purchase the land for speculation, but for his own use and benefit, that he has not made any agreement, directly or indirectly, in any way or manner with any person, by which the title which he shall acquire will inure to the benefit of any person other than himself, and that each of the

spouses may make such an entry. Whether there is inconsistency in so distinguishing the rights acquired under the different classes of the land laws is a question with which we have nothing to do. We are controlled by the settled law of the state of Washington which, as we have seen, does not contravene any provision of the homestead law, and very justly and equitably makes the land acquired as a homestead the community property of the man and wife, who have resided upon it, and cultivated it, and done the necessary acts to acquire the title thereto.

The decree is affirmed.

KIKUCHI v. RITCHIE.

(Circuit Court of Appeals, Ninth Circuit. February 17, 1913.)

No. 2,165.

1. ATTORNEY AND CLIENT (§ 96*)—CONTRACT OF RETAINER—CONSTRUCTION.

A sealing vessel having been seized, condemned, and her master and crew confined under a conviction and commitment for violating the United States sealing laws, the master executed a written contract retaining plaintiff as proctor and attorney for the schooner, the captain, officers, and crew; plaintiff agreeing to appear as proctor in admiralty to resist the forfeiture of the schooner in the District Court of Alaska and to undertake to secure the discharge of the captain and crew from imprisonment. The contract provided that plaintiff was to receive \$1,000 if the captain and crew were obliged to serve out their term of imprisonment, but the schooner was released on payment of \$500 and costs, and, if the discharge of the captain and crew was secured before the expiration of their sentences and the entire prosecution and forfeiture abandoned and the schooner released without a fine, the attorney was to receive \$1,500 and a deposit for costs, and, if the forfeiture case was appealed, the attorney was to receive such further compensation as should be agreed on with the owner. *Held*, that the first clause of the agreement by which plaintiff was retained as proctor and attorney in all matters arising out of the alleged law violation referred only to the services contemplated in the District Court thereafter specified in the contract, and not to services in the appellate court in case of an appeal.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 139, 186-189; Dec. Dig. § 96.*]

2. ATTORNEY AND CLIENT (§ 134*)—CONTRACT OF RETAINER—BREACH—MEASURE OF DAMAGES.

The general rule, that the measure of damages in case of an employer's breach of a contract for personal employment is the difference between what the employé received or might have received from others and the price agreed on, does not generally apply to breach of a contract for attorney's services, but did apply to a contract for the employment of an attorney to prosecute an appeal, which was broken by renunciation before anything was done under it and before performance became due.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 301-304; Dec. Dig. § 134.*]

3. ATTORNEY AND CLIENT (§ 134*)—CONTRACT—CONSTRUCTION.

An attorney's contract of employment, after providing that he should render certain services in the District Court of Alaska for the release of the captain and crew of a schooner and the discharge of the schooner from forfeiture, provided that if the forfeiture case was appealed the attorney was to receive such further compensation as might be agreed on with the owner. *Held* that, since the instrument left the amount

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of compensation to be paid in case of an appeal to be determined by subsequent negotiation, the contract, so far as the appeal was concerned, was not complete, and the attorney could not recover damages for the client's employment of other counsel to prosecute the appeal.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 301-304; Dec. Dig. § 134.*]

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Edward E. Cushman, Judge.

Action by E. E. Ritchie against Choemon Kikuchi. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

The defendant in error brought an action against the plaintiff in error to recover damages for breach of a contract of employment as an attorney at law to render services for the plaintiff in error in certain litigation, alleging the value of the services which he was willing to have rendered, and which he would have rendered, had he not been prevented by the plaintiff in error, to be the sum of \$1,800, of which \$200 had been paid, and alleging his damages for the breach of the contract in that sum. The contract was in writing and was as follows:

"Valdez, Alaska, November 12, 1910.

"Matsutaro Numasaki, master of the schooner Tokai Maru, seized by United States officers as forfeited for violation of the Alien Fishing Law of the United States, hereby retains E. E. Ritchie as proctor and attorney for said schooner and her captain, officers and crew, in all matters arising out of the alleged law violation.

"The said E. E. Ritchie agrees to appear as proctor in admiralty to resist the forfeiture of said schooner, in the District Court of Alaska. He also agrees to undertake to secure the discharge from further imprisonment of said captain and crew, now confined in the federal jail at Valdez, Alaska, under an alleged conviction and commitment for violation of said fishing law. For the foregoing services it is agreed that said Ritchie is to receive the following compensation:

"If the said captain and crew are obliged to serve out their time and the release of said schooner is secured in the District Court of Alaska on payment of the fine of five hundred dollars and costs, the said attorney is to receive one thousand dollars (\$1,000) American money. If the discharge of said captain and crew is secured before the expiration of their sentences and the entire prosecution and forfeiture abandoned and said schooner released without fine, said attorney is to receive fifteen hundred dollars, American money, and the \$245 already deposited for costs. If the forfeiture case goes to the Appellate Courts said attorney is to receive such further compensation as may be agreed on with the owner.

"[Signed] E. E. Ritchie.

"[And the captain's signature in Japanese.]

"Witness: W. Kino."

A demurrer to the complaint for want of facts sufficient to state a cause of action was overruled. Upon a trial had before a jury the defendant in error recovered judgment in the sum of \$800.

Thomas R. Shepard, of Valdez, Alaska, and James Kiefer, of Seattle, Wash., for plaintiff in error.

John B. Van Dyke and Josiah Thomas, both of Seattle, Wash., and John Lyons and T. P. Geraghty, both of Valdez, Alaska, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GILBERT, Circuit Judge (after stating the facts as above). Error is assigned to the order of the court overruling the demurrer, and to the instructions of the court to the jury whereby they were told that the contract contemplated that the defendant in error, if the case went to the Circuit Court of Appeals, should represent the plaintiff in error in that court.

[1] The first clause of the agreement, whereby the defendant in error was retained as proctor and attorney "in all matters arising out of the alleged law violation," evidently refers only to the various services that were to be rendered in the District Court which were thereafter in the agreement specified, and not to services in an appellate court in case of an appeal. *Kamm v. Stark*, 1 Sawy. 547, Fed. Cas. No. 7,604; *Berthold v. Fox*, 21 Minn. 51; *Hillegass v. Bender*, 78 Ind. 225. It is not disputed that for all those services the defendant in error has received the compensation which was agreed upon. His right to recover in the present action depends upon the construction to be placed upon the final clause, which is:

"If the forfeiture case goes to the appellate courts said attorney is to receive such further compensation as may be agreed on with the owner."

[2] The general rule as to damages in cases of breach of contract for personal employment is that the employé can recover only the difference between what he received or might have received from others and the price agreed upon. But the contract of employment of an attorney by a client is recognized as an exception to the rule. One reason for the exception is that such service is not easily partible or apportioned to the time or the labor performed or to be performed by the attorney. Another reason is that often the most difficult and valuable services of the attorney to his client are rendered in advising him of his legal rights before any papers are prepared or appearances made in court. Another is that by the contract the attorney loses the possible opportunity of employment by the adversary party. Many cases hold that where, after preliminary services have been rendered under such a contract, the client without valid excuse discharges the attorney, the latter is entitled to recover the full contract price. *Kersey v. Garton*, 77 Mo. 645; *Pennington v. Underwood*, 56 Ark. 53, 19 S. W. 108; *Walsh v. Shumway*, 65 Ill. 471; *Carter v. Baldwin*, 95 Cal. 475, 30 Pac. 595; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Myers v. Crockett*, 14 Tex. 257; *Weeks on Attorneys at Law*, § 366. But if it were conceded that the defendant in error here had a contract to render services on the appeal, none of the reasons on which the foregoing decisions are based would apply to the present case, for the contract was broken by renunciation before anything was done and before performance became due. The instrument, in referring to services on appeal, referred entirely to services that were to be rendered in the future. There is no allegation in the complaint that the plaintiff ever did render any services on the appeal. He rested his right to recover wholly upon the breach of his alleged contract for future services. In such a case the general rule should apply that the adverse party may recover only the damages occasioned by the breach, and not

the value of the services which he would have been called upon to render in the future.

[3] But as we read the agreement between the parties there was no contract with reference to any services to be rendered by the attorney after the final judgment in the District Court. The subject of the services to be rendered by him in case of an appeal was one upon which the minds of the contracting parties never met. The instrument shows that as to the appeal there was no present intention upon the part of the plaintiff in error to assume liability. Agreement is the essential element of every genuine contract. The terms thereof must be complete. Here there was no binding promise on the part of the attorney to render services and no promise on the part of the client to pay therefor. The matter of such subsequent employment and services, as well as the amount of the attorney's compensation, was by the instrument left open to future agreement. There is no ground for holding that the client thereby assumed liability for the payment of reasonable attorney's fees on the appeal. He never assented to that. He reserved the right, if he should thereafter call upon the defendant in error to take an appeal, to have the amount of his liability for attorney's fees first fixed and agreed upon, and therewith he reserved the right to reject the services if no agreement were made. An instrument which leaves the amount of compensation to be determined by subsequent negotiation is not complete. *Wardell v. Williams*, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814; *Gunn v. Newcomb*, 82 Iowa, 468, 48 N. W. 989. The plaintiff in error so understood the contract in this case and called upon the defendant in error to render no service on the appeal, but engaged other attorneys.

The judgment is reversed, and the cause is remanded, with instructions to sustain the demurrer to the complaint.

ROSS, Circuit Judge (dissenting). The record shows that the plaintiff in error, who was defendant in the court below, was the owner of a Japanese sealing schooner known as *Tokai Maru*, of which one M. Numasaki was master, which schooner was seized by a United States revenue cutter in the summer of 1910 for an alleged violation of the Alien Fishing Law of the United States. The captain, officers, and crew of the schooner, consisting of 38 persons in all, had been found guilty by the magistrate at Unalaska of violation of the law and sentenced to pay a fine of \$500 each, which, under the statute, in the event of nonpayment, they were required to serve out in prison at the rate of \$2 a day. In those circumstances the captain of the schooner employed the defendant in error, who was plaintiff in the court below, to render professional services; the contract between them, which was in writing, being set out in the opinion of the court.

Prior to the time of the making of the contract, proceedings had been instituted for the forfeiture of the schooner, in which proceedings a default judgment had been entered for the government, and after the making of the contract Ritchie sought and procured an order of the court vacating the judgment and permitting him to interpose a defense to the suit, and also sought to procure the discharge of the pris-

oners by means of the writ of habeas corpus. The writs were denied, and after a trial upon the merits the civil suit was decided in favor of the government and a final decree entered in accordance therewith against the schooner. The defendant, desiring to appeal therefrom, consulted, through his agent, with Ritchie in respect to such appeal, and the latter rendered some preliminary services in respect thereto, and was, according to the record, at all times ready and willing to take and conduct the appeal on the part of the defendant Kikuchi. He, however, told the latter's agent that if he would like to employ some one to assist him (Ritchie) in the matter of the appeal, he was willing that he should do so, but in that event wished to name the person, and suggested Mr. Sullivan of Seattle. Kikuchi, however, through his agents, determined to employ other counsel to take and conduct the appeal, and in pursuance of that determination sent to Ritchie the following letter:

"Seattle, Washington, March 21, 1911.

"E. E. Ritchie, Esq., Valdez, Alaska—Dear Sir: Your letter of March 8th to the Japanese Consul, of this city, has been handed to me. I do not see that you have any cause for complaint. My agent whom I sent out here did not see fit to retain Mr. Sullivan on the appeal for reasons which appeared to him fully satisfactory. Referring to our contract of November 12, 1910, I would say that your contract is to appear in the District Court and if you will examine the closing paragraph of the contract, you will see that the matter of appeal is to be subject to future contract or arrangement. No provision is made, as I read the contract, for your employment on appeal except by a further agreement.

"The expense of having you come out to San Francisco to attend this appeal would be prohibitive.

"I am sorry that you feel about the matter as you do, but I do not see that you have any cause to complain. You did your best in the trial court, and the court ruled against you. The owners have employed such counsel as they saw fit, and I do not see that you have any claim on them for compensation. Your agreement in the lower court was contingent. You failed, and I do not see that they owe you anything. We will endeavor to take care of the appeal and win, if possible.

"So far as the matter of costs is concerned, the costs will undoubtedly be paid out of the proceeds of sale and you will not be held on your cost bond.

"Yours truly,

M. Numasaki."

Subsequently Ritchie brought the present action against Kikuchi to recover, among other things, damages for the alleged breach of the contract, which action was tried with a jury and resulted in a verdict in the plaintiff's favor for \$800, upon which judgment was entered, with costs.

The main contention on the part of the plaintiff in error is that by the written contract between the parties Ritchie "was retained to conduct only the trial court proceedings and the habeas corpus proceedings." The only other point made in the brief of the plaintiff in error is that the court below erred in admitting this testimony:

"Q. Why wasn't the exact amount of your fees fixed for your services in the appellate court, in case the case went to the appellate court? A. I explained to the captain at a great deal of length what was necessary to do for the trial of the case and also the possibility that it might be decided adversely to us in this court.

"Mr. Shepard. Before the contract was signed?

"Mr. Ritchie. Yes, before the contract was signed and at the time."

To that testimony objection was made and an exception taken to the ruling admitting it.

If it be conceded that the testimony was inadmissible, it amounted to nothing, and was entirely harmless, and therefore not sufficient ground for a reversal of the judgment.

Nor do I think that the construction of the contract contended for by the plaintiff in error can be sustained. The contract expressly declared that Ritchie is retained "as proctor and attorney for said schooner and her captain, officers and crew, in all matters arising out of the alleged law violation," and after reciting Ritchie's agreement to appear as proctor in admiralty in the District Court of Alaska to resist the forfeiture of the schooner, and his agreement to endeavor to secure the discharge from imprisonment of the captain and crew, and specifying the conditional compensation to be paid him for such services, the contract concludes with the provision that "if the forfeiture case goes to the appellate courts said attorney is to receive such further compensation as may be agreed on with the owner."

Manifestly this was not a provision for a further contract for services, as is contended on the part of the plaintiff in error. The retainer of Ritchie was expressly for his services in all matters growing out of the alleged violation of the statute; his compensation for services in the lower court being made contingent, and the compensation for his services rendered in the appellate courts such as should be agreed on with the owner of the schooner. It is not pretended that there was any failure of the parties to agree upon the latter compensation, nor that Ritchie gave the owner any cause for his discharge. In such circumstances the attorney was entitled to sue for damages for breach of the contract, or else abandon it and recover upon a general indebitatus assumpsit. See 9 Cyc. of Law & Procedure, 688, and the numerous cases there cited.

In my opinion the judgment should be affirmed.

MANN v. DES MOINES WATER CO.

(Circuit Court of Appeals, Eighth Circuit. January 18, 1913.)

No. 3,684.

1. WATERS AND WATER COURSES (§ 196*)—MUNICIPAL WATER SUPPLY—FRANCHISE—OPERATION.

Where a city, acting under express grant of power from the state, granted a water franchise to a water company which constructed and was operating its plant, the company, to that extent, was discharging a municipal function, and was not only entitled, but it was its duty, to protect its water supply from damage and pollution.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 270; Dec. Dig. § 196.*]

2. WATERS AND WATER COURSES (§ 90*)—MEANDERED STREAM—NAVIGABILITY—RIPARIAN PROPRIETOR—RIGHTS.

Under the Iowa law, the title of a riparian proprietor on a meandered non-navigable stream extends only to high-water mark; the title to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

land under water and to the shore below ordinary high-water mark being vested in the state for public use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 91; Dec. Dig. § 90.*]

3. WATERS AND WATER COURSES (§ 196*)—MUNICIPAL CORPORATIONS (§ 714*)—NONNAVIGABLE STREAM—MUNICIPAL SUPPLY—USE.

The state, through a municipal subdivision, to wit, a city, has full power to make use of the bed and waters of a meandered non-navigable stream to supply water to the public and to make suitable grants to individuals or corporations to that end, which grant necessarily carries with it the power to protect the works from destruction or injury and the water supply from impairment or pollution.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 270; Dec. Dig. § 196;* Municipal Corporations, Cent. Dig. § 1524; Dec. Dig. § 714.*]

4. WATERS AND WATER COURSES (§ 196*)—MUNICIPAL WATER SUPPLY—POLLUTION.

A municipal water company, under its franchise, collected water in wells by means of galleries which ran from the wells under the bed of a river and about 10 feet below it through the water-bearing sand and gravel under and near the river, through which the water was forced and filtered. *Held*, that the removal of sand from the river over the galleries by teams, each of which removed from two to seven loads daily, threatened damage to the galleries and pollution of the waters entering the mains, which the water company was therefore entitled to enjoin.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 270; Dec. Dig. § 196.*]

5. WATERS AND WATER COURSES (§ 196*)—WATER SUPPLY—POLLUTION—REMOVAL OF SAND FROM FILTER BED—LICENSE.

That complainant water company granted a license to defendant to remove sand from the bed of a river which constituted a filter bed for the city's water supply did not estop the company from thereafter suing to restrain the further removal of the sand on its being discovered that the removal operated injuriously to the filtration and polluted the water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 270; Dec. Dig. § 196.*]

Appeal from the Circuit Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Suit by the Des Moines Water Company against Benjamin E. Mann. Decree for complainant, and defendant appeals. Affirmed.

R. G. Patton, of Des Moines, Iowa, for appellant.

Alonzo C. Parker, James L. Parrish, and William E. Miller, all of Des Moines, Iowa, for appellee.

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. This is a suit in equity brought by the Des Moines Water Company to restrain the appellant, his agents and employes from driving teams of horses upon and removing sand from the bed of the Raccoon river at or near the wells and galleries of the water company upon the ground that these acts threaten injury to such wells and galleries and pollute the water supply of the city.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The Des Moines Water Company and its predecessors have since May, 1871, operated the only waterworks and water supply system from which the city of Des Moines, Iowa, and its inhabitants receive their water supply. The city council of that city has from time to time passed ordinances to insure the purity of the water and to protect the company's works from injury or damage. These ordinances, among other things, provide:

"That no person shall throw or put into the Raccoon river or any of its tributaries, at any point above where the Des Moines Water Company take water from said river to supply its works, any dead carcass, manure, offal, putrid matter of any kind, or any other substance or fluid which will tend to pollute or render impure the water in said stream, nor shall any person deposit, place or discharge any such substance in, on, or near the banks of said river within five miles, so that the same will wash or flow into said river, nor shall any person bathe or swim in the water of said river within the corporate limits of the city of Des Moines, above said point where said water company draws water for its works."

And further:

"It shall be unlawful to place or deposit any dead carcass, manure, offal, putrid, unwholesome, unclean or offensive matter in, or in such location or place as that it may be carried, wash, flow, percolate, or in any manner reach the Raccoon river or any of its tributaries, at the point or within five miles above the point from which the Des Moines Water Company take or draw water to supply the city."

"No person shall engage in, establish, or carry on any business, occupation, * * * or permit the same to be done on any premises owned or controlled by him, within five miles from and above the point where the Des Moines Waterworks Company take or draw water from the Raccoon river to supply the city of Des Moines and its inhabitants with water, which will in any manner cause such water to be or become unclean, unwholesome, offensive or less palatable."

"It shall be unlawful to injure, damage, or in any way interfere with the works, machinery, pipes, mains, hydrants, trenches or sewers of the Des Moines Waterworks Company."

The state of Iowa has conferred upon its cities authority to grant to individuals or private corporations the power to erect and maintain water plants, and its Legislature has expressly recognized the grant by the city of Des Moines to complainant and its predecessors. It is stated in the bill, and established beyond dispute:

"That in order to enable the complainant to furnish its consumers good, clear, potable water, it is necessary for complainant, instead of pumping directly from the water in said river, to collect the water in wells from which it is pumped by complainant to the mains through which it is distributed. That the water is so collected in said wells by means of galleries which run from the said wells under the bed of the river and about ten feet below it through the water bearing sand and gravel under and near the river, the said galleries being of great length, rectangular in form, and open at the bottom so that the water from the river and water bearing strata, in order to reach the said galleries, is forced through the sand and gravel and is thoroughly filtered."

This is the system employed by complainant, and the water supply of the city is dependent, both as to quantity and purity, upon the use and maintenance of these galleries, and particularly upon preserving in the highest state of efficiency the sand-filtering medium overlying the galleries.

Five suits of a similar nature against divers defendants were consolidated for hearing before the master. His report was approved and decrees were entered granting to complainant the relief sought. The defendant, Mann, alone appeals, contending principally that it was not proven that the defendant had injured or would injure complainant's galleries, or the quantity or quality of the water going into complainant's mains; and further that the decree wrongfully denies to appellant, as a member of the general public, the right to use the stream and take sand therefrom.

[1-3] Through its franchise from the city, acting under express grant of power from the state, the Des Moines Water Company has constructed and is operating its plant. To this extent it is discharging a municipal function, and has not only the right, but the duty, to protect its property from damage, and the exercise of this legitimate function delegated to it from interference. The Raccoon river is a meandered stream, not navigable in fact; and under the laws of Iowa, which control, the title of a riparian proprietor extends only to high-water mark. *McManus v. Carmichael*, 3 Iowa, 1. The title to the land under water and to the shore below ordinary high-water mark is vested in the state for public use and benefit. *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224. Although it appears that appellee is a riparian owner at the point in controversy, and that appellant is not, no rights here asserted are to be determined by such considerations. The state, through its municipal subdivision, had full power to make use of the bed and the waters of this stream for the purpose of supplying water to the public, and to make suitable grants to individuals or corporations to that end. This grant necessarily carries with it the power by appropriate measures to protect the works from destruction or injury and the water supply from impairment or pollution. It is no denial of the substantial rights of individuals, as members of the general public, to use the waters of a stream and the sand forming its bed, that such rights are subordinated to a public use of paramount importance. *Gibson v. United States*, 166 U. S. 269-272, 17 Sup. Ct. 578, 41 L. Ed. 996; *Scranton v. Wheeler*, 179 U. S. 141-151, 21 Sup. Ct. 48, 45 L. Ed. 126.

[4] To support the judgment and decree of the trial court it remains only to consider whether it sufficiently appears from the record that the operations of appellant threatened damage to complainant's galleries and pollution of the waters entering its mains. Of this we entertain no doubt. Defendant employed as many as five teams in this work for a period extending from August to November, 1909, and each team removed from two to seven loads of sand daily. There was ground for apprehension that the continued digging, excavating, and removal of sand above and in the immediate vicinity of the galleries would weaken and damage them. But a still more serious menace was the impairment of the sand-filter through which the water percolates into the galleries and finds its way, in large measure freed from impurities, into the wells and reservoirs. It conclusively appears that in the operation of this filter the most important agency of purification is the upper layer of six inches, and, perhaps, a little more.

The benefit of this layer is not secured in a necessary degree until after it has been in operation for some time. If the surface is disturbed or loosened by digging into it, the rate of filtration is increased, and the filtering capacity correspondingly reduced. Add to this the deposit of filth and excrement in appreciable quantities from large numbers of men and beasts working in and above these waters and sands communicating with the galleries—sands whose filtering capacity had been and was being lowered by excavation and depletion on a large scale—and the dangers which threatened the water supply of a large community become at once apparent. The testimony shows that this danger was not theoretical merely, but actual. At the time when the operations at which these injunctions are leveled were at their height, analyses of the water by the State Board of Health disclosed an alarming increase of bacteria. After this work was stopped, the water gradually returned to its normal condition. All this was quite sufficient to support a finding that such operations at the source of the water supply of the city should not be permitted. In the face of imminent danger to life and health, considerations of individual interest must always yield. It was the duty of complainant, and of the court, to protect the public. Such action was in harmony, not only with plain principles of equity, but likewise with express municipal regulations.

[5] We agree with the master that it can make little difference whether or not complainant at any time gave defendant permission to remove sand at or near this point, or whether complainant itself employed similar instrumentalities in repairing and reconstructing its plant. Whatever complainant did in the latter particular was obviously necessary to maintain the water supply; and no license, if any, granted to defendant, could estop complainant from protecting that supply when injury, actual or threatened, was discovered. The master found that the defendant acted with no wanton purpose of injuring the galleries or of polluting the supply of water; that he exercised more care than the others in making his excavations and in preventing the accumulation of filth. It is conceded that opinion may differ as to the damage resulting from the individual operations of appellant. Nevertheless, where the purity of the water supply of an entire city is involved, all doubt should be resolved in favor of the public safety. The court, out of consideration for these findings, while granting the injunction, taxed the costs against the water company. This very proper exercise of discretion should leave no room for complaint.

It follows that the decree of the Circuit Court must be affirmed.

ALASKA PACIFIC S. S. CO. v. EGAN.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,149.

1. TRIAL (§ 419*)—WAIVER OF ERROR—ACQUIESCENCE IN DECISION.

The right of a defendant to assign error on the denial of his motion for nonsuit at the close of plaintiff's testimony is waived by his subsequent introduction of testimony and failure to move for a directed verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 982; Dec. Dig. § 419.*]

2. MASTER AND SERVANT (§ 226*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—RISKS ASSUMED BY SERVANT.

The negligence of the master in failing to furnish safe appliances and a safe place in which to work is not a hazard necessarily attendant upon employment, and in legal contemplation it is not a risk which the servant is presumed to assume.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

3. MASTER AND SERVANT (§ 120*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNSAFE APPLIANCES.

The owner of a vessel is not absolved from the duty of inspecting dock appliances which it requires its employés to use in loading the vessel, and seeing that they are in reasonably safe condition, because it is not the owner of the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 211; Dec. Dig. § 120.*]

4. MASTER AND SERVANT (§ 185*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNSAFE APPLIANCES.

If a master delegates to a servant the duty of inspecting appliances to be used by his fellow servants, he does not thereby relieve himself from liability for the negligent performance of such duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Frank H. Rudkin, Judge.

Action at law by Joseph Egan against the Alaska Pacific Steamship Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Herbert S. Griggs, of Tacoma, Wash., for plaintiff in error.

B. F. Jacobs, of Tacoma, Wash. (J. F. Fitch, of Tacoma, Wash., of counsel), for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The parties will be designated as they were in the court below. The plaintiff was a longshoreman in the employment of the defendant, engaged in lading its steamship the *Admiral Sampson* with a cargo of flour in Tacoma Harbor. The moor-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing lines of the steamer were attached to the tops of two dolphins, each consisting of a cluster of five piles, banded together at the top; the central pile standing higher than the others. These dolphins stood off the shore wall about 10 feet, and the shore wall stood at approximately the height of the dolphins. The usual means of approaching a dolphin for the purpose of attaching or casting off a mooring line was by a plank 2 inches in thickness, about 12 inches in width, and 10 or 12 feet long, one end of which rested on the shore wall, and the other resting on the top of one of the dolphin piles or attached by wire thereto. The plaintiff had been working in the hold of the steamship. After 5 o'clock of a December evening, when it was growing dark, he was directed by the foreman of the defendant to cast off the bow mooring line from the center pile of the dolphin to which it was attached. In obeying the order, he went along the shore or sea wall to a point opposite the dolphin, and undertook to cross over on the plank, when the plank came loose from the dolphin, and he was precipitated, together with the plank, to the rocks below, receiving the injuries for which the action was brought. He alleged in his complaint that the plank was in an unsafe and dangerous condition for the use to which it was put, a condition unknown to him, but which was known, or by reasonable care should have been well known, to the defendant. The answer denied negligence and alleged the defenses of assumption of risk, contributory negligence, and that the act of negligence, if any, was that of a fellow servant.

The plaintiff was a longshoreman of many years' experience, and was well acquainted with the premises in question. He testified that at some time prior to the accident, possibly a year, he had seen the off shore end of the planks attached to the dolphins by wire straps, but that of late he had not noticed their condition, and that at the time of the accident it was too dark for him to see how the plank was attached. He admitted that he had been out to one of the dolphins on the day of the accident, when it was light and he could see, but that he did not observe whether or not the plank was fastened to the dolphin. He testified that he had not to his knowledge ever before passed over to the dolphin to which the bow line of the steamer was attached; that he did not know that the offshore end of the plank was loose; that he supposed that end was fast and secured sufficiently for him to go out to let the line go, and get safely back. The employé who cast off the other mooring line at the same time gave illuminating testimony when he said:

"When a man goes to work he has to hurry up to get his line off, and he has not much time to look around."

[1] The assignment of error that the court denied the defendant's motion for a judgment of nonsuit, made at the conclusion of the plaintiff's testimony, is of no avail to the defendant, for the reason that, after the denial of its motion, it proceeded to take testimony, and, at the conclusion thereof, did not ask for an instructed verdict in its favor. *Hartford Life Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496; *Hansen v. Boyd*, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746. The record of the testimony, however, is such

that the court would not have been justified in taking the case from the jury.

[2] The only way to approach the dolphin for the purpose of casting off a mooring line was by the plank. The plaintiff, when directed to perform that act, unless the plank was obviously unsafe, had the right to assume that his employer had exercised reasonable care to see that the plank was safe. Its safety depended absolutely upon the fastening of it to the dolphin. At some time prior to the accident, perhaps a year, it had been fastened. It was practicable to fasten it securely and keep it fastened at all times, and it was not the plaintiff's duty to inspect the plank or its fastenings. The negligence of the master in failing to furnish safe appliances and a safe place in which to work is not a hazard necessarily attendant upon employment, and in legal contemplation it is not a risk which the servant is presumed to assume. *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Northern Pacific Co. v. Altimus*, 179 Fed. 275, 102 C. C. A. 631; *Utah Consol. Mining Co. v. Bateman*, 176 Fed. 57, 99 C. C. A. 365, 27 L. R. A. (N. S.) 958; *Bolen-Darnell Coal Co. v. Williams*, 164 Fed. 665, 90 C. C. A. 481; *Choctaw, Oklahoma & G. R. Co. v. McDade*, 191 U. S. 68, 24 Sup. Ct. 24, 48 L. Ed. 96.

[3] Error is assigned to the instruction of the court to the jury that it was the duty of the master to furnish a reasonably safe working place for his servants, or, in other words, to exercise reasonable care in that regard, and that "this duty or obligation extends not only to the working places or appliances owned by the master, but it applies equally to the working places or appliances owned by third persons which the master takes and uses temporarily as his own." The evidence was that the dock and the dolphins did not belong to the defendant, but were being used by it at the time of the accident. That fact did not absolve it from the duty of inspecting the appliances which it called upon its servant to use. For the time being those appliances belonged to the defendant. The plaintiff had nothing to do with the arrangements between the defendant and the owner of the property which was temporarily placed at the defendant's use. *Texas & Pacific Railway v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Baltimore & Potomac Railroad v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624; *Republic Elevator Co. v. Lund*, 196 Fed. 745, 116 C. C. A. 373.

The defendant requested an instruction which was in substance that, if the plank and the manner in which it was used were according to the general, usual, and ordinary course adopted by those in the same or similar business, the defendant was not guilty of negligence in using it, even though the jury believed that other methods of approach to the dolphin might have been safer. It was not error to refuse this instruction. There was no evidence in the case of a general, usual, or ordinary course adopted by those who were in the same or a similar business. No other dolphins were referred to than those which were at the dock where the steamship was moored. It is true that there was evidence that other vessels used the dolphins and used the planks as means of approach thereto; but there was no evidence as

to the precautions which they took in inspecting the fastenings of the planks, or that they used the same when they were in a dangerous condition.

[4] Nor was there error in refusing to instruct the jury that if they found that the plaintiff and William Wright, the foreman, were fellow servants in this instance, and that Wright was negligent in any respect and the plaintiff's injuries were the direct and proximate cause thereof, the plaintiff could not recover. There is nothing in the record to show that any act of William Wright contributed to the plaintiff's injury, unless it be the fact that he directed the plaintiff to cast off the mooring line. If it is sought to cast upon Wright the blame for failing to inspect the plank before he directed the plaintiff to perform that service, and to assert that his failure to inspect was the negligence of a fellow servant, the answer is that, if it was his duty to inspect the appliances, he was charged with the performance of a duty which devolved upon the defendant itself, and the defendant cannot take advantage of his failure to discharge that duty.

We find no error.

The judgment is affirmed.

THOMPSON et al. v. REED.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1913.)

No. 2,162.

FRAUDULENT CONVEYANCES (§ 241*)—SUIT IN EQUITY BY JUDGMENT CREDITOR—LIEN TO SUPPORT.

Under Carter's Ann. Code Civ. Proc. Alaska, § 260, which provides that the filing of a transcript of a judgment in the office of the recorder of any recording district shall make the judgment a lien on any real estate of the defendant within such district, such lien is not defeated by a fraudulent conveyance of the property by defendant pending the action, and will support a suit in equity by the judgment creditor to set aside the conveyance.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 694, 696-726; Dec. Dig. § 241.*]

Appeal from the District Court of the United States for the Third Division of the Territory of Alaska; Edward E. Cushman, Judge.

Suit in equity by J. L. Reed against Eri Thompson and J. M. Cummings. Decree for complainant, and defendants appeal. Affirmed.

S. O. Morford, of Seward, Alaska, and Thomas R. Shepard, of Valdez, Alaska, for appellants.

J. L. Reed and E. E. Ritchie, both of Valdez, Alaska, for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. The record shows that the appellee, Reed, in the year 1907 worked as a placer miner for the appellant Thompson and one Wallace, who were at the time general partners, and for such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

services afterwards brought an action against them in the court below, in which action he recovered judgment on the 25th of April, 1910, for \$1,598.80 and costs in the sum of \$32.65. Wallace thereafter left Alaska, and, so far as appears, never returned. Thompson had some property within the district where the action was pending, and during its pendency and prior to the entry of judgment therein he executed to the appellant Cummings a quitclaim deed for all of it, which deed expressed the nominal consideration of \$1, and described the property as follows:

"That certain placer mining claim known as the Battle Axe located on Thunder creek, a tributary of Cache creek, in Cook Inlet mining and recording precinct.

"An undivided one-half interest in and to that certain saloon situated in the town of Susitna, Alaska, known as Thompson and Price's saloon; together with and including all fixtures, cigar and liquor license, and the lot or parcel of land whereon said saloon is situated.

"That certain log house adjacent to John Jones' bathhouse, and lying between said bathhouse and the general merchandise store of H. W. Nagley, in said Susitna; together with all fixtures and chattels therein contained, owned by said first party and also that certain log cabin situated in the rear of said log house with all chattels or other property therein contained."

After the execution of the deed Thompson also left the territory, but he subsequently returned. An execution, as well as an *alias* execution, was issued upon the judgment in Reed's favor, both of which executions were returned by the marshal *nulla bona*—the first August 26, 1910, and the other September 6, 1910.

On Thompson's return to Alaska, Cummings claims to have sold to Thompson "all his interest in the saloon stock and licenses, and rented to him the saloon building and other buildings at Susitna for \$20 per month," retaining the other interest covered by the deed to him from Thompson, which deed was never filed for record until 8:30 p. m. of May 22, 1910, at which time it was filed for record in the office of the recorder at Susitna, in Cook Inlet recording district, in which district the property in question is situate, and in which office, at 11:10 p. m. of the same 22d day of May, a certified copy of the original docket of Reed's judgment was also recorded. Thereafter the present suit was commenced by the judgment creditor to subject the property described in the deed from Thompson to Cummings to the payment of the judgment, on the alleged ground that the said conveyance was fraudulent and void. The issue made by the pleadings on that vital question was found against the defendants (appellants here); the court expressly finding as a fact:

"That on the 25th day of October, 1909, the defendant Erl Thompson executed a conveyance, in form a quitclaim deed, to the defendant J. M. Cummings, purporting to convey to J. M. Cummings the following described property, situate, lying, and being in Susitna, Cook Inlet precinct, Third judicial division, territory of Alaska, particularly described as follows, to-wit:

"That certain placer mining claim known as the Battle Axe, located on Thunder creek, a tributary of Cache creek, in Cook Inlet mining and recording precinct.

"An undivided one-half interest in and to that certain saloon situated in the town of Susitna, Alaska, known as Thompson and Price's saloon; to-

gether with and including all fixtures, cigar and liquor license, and the lot or parcel of land whereon said saloon is situated.

"That certain log house adjacent to John Jones' bathhouse, and lying between said bathhouse and the general merchandise store of H. W. Nagley, in said Susitna; together with all fixtures and chattels therein contained, owned by said first party; and also that certain log cabin situated in the rear of said log house, with all chattels or other property therein contained.

"And caused said conveyance to be filed for record in the office of the recorder at Susitna in Cook Inlet recording district, district of Alaska, at 8:30 o'clock p. m., May 22d, in Book 3 of Deeds, p. 424.

"That said conveyance conveyed all of the property, real and personal, of the defendant Eri Thompson in the territory of Alaska out of which plaintiff could satisfy his judgment herein, and was made with intent to defraud the creditors of the said Eri Thompson."

It is strenuously urged by counsel for the appellants that the foregoing finding is against the evidence and that this court should so hold, on the ground that the trial judge "shifted the burden of evidence as to the bona fides of the sale from the plaintiff to the defendants."

That argument is based upon the following clause of the opinion of the lower court:

"While under section 1043, *supra*, the fraud presumed from want of change in possession is confined to personal property, yet in this case where both real and personal property was transferred by one instrument, which property constituted the entire estate of the debtor and there was no actual change of possession of any of the property until long subsequent, this, taken in connection with the various circumstances above pointed out, is sufficient to shift the burden of evidence as to the bona fides of the sale from the plaintiff to the defendants. Many circumstances may be mentioned of the class ordinarily denominated badges of fraud."

Some of the circumstances enumerated in the opinion may not be very persuasive, in view of the suggestions of learned counsel; but we are of the opinion, upon the whole record, that we would not be justified in refusing to be bound by the finding of fact made by the trial judge.

The deed from Thompson to Cummings being void for fraud, Reed's judgment became a lien upon the real property described in the deed upon the recording of the judgment in the office of the recorder of the district in which the property is situate, by virtue of the statute of Alaska (section 260, pt. 4, Carter's Codes) which reads as follows:

"Sec. 260. Immediately after the entry of judgment in any action the clerk shall docket the same in the judgment docket. At any time thereafter, while an execution might issue upon such judgment, and the same remains unsatisfied in whole or in part, the plaintiff, or in case of his death his representative, may file a certified transcript of the original docket in the office of the recorder of any recording district that may have been established in said district in accordance with law. Upon the filing of such transcript the recorder shall docket the same in the judgment docket in his office. From the day of docketing a judgment as in this chapter provided, or the transcript thereof, such judgment shall be a lien upon all the real property of the defendant within the recording district or districts where the same is docketed, or which he may afterwards acquire therein, during the time an execution may issue thereon."

The fact that the fraudulent deed was executed between the commencement of the action upon the debt and the entry of the judgment therein is unimportant.

"Whenever," said the Circuit Court of Appeals for the Eighth Circuit in *Schofield v. Ute Coal & Coke Co.*, 92 Fed. 271, 272, 34 C. C. A. 336, 337, "a creditor has a vested right in or a lien upon property, the enforcement of which is hindered or rendered inadequate by a fraudulent conveyance or incumbrance, he may maintain a suit in equity to remove it, without showing an execution or return of it unsatisfied, or without exhausting his other legal remedies. *Case v. Beauregard*, 101 U. S. 688, 690, 691 [25 L. Ed. 1004]; *McCalmont v. Lawrence*, 1 Blatchf. 232, 15 Fed. Cas. 1249 (No. 8,676); *Kittel v. Railroad Co.* [C. C.] 65 Fed. 862; *Tappan v. Evans*, 11 N. H. 311; *Wadsworth v. Schisselbauer*, 32 Minn. 84, 87, 19 N. W. 390; *Bank v. Newton*, 13 Colo. 245, 249, 250, 22 Pac. 444; *Loving v. Pairo*, 10 Iowa, 282, 289 [77 Am. Dec. 108]; *Cornell v. Radway*, 22 Wis. 260; *Beck v. Burdett*, 1 Paige [N. Y.] 305, 308 [19 Am. Dec. 436]; *Clarkson v. De Peyster*, 3 Paige [N. Y.] 320; *Newman v. Willetts*, 52 Ill. 98.

"The case in hand falls within the latter class of cases, in which a judgment creditor may successfully invoke the aid of a court of equity. The filing of the transcript of the judgment in La Plata county fastened a lien securing its payment upon the interest of the coal and coke company in its real estate in that county, under the statutes of Colorado. *Mills' Ann. St. Colo.* §§ 2529, 2530, 2531, 4185 (5); *Stephens v. Clay*, 17 Colo. 489, 491, 30 Pac. 43 [31 Am. St. Rep. 328]; *Bank v. Newton*, 13 Colo. 249, 250, 22 Pac. 444. The argument that this lien was insufficient upon which to base a suit in equity to remove the fraudulent trust deed, because it was a general lien created under the statutes, and not a specific lien fixed by the levy of an execution, finds no support in the authorities, and fails to appeal to the reason with persuasive force. There are, indeed, opinions in which it is pertinently said, as in *Jones v. Green*, 1 Wall. 330 [17 L. Ed. 553], that a right of a judgment creditor rests upon the fact that the execution has been issued, and a specific lien has been acquired upon the property of the debtor by its levy. That is a true statement where the lien which the creditor seeks to enforce is acquired by such a levy, but no case has been called to our attention in which it has been held that it was necessary to issue an execution and make a levy which would create no lien before a suit could be maintained to remove a fraudulent obstruction to the enforcement of a lien already created without the levy. Under the statutes of Colorado, and under those of many other states, the lien of a judgment attaches to the real estate of the debtor when the judgment, or a transcript of it, is recorded or filed in the proper office in the county where the land is situated. The issue, levy, and return of an execution without the collection and payment of any part of the judgment neither increase nor diminish the force and efficacy of that lien. In the case at bar all the property which the judgment debtor has is real estate in La Plata county. The judgment is a lien upon all this property. The levy of an execution upon it could not make this lien more specific or more efficient, and the conclusion is irresistible that the general lien upon real estate created by entering a judgment or filing a transcript of it in the county where the lands of the debtor are situated, in accordance with the statutes which provide therefor, is a sufficient basis for the maintenance of a suit in equity to remove a fraudulent obstruction to the enforcement of that lien. *Bump, Fraud. Conv.* 535; *Black, Judgm.* § 400."

The judgment of the court below, which limited the lien and rights of the complaining creditor to the real property in question, is, accordingly, affirmed.

HOUSTON OIL CO. OF TEXAS et al. v. GREEN et ux.**GREEN et ux. v. HOUSTON OIL CO. OF TEXAS et al.**

(Circuit Court of Appeals, Fifth Circuit. February 4, 1913. On Petition for Rehearing, February 25, 1913.)

No. 2,324.

1. VENDOR AND PURCHASER (§ 232*)—ORAL CONTRACTS—RIGHTS OF PURCHASER IN POSSESSION—SUBSEQUENT PURCHASER FROM VENDOR.

Where defendant purchased a tract of land by oral contract from the owner of the legal title, paid a part of the purchase price, and with the consent of the vendor went into possession and improved the land, and has since occupied the same with his family as a homestead, his equitable title is superior to the title of a subsequent grantee of his vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

2. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASER—NOTICE—POSSESSION BY PRIOR PURCHASER.

A purchaser of land which is in the actual occupancy of another claiming as owner under an equitable title from the same grantor cannot claim the rights of an innocent purchaser as against the equitable owner.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

Appeal and Cross-Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Ancillary bill in equity by Charles Dillingham, receiver of the Houston Oil Company of Texas and others, against William Green and Mittie Green, his wife. Decree for complainants in part, and both parties appeal. Reversed on defendant's appeal.

H. O. Head, of Sherman, Tex., and T. M. Kennerly, of Houston, Tex., for appellants and cross-appellees.

Jno. B. Warren, of Houston, Tex., for appellees and cross-appellants.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PARDEE, Circuit Judge. This is a suit by ancillary and supplemental bill, of Charles Dillingham, receiver of the Houston Oil Company of Texas, in the main receivership cause of Maryland Trust Company, Trustee, v. Kirby Lumber Company et al., filed September 3, 1908, against William Green and wife, Mittie Green, to recover title and possession of two tracts of land in Jasper county, Tex., being 86 acres out of the Sherrod Wright survey, and 66 acres out of the Jacob Youngblood survey. The original answer of defendants was filed December 7, 1908, and the case went to a master, who filed his report January 20, 1909, recommending judgment in favor of complainants. The Circuit Judge confirmed the report of the master February 26, 1909. Thereafter defendants moved to set aside said decree and the master's report, which motion was granted. Thereafter com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plainants filed, by permission of the court, amended bill, and defendants filed amended answer. The trial in the Circuit Court was had on such amended pleadings.

[1] Complainants allege, and prove, a regular chain of title from and under the sovereignty of the soil; complainants' immediate vendor being the Texas Tram & Lumber Company. Defendants allege an oral sale and purchase from the Texas Tram & Lumber Company, the then undisputed owner in 1896, the payment of the price, and adverse possession, occupancy, and improvements thereunder, and plead the 10 years' statute of limitation of the state of Texas. Complainants deny such oral sale, but allege that, if one was made, same was, by mutual agreement of the parties set aside and rescinded previous to the purchase of the property by complainants, and further that, if defendants had any such title to said property, same was an equitable title, and complainants were innocent purchasers for value of said property, acquiring the legal and record title thereto without notice of defendants' claim. Defendants deny the acts set forth by complainants and claimed by them to constitute a rescission, and besides plead that the property was the homestead of defendants at such time, and therefore that the consent of the wife was necessary to allow a rescission.

On the trial of the cause before the Circuit Judge, a decree was entered in favor of complainants for the 66 acres out of the Jacob Youngblood survey. A decree was entered in favor of the defendants for the 86 acres out of the Sherrod Wright survey, but charging same with the sum of \$215 with 6 per cent. interest on same from January 1, 1902, which the Circuit Court Judge found to be the amount of the purchase money owing by the defendants thereon to the Texas Tram & Lumber Company, complainants' vendor.

The Circuit Judge filed no written opinion. From that portion of the decree refusing judgment for the 86 acres out of the Sherrod Wright survey complainants are prosecuting this appeal. Defendants are prosecuting a cross-appeal from that portion of the decree awarding complainants judgment for the 66 acres out of the Jacob Youngblood survey, and fixing a lien upon the 86 acres out of the Sherrod Wright survey awarded to defendants as above set forth.

Under our view of the evidence, William Green purchased the two tracts of land mentioned in the fall of 1896 from the then undisputed owner, the Texas Tram & Lumber Company, for an agreed price, part of which was paid at the time; and, with the consent of the vendor, Green went into possession and occupancy of the land, and has since lived thereon, making it his homestead and, claiming as owner, has improved, cultivated, and enjoyed the fruits of the same.

We do not find that at any time there has been any valid rescission of the contract of purchase. We find that the claimed acknowledgments of tenancy by William and Mittie Green to and under the Houston Oil Company of Texas were not sufficiently established under the evidence to defeat the equitable title of Green. They appear to have been without actual consideration and to have been procured under such circumstances that Green was deceived as to the actual facts and his own rights in the premises. One of them, however it may have

been intended, does not include the lands in controversy, but refers to 300 acres said to be located in the Robertson Bean headright survey.

[2] It is clear from the evidence of Green and others that he never intended to acknowledge any tenancy in conflict or derogation of his claimed rights as owner. The Houston Oil Company could not be an innocent purchaser with Green in actual occupancy claiming as owner.

We think that under the evidence Green has an equitable right to the land in question irrespective of the statute of limitations, and is clearly entitled to retain and to be decreed the owner of the same.

The decree appealed from is reversed, and it is now adjudged by this court that the said William Green and his wife, Mittie Green, have and recover from the Houston Oil Company of Texas all and singular the tracts and parcels of land situated in Jasper county, state of Texas, and described as follows, to wit:

"Eighty-six (86) acres out of the Sherrod Wright survey Abst. No. 47, beginning on Sherrod Wright east line and on the Jacob Youngblood west line at a post from which a pine bears S. 17 E. 1 varas another west $12\frac{4}{10}$ varas; thence N. 68.30 W. at 212 varas a pine from which a pine bears S. 3 E. 7 varas and a gum bears N. 27 E. $4\frac{4}{10}$ varas; thence down branch on which S. Wright lives S. 52 W. being the general course of the said branch 920 varas on a straight line to a post in the branch to Grants Bluff fro. which a black gum bears N. 71 W. $3\frac{4}{10}$ varas and a bay bears N. 24 W. $4\frac{4}{10}$ varas; thence south 66 deg. and 20' east 881 varas to a stake on Sherrod Wright's eastern boundary; thence north 9 deg. and 20' east with said eastern boundary 155 rods to the beginning corner post containing eighty-six acres more or less."

And also:

"Sixty-six (66) acres out of the Jacob Youngblood survey, abstract No. 549, patent No. 195, vol. 18. Beginning on the east boundary line of Sherrod Wright's league a post from which a pine marked X bears S. 41 deg. W. 1.8 varas a pine same mark S. 77 deg. E. 4 varas; thence north 60 deg. E. pine woods at 145 rods a post from which a pine is south 8 vrs. marked X and another pine bears N. 15 same mark varas; thence northwest at 145 rods to a post where the said Youngblood's north boundary line intersects the aforesaid Wright survey or league from which post a pine is north 62 deg. W. 5 varas, another N. 21 deg. E. 3.8 varas marked X each; thence south 9 deg. 30' W. with the league line 1,097 varas to the beginning corner, containing sixty-six acres, more or less."

The Houston Oil Company of Texas to pay the costs of both courts.
On Petition for Rehearing.

In the opinion and decision rendered in this case February 4, 1913, we did not pass upon the question as to whether William Green and Mittie Green were indebted to the Houston Oil Company for the purchase money of the land in question, because we found no pleadings in the case which presented such issue. In the petition for rehearing now filed, our attention is called to the fact that William Green and Mittie Green in their answer aver that, because no one had ever made demand of them for the purchase money agreed to be paid for the land in controversy, they assumed, because of their long service in behalf of the Texas Tram & Lumber Company, that the said company and its successors recognized the right of these defendants to the said land; and they further aver that they are ready, able, and willing, and

now offer, to pay the balance of the purchase money for the said property to whomsoever this court may adjudge it to be due, hereby offering to do all things in equity in the premises. And we further find in the evidence of said Green, defendant, that the original purchase price of the said land agreed upon to be paid was \$380; that he paid thereon \$256 cash; that thereafter said \$256 was repaid to him by one Simmons, agent of the Texas Tram & Lumber Company, and received by him (Green) under protest.

The result of this evidence is that the entire amount of purchase money agreed to be paid has never been paid. For the Greens now to do equity in the case, it is necessary that that indebtedness of \$380 should be recognized as a lien upon the lands hereinbefore adjudicated to the said William Green and Mittie Green. Under the circumstances, interest should be allowed thereon at the legal rate in Texas from the time the Houston Oil Company first asserted its claim as against said Green to the said land, which appears to be the filing of the ancillary bill in this case September 3, 1908.

It is therefore ordered that our former decree in this case be amended so as to adjudge that the parcels of land therein declared to be the property of William Green and Mittie Green be and the same are charged with a lien in favor of the Houston Oil Company in the sum of \$380 with legal interest thereon from September 3, 1908; and, further, that the said lien is hereby foreclosed against said land, and William Green and Mittie Green are ordered to pay into the registry of the court within 90 days from the filing of the mandate herein the said sum of \$380 with legal interest thereon from the date aforesaid for the use and benefit of the Houston Oil Company of Texas; and that should the said William Green and his wife, Mittie Green, fail or refuse within the 90 days from said date to pay over said money with interest thereon, then, upon application of the Houston Oil Company of Texas, let orders be issued directed to the marshal of the Eastern district of Texas directing the said marshal to seize and sell the said tracts of land as under execution, in accordance with the provisions of the law in such cases made and provided, and apply the proceeds of sale to the costs of executing said order of sale and then to the payment of the sum of \$380 and legal interest thereon from September 3, 1908, to the Houston Oil Company, and shall then pay the balance, if any be, over to the said William Green and wife, Mittie Green.

And with the decree thus amended, the petition for rehearing is denied.

FETZER v. SOUTH SIDE LUMBER CO. OF CHICAGO.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

No. 1,866.

1. PLEDGES (§ 56*)—FORECLOSURE—EFFECT.

Defendant's agreement to hold an interest in a lumber company which had been pledged to him above his own claim as security for any damages to plaintiff arising out of a contract between plaintiff and the pledgor was in personam, and was therefore not affected by defendant's foreclosure and sale of the pledged claim in settlement of his own prior lien, since, on defendant's purchase of the claim at his own sale, he acquired the title subject to his agreement to hold the balance for plaintiff.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 152-183; Dec. Dig. § 56.*]

2. APPEAL AND ERROR (§ 1010*)—FINDINGS—REVIEW.

A finding of fact by the trial court which has support in the evidence will not be reviewed on appeal to determine the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

3. PLEDGES (§ 31*)—SECURITY—CONVERSION—MEASURE OF DAMAGES.

Defendant, to whom an interest in a land and lumber company had been pledged to secure a debt of \$6,000, agreed to hold the balance of such interest to secure any damages plaintiff might sustain under a contract with the pledgor; but, before the plaintiff's damages were ascertained, defendant purchased the pledged interest under an alleged foreclosure of his own lien, and thereafter refused to assign the same on plaintiff's tender of the debt for which the interest had been pledged. *Held*, that defendant was liable for plaintiff's damages, which was the difference between the \$6,000 and the value of the pledged interest, and interest from the date of plaintiff's tender and demand; such amount not exceeding the damage plaintiff was entitled to recover under his contract with the pledgor.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 86-88; Dec. Dig. § 31.*]

4. CORPORATIONS (§ 123*)—PROPERTY INTEREST—VALUE—DETERMINATION.

Where a one-fifth interest in the property of a corporation was pledged, its market value could be determined only by ascertaining the value of the corporation's property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 612, 618; Dec. Dig. § 123.*]

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin; Arthur L. Sanborn, Judge.

Action by the South Side Lumber Company of Chicago against Henry Fetzer. Judgment for plaintiff, and defendant brings error. Affirmed.

Defendant in error, herein termed "plaintiff," made a contract with the George Pankratz Lumber Company, herein termed the "Pankratz Lumber Company," for the purchase of logs and the manufacture of lumber at Sturgeon Bay, Wis. Before the execution of this contract, and as a part consideration therefor, the plaintiff in error, termed "defendant" herein, who was interested in the transaction as cashier and a stockholder of the bank of Sturgeon Bay, wrote a letter dated at Sturgeon Bay, Wis., January 9, 1907, to plaintiff, which letter reads as follows, viz.:

"Gentlemen: Your letter of the 7th inst., directed to R. P. Cody, vice

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

president of the Bank of Sturgeon Bay, just received, and replying to the same will say that the Bank of Sturgeon Bay is the owner of the mortgage on the George Pankratz Lumber Co. property in this city. The interest in Vans Harbor Land & Lbr. Co. is owned by George and Frank J. Pankratz. I am the owner of the \$6,000 incumbrance on the George Pankratz and Frank J. Pankratz interest in the Vans Harbor Land & Lumber Co. and am willing to hold it as security for any loss that you may incur under your contract with the George Pankratz Lumber Co. subject to my incumbrance of \$6,000, and in case there is a loss to you when you settle up your business under your contract with the George Pankratz Lumber Co., I will assign the interest of George and Frank J. Pankratz in the Vans Harbor Land & Lumber Co. to you as security for the loss you may incur, if any, unless the George Pankratz Lumber Co. pays said loss.

"I believe that this will cover what you want. Of course, in the event of an assignment of the interest in the Vans Harbor Land & Lumber Co. to you, as above, you would have to pay me the \$6,000.00.

"Yours Truly,

Henry Fetzer."

The subject-matter proposed to be assigned consisted of an equitable one-fifth interest in the capital stock of the Vans Harbor Land & Lumber Company, which stock had not been issued. This interest was held by Fetzer subject to his lien for an advance to said George Pankratz of the said sum of \$6,000, by him, said Fetzer. As further security, the Pankratz Lumber Company, in said contract, conveyed to plaintiff all its interest in said Vans Harbor Land & Lumber Company, which stood in the name of the two Pankratzes. Frank J. Pankratz subsequently acquired a one-half interest in said one-fifth of said Vans Harbor Land & Lumber Company's stock, subject to the said lien of \$6,000. This one-fifth interest the District Court found from the evidence to be of the value of \$10,000, and there is evidence in the record to sustain that finding. It was the expectation of the parties that the operations under said log and manufacturing contract would be closed by January 1, 1908. As a matter of fact, the matter was not closed up until about November 1, 1908. In the meantime, and about January 1, 1908, defendant began writing plaintiff asking it to take steps to enable defendant to realize on its said \$6,000 loan, and to take the stock interest off its hands.

On January 8, 1908, defendant notified plaintiff that unless action was taken he would transfer the interest in the stock to someone else. Plaintiff replied on January 10, 1908, that the affairs of the log and manufacturing company had not yet been settled so as to disclose the result, although a deficiency had been ascertained, and that it was not yet in position to say whether it would require the Vans Harbor Stock. On January 24, 1908, plaintiff received a letter from defendant peremptorily demanding that it make its election to take or not to take the stock. To this, no answer was given, and defendant wrote again. On March 10, 1908, plaintiff wrote that it wished to wait until the facts were learned, and asked for patience on defendant's part, and saying, "We expect to avail ourselves of any profit there may be in the stock you hold, if necessary, and will do the best we can to bring it to a termination at the earliest possible moment." On June 9, 1908, defendant wrote again asking to know whether "you intend to take the security that I hold from George and Frank Pankratz in the Vans Harbor Land & Lumber Company," and that he did not intend to hold it any longer. On July 7, 1908, defendant against plaintiff's protest, instituted proceedings, to which plaintiff was made a party, and served merely by publication to foreclose the \$6,000 lien. Plaintiff failed to appear, and such proceedings were had as that said stock was duly sold to defendant to satisfy his demand then fixed at \$6,939.16. Thereafter, and on January 15, 1909, plaintiff notified defendant that it had elected to take over said stock, tendered to him the \$6,000, and demanded the delivery of the interest which defendant had in the Vans Harbor Land & Lumber Company, which demand was refused, defendant claiming that he had foreclosed his lien. At the time of the tender by plaintiff, defendant held the stock interest as purchaser at his said sale. Subsequently, he sold it to Perley Lowe for \$7,500.

Plaintiff thereupon, and on April 13, 1909, instituted this suit, laying its damages for the failure of defendant to assign to it said interest in said stock pursuant to said agreement, at the date of said tender, at the sum of \$15,655.50, with interest from November 1, 1903. After answer filed, the parties waived a jury and consented that the cause be tried before the court. On the hearing, the court found the facts as hereinbefore stated, and also found that the said Vans Harbor Land & Lumber Company was the owner of about 40,000 acres of wild cut over land, 2,800 acres in farms, a sawmill, and certain personal property, all of which, including the capital stock, was worth \$70,203.55; that at the date of the tender, January 15, 1909, the value of said one-fifth interest in said corporation was \$10,000; that the loss of the plaintiff growing out of defendant's refusal to transfer the contract with the Pankratz Lumber Company exceeded the sum of \$4,000. Objection is made to this finding on the ground that the books of plaintiff were not placed in evidence, and that the witness Somers was permitted to swear that from an inspection of the books it appeared that there was a loss in excess of \$18,000, but the objection to the absence of the books appears to have been waived subsequently. The conclusions of law of the District Court are:

"(1) The assignment or pledge of George Pankratz to defendant carried as full and complete a title to the Vans Harbor stock as the assignor himself had, and thereafter was subject only to his equity of redemption, and that of his subsequent assignee, Frank Pankratz.

"(2) The foreclosure cut off this equity of redemption, but left the same kind and quality of title in defendant as he previously had.

"(3) The manufacturing contract passed no interest whatever in the Vans Harbor stock to the South Side Company, because the Pankratz Company never had any interest therein.

"(4) The letter of January 9, 1907, vested no interest in the Vans Harbor stock in the South Side Company, but simply gave the latter an option to take the same on certain conditions. Its rights were wholly in personam; hence the foreclosure decree was without effect upon the South Side Company.

"(5) By the terms of the aforesaid letter the South Side Company was not required to exercise its option until its business under the manufacturing contract was completed, which did not occur until October 27, 1908, whereupon it promptly demanded compliance with the terms of the letter.

"(6) By the refusal of defendant to transfer the Vans Harbor interest to plaintiff upon said tender, and his subsequent sale thereof, he wrongfully converted the same to his own use, and became liable for the resulting damage to plaintiff, which was the sum of \$4,000, with interest at 6 per cent. from January 15, 1909, to the entry of judgment herein."

Exceptions to the finding of facts made by the court were filed and overruled. Numerous errors were assigned, of which we deem it necessary to consider only the following, viz.:

The finding of the District Court that the one-fifth interest in the Vans Harbor Land & Lumber Company covered by the letter of Fetzer dated January 9, 1907, was of the value of \$10,000.

The finding of said court that plaintiff's loss under the contract for logs, etc., and the manufacture of lumber, etc., with the Pankratz Lumber Company exceeded the sum of \$4,000.

The finding by said court that plaintiff was not required to exercise its option to take said interest in the Vans Harbor Land & Lumber Company until its business under the same was completed, which was not the case until October 27, 1908, and that plaintiff's rights were not affected by the foreclosure proceedings.

The finding that by his refusal to transfer said interest in the Vans Harbor Corporation on tender of \$6,000, and his subsequent sale thereof, defendant wrongfully converted said interest to his own use, and became liable for the resulting damage to plaintiff, which was the sum of \$4,000 and interest thereon at 6 per cent. from the time of demand, i. e., January 15, 1909, and costs.

A. L. Nash and L. J. Nash, both of Manitowoc, Wis., for plaintiff in error.

James G. Flanders, of Milwaukee, Wis., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). By the letter of January 9, 1907, defendant bound himself to assign to plaintiff, on tender of the \$6,000 due him, the interest of George and Frank J. Pankratz in the Vans Harbor Land & Lumber Company, as security for any loss the plaintiff might incur by reason of its contract with the George Pankratz Lumber Company. This latter contract contemplated the completion of its terms during the years 1906 and 1907. As a matter of fact, through no fault of the plaintiff, completion was not had until October 27, 1908, when a loss of over \$18,000 was ascertained. In the meantime, after repeated notices and demands that plaintiff elect, and after notice that steps would be taken to reduce its said \$6,000 lien to cash, defendant foreclosed the same in a proceeding to which plaintiff was made a party, and brought in by publication, but to which proceeding it made no defense. The decree of foreclosure provided that the defendants in said suit and all persons claiming under them should be forever barred and foreclosed from all right, title, interest, and equity of redemption in the mortgaged or pledged property, except the right of redemption before sale. Thereafter the property was sold pursuant to law to defendant for the amount of his demand, fixed at \$6,939.16.

This was the situation at the time of the tender by plaintiff. Was defendant required under his agreement with plaintiff to hold said interest in the Vans Harbor Land & Lumber Company subject to the right of plaintiff to elect whether to take it or not, after the year 1907 and until the final settlement of the affairs growing out of the Pankratz Lumber Company contract? And, if so, was the amount of loss definitely ascertained prior to about the time of the tender to defendant of the \$6,000?

[1] The agreement between defendant and plaintiff was in personam. Such an undertaking could not be affected in a foreclosure proceeding. Plaintiff had only defendant's agreement to assign his said pledge contract in case of its election to take. No interest in the defendant's pledge contract or in the subject-matter thereof passed to plaintiff under the contract granting it the option; therefore there was no right in rem of plaintiff to be foreclosed in defendant's foreclosure suit. As was said by the District Judge in his conclusions of law:

"The foreclosure cut off this (that of the Pankratz brothers) equity of redemption, but left the same kind and quality of title in defendant as he previously had."

So far as concerns plaintiff, this is unquestionably correct. Whether by proper proceedings defendant could have barred plaintiff from asserting any rights under his said undertaking of January 9, 1907, we need not here consider. At the time demand was made, all rights

of the Pankratzes, if any, had expired, and defendant was fully empowered to carry out its contract.

[2] Error is assigned upon the finding of the court that plaintiff's loss under the George Pankratz Company contract amounted to more than \$4,000. As a matter of fact, plaintiff claims that it exceeded \$18,000. A number of objections to the method followed in arriving at this sum were raised by defendant, especially to the interest items thereof. As will be seen from the statement of facts hereof, the District Court had before it evidence to support its finding, and this court will not attempt to weigh the evidence and unsettle that judgment. The same is true of the court's finding that the value of the interest in the Vans Harbor Company held by Fetzer and by him tendered to plaintiff in his letter of January 9, 1907, was \$10,000. The District Court might lawfully make that finding upon the evidence before it, and we may not, under the facts of this case, go back of its judgment. The amount received by defendant on his subsequent sale of said one-fifth interest to Lowe cannot be taken as fixing the value of said interest.

[3] It was held by the District Court that the amount of plaintiff's damages in the case should be the difference between the \$6,000 secured as above to defendant and the value of that security, i. e., \$10,000. This difference of \$4,000, it gave judgment for, together with interest thereon from the date of the tender by plaintiff and costs. As we look at the matter, plaintiff was entitled to have the security contract turned over to himself on demand and tender of the \$6,000. That being so, and defendant, having wrongfully refused to make the \$6,000 and assign the contract as he should have done under his agreement, was liable to plaintiff for its damages thereby sustained, viz., the sum of \$4,000, and no reason is apparent why he should not be charged with interest from the date of tender and demand, viz., January 15, 1909.

[4] It must be borne in mind that defendant's security contract did not call for stock, but for a one-fifth interest in the Vans Harbor Land & Lumber Company. Manifestly, its market value could be arrived at only by ascertaining what property it represented. We think that the method pursued by the District Court in arriving at its value was the correct method under the circumstances. *Murray v. Stanton*, 99 Mass. 348; *Ruppel v. Adrian Furniture Co.*, 96 Mich. 455, 456, 55 N. W. 995; *Feige v. Burt*, 124 Mich. 565-568, 83 N. W. 367.

Numerous errors are assigned to the method pursued in regard to the taking of testimony. On the whole record, we think that sufficient evidence was properly admitted to justify the District Court in rendering its judgment, and that substantial justice has been done.

We find no reversible error in the judgment of the District Court, and it is therefore affirmed.

In re BLUM.

BLUM v. HOUSER.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1913.)

No. 1,898.

1. BANKRUPTCY (§ 224*)—PROPERTY CLAIMED BY THIRD PERSON—"COLORABLE."

The term "colorable," as used in the rule that a referee in bankruptcy has jurisdiction in summary proceedings to determine the validity of a claim by a third person of property alleged to belong to the bankrupt when it appears that the claim of such third person is merely colorable, means that the claim is made by one holding the property as agent or bailee of the bankrupt, and does not apply where the claimant sets up as facts, and not as conclusions of law, matters which, if true, would constitute a statement of an adverse claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 383; Dec. Dig. § 224.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1262, 1263.]

2. BANKRUPTCY (§ 224*)—PROPERTY OF BANKRUPT—ADVERSE CLAIM—JURISDICTION—PLENARY SUIT.

Where, in reply to an order to show cause why a bankrupt's wife should not turn over to the trustee \$3,000, alleged to belong to the bankrupt's estate, she alleged that she had owned the money in her own right since the spring and summer of 1910, and that she had loaned it to her son-in-law on a chattel mortgage, who repaid the money May 16, 1911, and denied the referee's jurisdiction to determine the claim, it did not appear that her claim was merely colorable; and hence she was entitled at her election, to a determination thereof in a plenary suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 383; Dec. Dig. § 224.*]

Petition to review in matter of law an order of the District Court for the Western District of Wisconsin; Arthur L. Sanborn, Judge.

In the matter of bankruptcy proceedings of David Blum. Summary proceedings by Walter L. Houser, trustee of the bankrupt's estate, against Nettie Levy Blum to recover certain money alleged to belong to the estate. An order was entered requiring her to turn over the money to the trustee, and she petitions for review. Reversed, with directions.

David Blum was declared a bankrupt on April 12, 1911. Thereafter the referee entered an order upon him and his wife, Nettie Levy Blum, to show cause why they should not turn over to the trustee a certain sum of money amounting to about \$3,000, which it was alleged Nettie Levy Blum had in her possession, belonging to her husband, David Blum. She answered the rule, setting up that she had owned the money since the spring and summer of 1910; that she had loaned it to her son-in-law, Joseph Schwartz, and had taken a chattel mortgage upon a certain moving picture business located in Milwaukee, Wis., to secure the same; that thereafter, and on May 16, 1911, Schwartz repaid the same. She denied the jurisdiction of the referee and of the court on the ground that she was an adverse claimant and was entitled to have her claim adjudicated in a plenary suit. The referee retained jurisdiction, entered a restraining order, and ordered that she turn the money over to the trustee—which order was duly confirmed by the District Court. Thereupon she filed her petition for a review, assigning as grounds therefor that the money was her own, and that, under the facts of the case, neither

For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index

the District Court nor the referee had jurisdiction to enter a summary order requiring her to turn the same over to the trustee.

Aaron Heims, of Chicago, Ill., and John M. Olin and H. L. Butler, both of Madison, Wis., for petitioner.

S. T. Swansen, T. C. Richmond, and R. W. Jackman, all of Madison, Wis., for respondent.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The only question presented is whether petitioner's answer sets up an adverse claim within the meaning of the bankruptcy act. If it does, then petitioner is entitled to have it adjudicated in a plenary suit.

The hearing before the referee seems to have proceeded upon the theory that the referee might inquire into all the facts attending the acquirement of the money by the petitioner and then determine from the evidence whether the claim of title was merely colorable or was adverse, and proceed accordingly. The referee found that petitioner's claim was fraudulent, and, at most, colorable, and not adverse, thus determining that the evidence given by petitioner, her husband, her son-in-law, and others was false.

On a petition to review, this court can pass only upon errors of law. We are therefore limited to the inquiry as to whether the conclusions of law of the referee and the District Court are sustained by their conclusions of fact, or whether, when petitioner set up in her answer that she was in possession of and claimed as her own the said money, she did not in fact state a case which ousted the summary jurisdiction of the court. This involves a disposition of the proposition whether the referee is vested by the statute with power in a summary proceeding to weigh the evidence and pass upon contested matters of fact in order to determine—not whether petitioner claimed to hold adverse title to the money as being her own, but whether the evidence she offered as to her title thereto was worthy of credence.

[1] The term "colorable" seems to have crept into the bankruptcy decisions without authority of statute, unless it be construed to mean merely that if a respondent sets up as facts, and not as conclusions of law, matters which, if true, would constitute a statement of an adverse claim, then the claim would be adverse and not colorable, and not within the jurisdiction of the referee. It can hardly have been the purpose of Congress to deprive a litigant of the benefit of a plenary hearing in cases involving the determination of contested questions of fact. Undoubtedly, one holding property of the bankrupt as an agent or bailee may be required summarily to turn it over to the trustee, and, in a proper case, to a receiver; but we are of the opinion that, whenever the facts alleged on their face disclose possession and a legal right in the party claiming title, the referee has no jurisdiction in a summary proceeding to require the property to be turned over without the consent of the respondent. The decisions which hold it to be the duty of the referee to determine whether a claim is colorable or adverse, and, if colorable only, to proceed to deal with it in a summary way, seem to be predicated mainly upon the language of the Su-

preme Court in *Mueller v. Nugent*, 184 U. S. 1, wherein, on page 15 (22 Sup. Ct. 269, on page 275 [46 L. Ed. 405]), the court says:

"But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court had the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction, while its conclusion might have been that an adverse claim, not merely colorable, but real, though fraudulent and voidable, existed in fact, and so that it must decline to finally adjudicate on the merits. If it erred in its ruling either way, its action would be subject to review."

[2] It will be readily seen that unless the term "colorable," as here used, is construed as above, an endless inquiry would be opened up. The term itself is indefinite, varying with the standpoint from which it is approached. It appears from the opinion in *Mueller v. Nugent* that the referee found that the money was held by the respondent as agent for the bankrupt. No claim of adverse title was set up until after the matter was decided. The District Court held that the motion for leave to amend setting up respondent's claim to be the owner of the money and, consequently, an adverse claim, came too late. Up to that time respondent's defense had rested upon the ground that he had not received the money or any part of it after the petition in bankruptcy was filed. No objection was made before the referee or the district judge to the authority of the referee as such to entertain those proceedings. These facts were found by the court.

"The position now taken," says the court at page 15 of 184 U. S., at page 275 of 22 Sup. Ct. (46 L. Ed. 405), "amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact, and therefore an adverse claim when the petition was filed, and to that we cannot give our assent."

The Supreme Court, further says:

"In this case, however, respondent asserted no right or title to the property before the referee, and the circumstances under which he held possession must be accepted as found by the referee and the district court."

The court then cites *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, and *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, in support of the proposition above stated.

It will be observed that the question here involved was not then before the court. We see nothing in the opinion, however, which conflicts with our construction of the term "colorable."

In the case of *Louisville Trust Co. v. Comingor*, 184 U. S. 19, 22 Sup. Ct. 293, 46 L. Ed. 413, it appears that Simonson and others, co-partners, made an assignment to Comingor for the benefit of their creditors, in accordance with the statute of Kentucky. Shortly thereafter, Comingor brought suit involving the administration and settlement of the estate in the Circuit Court, as he was by said statute authorized to do. Some time after the assignment, an involuntary proceeding in bankruptcy was filed against Simonson and others, partners, etc., setting up the assignment as ground therefor. In due time they

were adjudicated bankrupts. Comingor was made a defendant to the petition in bankruptcy, but no relief was asked against him, and he moved to be dismissed out of the proceedings. No action was taken on that motion. Later, the District Court enjoined him from proceeding further with reference to the bankrupt's estate. Later, without notice, the referee directed him to file a statement covering the bankrupt's estate, which he did. Thereupon, a receiver was appointed, and he was ordered to apply to the Circuit Court for the whole of the fund in that court. This the Circuit Court declined to consent to. Thereafter, a trustee was chosen and directed to take steps to become a defendant to the Circuit Court proceeding, and to procure possession of the fund. This was done, and the fund turned over. Comingor was then ordered by the referee to show cause why he should not be required to pay over funds retained by him. He responded that he had kept some \$6,598.90 and applied same on his attorney's fees and commissions as assignee. This sum the referee ordered to be paid over. On review by the District Court, the referee was ordered to take account of character and value of the services and outlays of Comingor and his lawyers. Thereupon Comingor tendered an amended answer setting up want of jurisdiction over either the person or subject-matter. This answer was rejected by the referee, and later by the court. The referee reported that neither the receiver nor his attorneys had rendered any services of value to the creditors. The District Court confirmed the referee's report, and held that Comingor had acquiesced in the jurisdiction of the court and dismissed the petition for review, and ordered the money paid over. The Court of Appeals reversed the case. Certiorari was granted, and the Supreme Court held (184 U. S. at pages 24, 25, 22 Sup. Ct. at page 296 [46 L. Ed. 413]) that, on the face of his responses, Comingor had set up an adverse claim, and that the case came within *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, and that the question involved—

"could only be raised in the District Court by consent, and then only by a plenary suit. * * * We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of the law in defense of their rights"—citing *Marshall v. Knox*, 16 Wall. 556, 21 L. Ed. 481, and *Smith v. Mason*, 14 Wall. 419, 20 L. Ed. 748.

Further on in its opinion the court holds that Comingor did not consent to the jurisdiction of the court, and affirmed the Circuit Court of Appeals in reversing the District Court.

In *Whitney v. Wenman*, 198 U. S. 552, 25 Sup. Ct. 781, 49 L. Ed. 1157, Mr. Justice Day says:

"We think * * * that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same, and the extent and character of liens thereon or rights therein, and citing a number of cases."

In *First National Bank v. Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, it was held that, the court having

found that it was not in possession of the property, the jurisdiction of the District Court did not attach.

In *Johnston v. Spencer*, 195 Fed. 215, at page 219, 115 C. C. A. 167, at page 171, the Court of Appeals for the Eighth Circuit, after reviewing a number of cases, says:

"According to these controlling decisions, the possession of property of the bankrupt at the time of the institution of the proceedings in bankruptcy is a necessary condition to jurisdiction in the Circuit Court to determine the rights of third parties to it, except when such jurisdiction is invoked by their consent. The possession may be in the bankrupt himself or by some one for him as his agent or bailee"—citing *Mueller v. Nugent*, supra.

We are advised of no Supreme Court decision which recognizes jurisdiction of the District Court to deal summarily with the rights of one in possession and claiming title to property, as here, even though there be grave suspicions as to the bona fides of the claim. This holding we believe to be not in conflict with the language of the Supreme Court in *Sharpe v. Doyle*, 102 U. S. 686, 689, and 690 (26 L. Ed. 277), approved by the court in *Bryan v. Bernheimer*, 181 U. S. 188—196, 21 Sup. Ct. 557, 560 (45 L. Ed. 814), viz.:

It is made "his [the officer's] duty to collect and hold possession until the assignee is appointed or the property is released by some order of the court and he could ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee when appointed, as a sufficient reason for failing to take possession of it."

We believe the true rule to be as above stated, viz., that where a party in possession sets out in his answer facts which, if true, would constitute an adverse title, the court may not in a summary proceeding, and against his protest, dispose of his rights in property. It therefore follows in the present case that petitioner was entitled to have her claim adjudicated in a plenary suit. The decree of the District Court must be reversed, with direction to vacate the same and release further jurisdiction of the summary proceeding.

Reversed.

LOUISVILLE & N. R. CO. v. WENE.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1913.)

No. 1,914.

1. MASTER AND SERVANT (§ 228*)—DEATH OF SERVANT—RAILROADS—EMPLOYER'S LIABILITY ACT—CONTRIBUTORY NEGLIGENCE.

Under Federal Employer's Liability Act, April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), providing that contributory negligence shall not bar recovery, but shall be considered in abatement of recovery in accordance with the degree thereof, the fact that an employé's negligence is equal to or greater than that of the railroad company will not bar a recovery of any damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 247*)—DEATH OF SERVANT—PROXIMATE CAUSE.

Decedent, a conductor of a freight train, whose duty it was to take a switch and see that the switch was closed after his train in order that a following passenger train might pass, left the duty of closing the switch to his rear flagman, who failed to do so. As the passenger train approached, however, the engineer, if he had looked, could have discovered that the switch was open a distance amply sufficient to have enabled him to stop the train, but he failed to discover the open switch until after he had run into it, when he collided with the freight train, and caused decedent's death. *Held*, that the engineer's negligence in failing to discover the open switch, and not the negligence of decedent, was the proximate cause of his death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795-800; Dec. Dig. § 247.*]

3. NEGLIGENCE (§ 101*)—DEATH OF SERVANT—RAILROADS—EMPLOYER'S LIABILITY ACT—CONTRIBUTORY NEGLIGENCE—DEGREE—ABATEMENT OF DAMAGES.

Where, in an action for death of a railroad freight conductor in a collision with a following passenger train on a switch under Federal Employer's Liability Act, April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), providing that contributory negligence shall not be a defense, but may be considered in reduction of damages, it appeared that decedent was negligent in failing to see that the switch was closed after his train had passed thereon, while the engineer of the following train was also negligent in failing to discover that the switch was open in time to have stopped his train, the court properly charged that decedent was guilty of contributory negligence, and that, after the jury had found the amount of damages to which the decedent's next of kin would be entitled in the absence of decedent's contributory negligence, they should abate that sum by the amount they should find represented decedent's proportionate contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164; Dec. Dig. § 101.*]

In Error to the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Action by Mattie I. Wene, as administratrix of the estate of William Wene, deceased, against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On October 8, 1908, at about 4:40 o'clock p. m., the decedent of defendant in error (the latter being herein termed "plaintiff") was killed at Mt. Vernon, Ill., by the collision of passenger train No. 52 of plaintiff in error (herein entitled "defendant") with its freight train known as No. 72 of which the plaintiff's decedent was conductor, while the freight train was standing upon a side track, under the following circumstances: The freight train, under the care of plaintiff's decedent, was run onto the switch track in order to permit No. 52 to pass upon the main track. Rule 117 of defendant railroad reads:

"Conductors will be held responsible for the proper adjustment of the switches used by them and their trainmen, except where switch tenders are stationed. Whoever opens a switch shall remain at it until it is closed, unless relieved by some other competent employé."

Under said rules of the company, the decedent, as conductor of No. 72, was required to close the switch leading onto the side track, or to see that it was closed. For some reason, the switch was not closed. While the conductor of No. 72 was in general charge of the closing of the switch, yet the duty nevertheless immediately devolved upon the rear flagman of No. 72; he being under the direction of the conductor. Both of these, together with

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the brakeman and other train porters, receive their instructions from the master of trains. Each and all of these were hired by the company, and were charged with the duty of looking out for the safety of trains and their contents, without regard to the special duty cast on the conductors and others in express language; so that, at the time of the accident, the decedent left the duty of closing the switch to the rear flagman, as was usual, while he was himself engaged on other train duties.

Shortly after the freight train No. 72 had come to rest, at a distance of about 235 feet beyond the switch, and while decedent was seated within the caboose, at the rear of No. 72, train No. 52 came along at the rate of 18 or 20 miles an hour. At that time the switch was open, and that fact would have been apparent to the engineer of No. 52, if he had been on the lookout, at a distance of 850 feet back from the switch. The evening was "bright and beautiful." The switch target or semaphore showed red, and indicated plainly that the switch was open; the track being straight.

Both trains were within the limits of said city of Mt. Vernon. By ordinance, the city had provided that no train should pass through the city at a speed greater than ten miles per hour. The train No. 52 was coming up a quite heavy grade. Its engineer appeared to be looking straight up the track and paid no attention to the signals at the switch. At no time was the steam cut off, until the engine and train had taken the switch, run on the siding, and struck the caboose. Plaintiff's decedent was almost immediately killed. There is evidence to show that the engineer of No. 52 could have seen the switch itself at a distance of 200 feet, without looking at the signals.

Letters of administration were duly granted to plaintiff, who brought suit in the superior court of Vanderburgh county, Ind., on October 19, 1909, for \$10,000. The complaint sets out the above facts substantially, that decedent was aged 42 years at the time of his death, and that he left him surviving a widow and four children, all dependent upon him, and charges that decedent's death was caused by the negligence of the flagman of train No. 72 in failing to close said switch, and that of the engineer of train No. 52 in failing to obey the switch signal and said speed ordinance. It further sets out that defendant was at the time of the accident, and is, a common carrier, and subject to the provisions of the act of Congress entitled "An act relating to the liability of common carriers by railroads to their employes in certain cases," approved and in full force April 22, 1908.

Afterwards such proceedings were had that said cause was removed to the Circuit Court of the United States, and amended in matters not here important. Defendant filed the general issue and a plea setting up the two-year limitation act provided in cases of this character. A trial was had before a jury. At the close of all the evidence, defendant moved the court to instruct the jury to find for the defendant, which motion was denied. Defendant thereupon moved the court to instruct the jury that if they found from the evidence that it was the duty of plaintiff's decedent to close the switch, and that he, knowing it to be his duty, failed to close it, such failure was the proximate cause of his death, and in such case plaintiff could not recover. It also asked the court to instruct the jury that if both defendant and plaintiff's decedent were found, from the evidence, to be guilty of negligence which caused the death, they "should consider the proportion in which William Wene and the railroad company were negligent, and assess the damages as above stated. But if you find that the contributory negligence of William Wene was equal to or greater than the negligence of the railroad company in producing his injuries, then, and in that event, your verdict cannot be more than nominal damages for the plaintiff." All of which motions were denied.

The court then instructed the jury that they were the sole judges of the facts, and were not to be swayed by his opinion of the evidence; that in his opinion the evidence established the negligence of the defendant, and the contributory negligence of decedent; that decedent and the flagman and the engineer of No. 52 were all negligent, and thereupon read to them the statute in such case provided, which reads:

"Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative for the benefit of the surviving widow or husband and children of such employé, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier. * * * That in all actions hereafter brought against any such common carrier by railroad, under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé."

The court further said to the jury:

"The fact is that Wene was guilty of contributory negligence. In other words, it was his duty to see to it that the switch was closed, and inasmuch as he did not see to it, and that fact contributed to his death, he was guilty of contributory negligence. In that case you shall not find a verdict for the defendant, but the damages which you shall determine is the amount of loss to the personal representative for the benefit of the surviving widow and children diminished by you, lessened by you, in proportion to the amount of negligence attributable to such employé. * * * You should determine what amount will compensate this widow and children for this loss; that is to say, pecuniarily compensate the widow and children for their loss. Having determined what amount will compensate them, you will then take into consideration this question of comparative negligence and reduce it."

Thereupon a verdict was rendered for \$7,500, upon which judgment was entered, and this writ of error sued out. The errors assigned are:

That the court erred in not taking the case from the jury at the close of all the evidence.

That the court erred in refusing to instruct the jury that if they found from the preponderance of the evidence that by the rule of the company it was the duty of decedent to see to the closing of the switch, that he knew that fact and failed to obey the rule, and his failure to obey was the proximate cause of his own death, plaintiff could not recover.

That the court erred in refusing to instruct the jury that if they found the defendant guilty and also found plaintiff guilty of contributory negligence, and should find that the contributory negligence of plaintiff was equal to or greater than the negligence of defendant in the premises, then they should render a verdict for only nominal damages.

That the court erred in instructing the jury that they might, if they found defendant guilty, assess the amount which the evidence showed the widow and children had sustained, and then diminish that amount in proportion to the amount of negligence attributable to such decedent; that is, having ascertained the damages, then take into consideration the question of comparative negligence, if any, and reduce the amount of damages accordingly.

That the court erred in refusing to instruct the jury that leaving the switch open was the proximate cause of the injury, and that, decedent being responsible therefor, no recovery could be had. Further facts are set out in the opinion.

Philip W. Frey and George R. De Bruler, both of Evansville, Ind., for plaintiff in error.

Frank H. Hatfield, of Evansville, Ind., G. Gale Gilbert, of Chicago, Ill., G. V. Menzies, of Mt. Vernon, Ind., and J. R. Brill, of Evansville, Ind., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] It is conceded that defendant was engaged in interstate commerce and subject to the provisions of the so-called Federal Employer's Liability Act of April 22, 1908.

In its brief, at page 19, defendant says:

"The question at bar raised by the various assignments of error may with propriety be grouped into almost a single legal question, although presented in different forms. Can a plaintiff injured, being himself the offending and negligent factor, his negligence being the proximate cause of the injury, recover against his master for his injury? Or, stating the proposition more favorably to the defendant in error, where, under the Federal Employer's Liability Act * * * an employé is injured through his own negligence and that of the railroad company, his employer, and where the negligence of the employé is equal to or greater than that of the railroad company, may the employé under said act recover at all?"

[2] The material evidentiary facts are not contested. By the foregoing, it will be seen that defendant insists that these show the proximate cause of the accident to have been the open switch. Yet this would have been innocuous had the defendant's engineer observed the signal at the switch. On an upgrade, and even while running at a speed of 18 or 20 miles an hour under a city ordinance which limited the train's speed to 10 miles an hour, there can be no question of the engineer's ability, in the exercise of reasonable diligence, to have stopped his train between the point in the track from which the open switch signal became observable (and when he was in duty bound, under the circumstances of the occasion, to have seen it) and the switch. Clearly, the engineer's negligence was later and quite as apparent as was the decedent's.

In *Pittsburgh, etc., Co. v. Sudhoff*, 173 Ind. 314, 90 N. E. 467, under substantially the same state of facts as here, it was held that the act of a brakeman in failing to close the switch could not be held to be the proximate cause, while it has been held in a number of cases that where the facts relating to proximate cause are undisputed and but one conclusion can be deduced therefrom, that question becomes a matter of law to be determined by the court. *Pittsburgh, etc., Co. v. Sudhoff*, supra, and cases cited. We do not, however, consider that rule of law controlling here.

[3] The court by its instruction held that the evidence showed that the defendant was guilty of negligence, which made it liable for damages to the next of kin for causing decedent's death. In this the jury concurred. It also held, the jury concurring, that decedent was guilty of contributory negligence, and the court thereupon held that, to the degree in which such contributory negligence contributed to the injury, the liability of defendant should be abated. Thus the amount of damages to the next of kin, for which defendant should be held in the first instance, and the amount thereof which should be abated by reason of decedent's contributory negligence, were the only matters left for the jury to pass upon. The question as submitted was not as to the proximate cause, but as to the degree of negligence of the respective parties. Manifestly, to give effect to the act, it is essential that the relative amounts of damages caused by the negligence of the

respective parties should be declared, and we know of no fairer method than that followed by the trial judge in this case.

We said, in *Grand Trunk Western Railway Co. v. Lindsay*, 201 Fed. 836, handed down at the present term of the court:

"If, under the Employer's Liability Act, plaintiff's negligence contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted in whole or in part from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act."

That he was not required to and did not instruct as to proximate cause, did not work any injury to defendant, as we read the undisputed evidence; and the errors based upon that point are held to be not well assigned. The construction of this act asked for by defendant, viz., that, if the jury should find from the evidence that the negligence of plaintiff equaled or exceeded that of defendant, then they could assess no damages against defendant, is not deemed by us to be the proper construction of the act. While the question is one of first impression, we are satisfied that the construction placed on the act by the trial court was the proper one. It accords with the remedial spirit of the act. The jury, having found that plaintiff was guilty of contributory negligence, were at liberty, within the evidence, to find that the contributory negligence contributed any proportion of the damages, even to substantially all thereof, if justified by the evidence. In the present case they rendered a verdict for \$2,500 less than the maximum statutory amount, and that action may well imply that they made due allowance for any offset defendant was entitled to by reason of decedent's contributory negligence. Whether the deduction shall be made from the damages actually sustained in case they are found to exceed the statutory limit of recovery, or from the statutory maximum limit of recovery, is a question that is not presented in this record.

We discover no error in the instructions or other matters set out in the assignments of error, and the judgment of the District Court is affirmed.

CITIZENS' BANKING CO. v. RAVENNA NAT. BANK et al.

FIRST NAT. BANK OF FREMONT v. SAME.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1912.)

Nos. 2,193, 2,194.

BANKRUPTCY (§ 59*)—ACTS OF BANKRUPT.

Whether merely permitting an execution levy on real estate to remain undisturbed for 3 months and 29 days is an act of bankruptcy, *quære*.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 81, 82; Dec. Dig. § 59.*]

Appeals from the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

In the matter of bankruptcy proceedings of Cora M. Curtis. The Ravenna National Bank having filed a petition in bankruptcy against the alleged bankrupt, she answered, admitting that she was insolvent, and that she was willing to be adjudged a bankrupt on the ground afforded by her answer, but while her previous demurrer was pending the First National Bank of Fremont, one of the preferred creditors, excepted and demurred to the petition and the Citizens' Banking Company, another preferred creditor, though in default, tendered for filing an answer denying that the bankrupt had committed any act of bankruptcy. From an order of adjudication the First National Bank of Fremont and the Citizens' Banking Company prosecute separate appeals. Case certified to Supreme Court for the determination of certified questions.

G. R. Craig, of Norwalk, Ohio, and E. R. Rhoades, Jr., of Toledo, Ohio, for appellants.

J. W. Schaufelberger, of Toledo, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. In these cases the controlling question seems to be whether Cora M. Curtis, the alleged bankrupt, committed an act of bankruptcy under the provisions of section 3a(3) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), in that a creditor obtained a judgment and execution and levied upon her real estate, and in that for a period of three months and 29 days Mrs. Curtis did nothing. More specifically, the question is whether the fact that an execution levy will or may, upon the expiration of four months from its date, ripen into a lien unassailable in bankruptcy proceedings resting upon a petition filed after the expiration of such four months, constitutes a "final disposition" of the property within the meaning of this section.

On the one hand, it is argued that, to the extent of the lien, an interest in the property is "finally" fixed, as against a subsequent trustee in bankruptcy, and that any construction of this section which would permit such liens to become thus fixed would tend to defeat the full accomplishment of the general intent to put upon the same plane all creditors of insolvents, which general intent is clearly manifested by other portions of the act. It is said, also, that the reported decisions tend to the effect that this situation does create an act of bankruptcy. *Re Tupper* (D. C.) 163 Fed. 766; *Re Putman* (D. C.) 193 Fed. 464; s. c. on appeal, 194 Fed. 793, 114 C. C. A. 513; but see *Re Vetterman* (D. C.) 135 Fed. 443; *Re Windt* (D. C.) 177 Fed. 584; *Re Crafts-Riordon Shoe Co.* (D. C.) 185 Fed. 931.

On the other hand, the argument runs as follows: The mere fact that a lien upon the property becomes so fixed as to be unassailable by a subsequent bankruptcy trustee does not from all points of view amount to a "final disposition" of the property by the execution debtor. The property still remains hers, subject to be sold or otherwise finally

disposed of by her, with due regard to the existence of the lien. Indeed, the continued existence of the lien is uncertain as against the debtor, for the judgment may be set aside upon motion for a new trial or by a reviewing court. So, too, the section covers attachment liens as well as execution liens (*Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122), and attachment liens are often, if not usually, subject for a much longer period than four months to defeasance by the ordinary incidents of procedure, as by a motion to dissolve, or by a failure by the plaintiff to recover judgment. How, then, counsel argue, can it be said that the undisturbed existence of an attachment lien for four months has accomplished a "final disposition" of the property? It is further urged that it seems to be a substantial theory of the present bankruptcy law, differing in this particular from the law of 1867, that an insolvent person should not be, against his will, forced into bankruptcy merely because he does not pay his debts, and that there seems to be in the new law an underlying intent that mere non-payment shall not be an act of bankruptcy; but if, however, an execution is issued and levied on the property of an insolvent person and the indebtedness is admitted or established, there is, outside of the bankruptcy law no possible way for the debtor to "vacate or discharge" the levy, except by payment, and he is, although hopeful for the future, wholly unable at present to pay, and he cannot in any way vacate the levy, except by filing a voluntary petition in bankruptcy. In other words, only by filing the voluntary petition and committing an act of bankruptcy can he avoid becoming subject to adjudication as a bankrupt under this section; or, in still other words, the only way to avoid committing an act of bankruptcy is to commit one. Counsel concede that this seeming anomaly does arise five days before the execution sale under a judgment voluntarily confessed (*Wilson v. Nelson*, 183 U. S. 191, 198, 22 Sup. Ct. 74, 46 L. Ed. 147), but say that this arises from the necessity of the very words of the statute, and that in such case the debtor has enjoyed the full term of grace extended by the law, as he had in *Bogen v. Protter*, 129 Fed. 533, 64 C. C. A. 63.

The petition does not attempt to state a case under section 3a(1), so that we cannot consider any question of actual intent to "hinder, delay or defraud," or whether the facts stated would justify inferring such intent.

Balancing these recited, as well as other considerations bearing upon the correct interpretation of this statute, we find ourselves unable to reach a satisfactory conclusion, and we have accordingly decided to certify the question to the Supreme Court. These two cases involve the same point, and one will be certified while the other remains pending in this court. The certificate will be as follows:

On the hearing of this cause, questions arose for the proper decision of which this court desires the instruction of the Supreme Court. The facts upon which the questions arise are as follows:

August 10, 1908, the Ravenna National Bank filed in the United States District Court for the Northern District of Ohio its petition in bankruptcy against Cora M. Curtis. The petition included every allegation necessary to require an adjudication of bankruptcy, unless upon

the point whether the defendant had committed an act of bankruptcy, and upon this subject its sole allegation was as follows:

"That the said Cora M. Curtis is insolvent, and that within four months next preceding the date of this petition she committed the following acts of bankruptcy, to wit:

"(a) On April 9, 1908, the respondent suffered and permitted the Citizens' Bank of Norwalk, Ohio, to recover a judgment against her for \$1,598.78 and costs by the consideration of the common pleas court of Erie county, Ohio. That on April 9, 1908, execution was issued and levied on the real estate owned by respondent in Norwalk, Ohio. That subsequently said execution was levied on the real estate of respondent in Toledo, Ohio.

"(b) That on or subsequent to April 9, 1908, the respondent suffered and permitted the First National Bank of Fremont, Ohio, to recover a judgment against her for \$3,034.66 and costs, by the consideration of the same court. That on April 11, 1908, an execution was issued thereon and levied on the real property of respondent which was situated in Norwalk, Ohio. That shortly thereafter an execution on said judgment was levied on the real property of respondent which is situated in Toledo, Ohio.

"(c) That the said respondent suffered the Huron County Banking Company, of Norwalk, Ohio, to recover a judgment against her for \$3,878.12 and costs, by the consideration of the same court, said judgment having been rendered subsequent to April 9, 1908. That on April 16, 1908, an execution on said judgment was duly issued and levied on the real estate of respondent. That by the acts of bankruptcy aforesaid the respondent suffered and permitted the three judgment creditors above mentioned to obtain preferences. That respondent has not, at any time, vacated or discharged said preferences or any part thereof."

To this petition respondent demurred, but later withdrew her demurrer and filed an answer admitting that she was insolvent at the time of filing the petition and stating her willingness to be adjudged a bankrupt "on the ground afforded by this answer." While her demurrer was pending, the First National Bank, of Fremont, one of the alleged preferred creditors, filed its paper, saying that it—

"herewith excepts and demurs to the petition filed herein, for the reason that the same is wholly insufficient in law, and that the same discloses no act of bankruptcy committed by the said respondent."

During the same time the Citizens' Banking Company, another alleged preferred creditor, being in default, tendered, for filing, its answer, in which it alleged the rendition of its judgment as stated in the petition, and that the judgment was in full force and wholly unsatisfied, and denied that the respondent, Cora M. Curtis had committed any act of bankruptcy, and averred that the petition disclosed no act of bankruptcy committed by the respondent.

No other interested person appearing, the matter came on to be heard on the pleadings, and the District Court, being of the opinion that the petition alleged an act of bankruptcy not denied by the answer tendered, overruled the demurrer, refused to permit the answer to be filed, and made the usual order of adjudication in bankruptcy. From this order the First National Bank of Fremont and the Citizens' Banking Company appealed to the Circuit Court of Appeals.

Upon the facts above set forth, the questions of law concerning which this court desires the instructions of the Supreme Court are as follows:

(1) Whether the failure by an insolvent judgment debtor, and for a period of one day less than four months after the levy of an execu-

tion upon his real estate, to vacate or discharge such levy, is a "final disposition of the property" affected by the levy, under the provisions of section 3a(3) of the Bankruptcy Act of 1898.

(2) Whether an insolvent debtor commits an act of bankruptcy, rendering him subject to involuntary adjudication as a bankrupt under the Bankruptcy Act of 1898, merely by inaction for the period of four months after the levy of an execution upon his real estate.

In accordance with the provisions of section 239 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [U. S. Comp. St. Supp. 1911, p. 228]) the foregoing questions of law are, by the Circuit Court of Appeals of the United States, Sixth Circuit, hereby certified to the Supreme Court.

In re WITHERSEE.

IN re UNITED WIRELESS TELEGRAPH CO.

(Circuit Court of Appeals, First Circuit. March, 1912.)

No. 1,008.

BANKRUPTCY (§ 444*)—PROCEEDINGS—REVIEW—PETITION.

A petition to revise authorized by Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), failing to allege that the error complained of was "in matter of law" or to assign any specific errors of law, is insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920-927; Dec. Dig. § 444.*]

2. **BANKRUPTCY (§ 439*)—PETITION TO REVISE—DISPUTED QUESTIONS OF FACT.**
Disputed questions of fact cannot be reviewed on a petition to revise authorized by Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 439.*]

3. **BANKRUPTCY (§ 439*)—REVIEW—PETITION TO REVISE—SCOPE OF REVIEW—DIRECTIONS TO TRUSTEES.**

Under a petition to revise authorized by Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), the Court of Appeals is limited to a review in matter of law of questions of law arising out of the facts found or conceded, and hence in such a proceeding could not make further orders requiring the trustees in bankruptcy to do particular things.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 439.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

4. **BANKRUPTCY (§ 269*)—CORPORATIONS—RIGHTS OF STOCKHOLDERS.**

A stockholder of a bankrupt corporation has no standing for that reason in a bankruptcy case, nor right to require the trustees to answer his petition to set aside a sale to a reorganization committee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 370; Dec. Dig. § 269.*]

5. **BANKRUPTCY (§ 261*)—CORPORATIONS—SALE OF ASSETS—NOTICE TO STOCKHOLDERS.**

Since trustees in bankruptcy of a corporation held its assets for creditors or after payment of debts for the corporation itself, stockholders

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were not entitled to notice of a proposed sale of its assets by the trustees to a reorganization committee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 361, 362; Dec. Dig. § 261.*]

6. BANKRUPTCY (§ 100*)—ADJUDICATION—INSOLVENCY

While a bankruptcy adjudication of a corporation remains in force, the corporation must be regarded as insolvent for all purposes of the bankruptcy administration, whatever the value of its assets or the amount of its liabilities.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141-144; Dec. Dig. § 100.*]

7. BANKRUPTCY (§ 88*)—CORPORATIONS—SURPLUS—STOCKHOLDERS.

An assumption that a corporation, the assets of which are being administered in bankruptcy, is not insolvent, and that there will be a surplus, does not make a stockholder a proper party to the bankruptcy case.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 58, 98-112; Dec. Dig. § 88.*]

8. CORPORATIONS (§ 398*)—ABILITY TO ACT—BANKRUPTCY PROCEEDINGS—INCARCERATION OF OFFICERS.

No inability of a corporation to act for itself could be implied from the fact that its executive officers were in prison under conviction for using criminal methods in the sale of corporate stock to the public.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1592-1594; Dec. Dig. § 398.*]

9. BANKRUPTCY (§ 268*)—CORPORATIONS—SALE OF ASSETS—REORGANIZATION COMMITTEE—CONTROL.

Where the trustees in bankruptcy of a corporation sold its assets to a reorganization committee, the court in a bankruptcy proceeding had no jurisdiction to control such committee or regulate the rights to be given to the stockholders of the bankrupt company on reorganization.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372-379; Dec. Dig. § 268.*]

10. BANKRUPTCY (§ 447*)—REVISION—SUBMISSION—DETERMINATION OF CAUSE—WITHDRAWAL OF PETITION TO REVISE.

A petition to revise having been argued and submitted by both parties, petitioner moved to withdraw his petition, to which the bankrupt's trustees objected, and, this being denied, petitioner filed its consent that the petition to revise be dismissed. *Held*, that the filing of such consent did not deprive the trustees of a right to a decision on the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 930; Dec. Dig. § 447.*]

Petition to Revise Order of the District Court of the United States for the District of Maine; Clarence Hale, Judge.

In the matter of bankruptcy proceedings of the United Wireless Telegraph Company. On petition by Joseph V. Witherbee to revise an order confirming a sale of certain of the bankrupt's assets to a reorganization committee. Affirmed.

Howard H. Williams, of New York City, for petitioner.

Albert S. Woodman, Robert T. Whitehouse, and Woodman & Whitehouse, all of Portland, Me., for respondent.

Before DODGE, Circuit Judge, and ALDRICH and BROWN, District Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
202 F.—57

DODGE, Circuit Judge. This purports to be a petition under section 24b of the Bankruptcy Act to revise an order made October 12, 1912, by the District Court in Maine, in a bankruptcy case pending before it.

[1] The order was that a petition filed in the case by this petitioner on May 22, 1912, be denied. The present petition alleges that the District Court erred in denying the petition addressed to it, and that the petitioner is thereby aggrieved. It does not allege that the error complained of was "in matter of law," nor are any specific errors of law assigned in it. It is, to say the least, doubtful whether we are required to consider a petition to revise which is defective in these respects. *Re Taft*, 133 Fed. 511, 513, 66 C. C. A. 385.

[2] The petition to revise, however, alleges that no proof was taken in the District Court and no opinion filed, and this is admitted by the answer which the trustees in bankruptcy have filed in this court. We must regard the District Court, therefore, as having denied the petition because as matter of law what it set forth did not entitle the petitioner to the relief he sought. If the denial was for failure to support the petition by proofs, there could have been no error in matter of law. So far as the petition and answer raise disputed questions of fact, they raise questions not properly before us in this proceeding. *Re Stewart*, 179 Fed. 222, 228, 102 C. C. A. 348. Whether the District Court erred or not, upon such facts as the petition alleges and the answer admits, is the only question we can consider or determine.

[3] The petition not only asks that the order complained of be set aside, but also asks this court to make further orders requiring the trustees in bankruptcy to do certain things. But in a proceeding under section 24b this court "is limited to a review in matter of law, and only questions of law arising out of the facts found or conceded can be determined." *Re Stewart*, 179 Fed. 222, 228, 102 C. C. A. 348. No further attention will be given, therefore, to the request for directions to the trustees.

It is undisputed on the record before us that the bankrupt in this case is the United Wireless Telegraph Company, a corporation; that it has been adjudged bankrupt upon an involuntary petition against it; that three trustees have been appointed and are acting; and that its estate is in process of administration under the Bankruptcy Act. By an order made April 4, 1912, the District Court, with the consent and approval of the creditors, authorized and directed the trustees to accept a certain offer made to them for the purchase of certain properties belonging to the bankrupt estate. They accordingly made an agreement with the intending purchaser for a sale of the properties upon the approved terms. Part of the agreed price had been paid to them, and certain stock delivered to them, to be held as security for the balance remaining due. Thereupon also on April 4, 1912, they had reported their doings as above to the court, and the court had entered an order confirming the sale.

There has been no attempt, so far as the record shows, to revise or appeal from any of the orders of court authorizing and confirming the sale. But in his petition filed May 22, 1912, the petitioner asked

the bankruptcy court to order the trustees to show cause why their agreement for sale, approved and acted on as above, should not be modified in a certain manner set forth. He asked also that, pending the hearing, the trustees be enjoined from taking further steps toward carrying the sale into effect.

The purchaser at the sale is a reorganization committee of the bankrupt's stockholders. The only allegation in the petition tending to show that the petitioner has any standing in the bankruptcy case, for any purpose, is that he owns 50 shares of stock in the corporation. His petition sets forth that it is brought on behalf of himself and of other stockholders similarly situated, who may care to join in the proceeding and share the expense involved. No other stockholder, however, has appeared to join in it.

[4, 5] The fact that he is a stockholder gave the petitioner no standing in the bankruptcy case, and no right, therefore, to require the trustees to answer his petition. It gave him no such interest in the bankruptcy proceedings as would make him a proper party to them. The corporation, not its stockholders, had surrendered its property for administration, and the trustees were holding it because they had been vested with the corporation's title to it, not because any interests of stockholders in it had passed to them. They were holding it in trust, not for the stockholders, but for the creditors of the corporation; or, after payment of all debts, for the corporation itself. The petitioner alleged that the proceedings on April 4, 1912, were without notice to stockholders other than those composing the committee. No notice to stockholders of the proposed sale was necessary. The creditors were the only persons interested or entitled to notice. No requirement of notice to the bankrupt of such a sale is to be found in the act, still less any requirement of notice to the stockholders of a bankrupt corporation.

[6] The petition to the bankruptcy court contained an allegation that the corporation "is not now and for some time has not been insolvent, but the value of its assets is now largely in excess of its liabilities." Of course, while the adjudication remained in force (and no attempt to vacate it has ever been made, so far as appears), the corporation must be regarded as insolvent for all purposes of the bankruptcy administration, whatever the value of its assets or the amount of its liabilities. *West Company v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098. The allegation amounts only to saying that there will be a surplus belonging to the corporation after the bankruptcy administration is completed. There are further allegations in the petition to the same effect, purporting to show also that the surplus will be of large amount.

[7, 8] The assumption that there will be such a surplus, however, does not help to make a stockholder a proper party in the bankruptcy case. The surplus would belong to the corporation, not to its stockholders. The trustees would hold it for the bankrupt, from whom it came to them. *Re Hoyt*, Fed. Cas. No. 6,806. For the purpose of returning it, whether under section 66b or otherwise (*Johnson v. Norris*, 190 Fed. 459, 111 C. C. A. 291), the court could not recognize

stockholders—it could deal only with duly authorized representatives of the corporation. The court's jurisdiction being limited, and only that necessary to enable it to administer the estate under the bankruptcy act, it would be without power to hear and determine claims made by others to property in its control for the purpose only of being returned to the bankrupt from whom it came. In an affidavit later filed by the petitioner, in the bankruptcy court, on September 12, 1912, it is stated that the bankrupt was not represented when the sale was ordered and confirmed, because "its executive officers were in prison, having been convicted of criminal methods in the sale of stock of the bankrupt company to the public." Even if representation of the bankrupt had been necessary at the hearing regarding the sale, it is obvious that no inability of the corporation to act for itself could be implied from the facts thus stated.

The grounds set forth in the petition to the bankruptcy court for the relief therein sought were certain alleged doings of the reorganization committee, claimed to have been in violation of the rights of stockholders. It was asserted that terms prescribed by the committee, upon which stockholders might subscribe to a plan of reorganization, were inequitable, and such that many stockholders could not comply with them. It was asserted that the committee was reselling the assets purchased by it for certain stock of another company, and that, unless this stock was distributed pro rata among the bankrupt's stockholders, the effect of the trustees' sale would be to let certain stockholders profit at the expense of a majority. The bankruptcy court was asked to require the trustees, before completing the sale ordered, to modify their agreement with the committee so as to require the "distribution of any proceeds over and above the amount necessary to satisfy the indebtedness of the bankrupt and the expenses of this proceeding equally among all the stockholders."

[9] If any circumstances could, in any event, have justified the bankruptcy court in directing its trustees not to complete a sale approved by creditors, ordered by the court and partly carried into effect, it is obvious that no such circumstances appeared from this petition. The committee was before the court only as the highest bidder for the property to be sold. Whether it was composed of stockholders of the bankrupt corporation or not, whether it had authority from them or not, or what dealings, if any, there had been between it and them, were all matters in which the court was in no way concerned. The attempted interference by a stockholder owning 50 shares out of 1,200,000, with the trustee's performance of what the court had authorized and directed, was wholly unjustified by anything alleged in the petition, and denial of the petition was the only action which the court could have taken.

[10] This case was argued and briefs submitted by both sides on January 30, 1913. Afterward, on February 6, 1913, the petitioner moved to withdraw his petition to revise. The trustees objecting, this motion was denied. *American Bell, etc., Co. v. Western Union, etc., Co.*, 69 Fed. 666, 16 C. C. A. 367; *Pullman Co. v. Transp. Co.*, 171 U. S. 138, 146, 18 Sup. Ct. 808, 43 L. Ed. 108. Thereafter, on Febru-

ary 11, 1913, the petitioner filed his consent that the petition to revise be dismissed. Notwithstanding this, however, we think the trustees are entitled to a decision by the court.

Let there be a decree affirming the order of the District Court, with costs for the respondents.

ARMOUR & CO. v RENAKER et al.

(Circuit Court of Appeals, Sixth Circuit. March 4, 1913.)

No. 2,282.

1. COMPROMISE AND SETTLEMENT (§ 19*)—MISTAKE—NATURE OF RELIEF.

Where a compromise and settlement was effected after extended negotiations concerning demands wholly unliquidated on both sides, when it was discovered that by mistake a payment made by complainant of \$4,900 had been omitted, of which defendant had knowledge but kept silent, complainant was, at most, entitled to have the settlement set aside and the whole controversy opened, and was not entitled merely to have the settlement surcharged to the extent of the mistake.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 67, 71-75; Dec. Dig. § 19.*]

2. COMPROMISE AND SETTLEMENT (§ 19*)—UNLIQUIDATED DEMANDS—MISTAKE.

Where by complainant's mistake, of which defendant had knowledge, a settlement of unliquidated demands between them was arrived at without taking into consideration a payment of \$4,900 made by complainant to defendant, the burden was on complainant, in a suit to set aside the settlement, to show that it had, in fact, been injured, and that the substantial equities of the parties required that defendant should make some repayment to complainant because of the mistake.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 67, 71-75; Dec. Dig. § 19.*]

3. COMPROMISE AND SETTLEMENT (§ 19*)—MISTAKE—SUIT TO VACATE—CROSS-BILL.

In a suit to set aside a compromise and settlement because of complainant's mistake in omitting to take into consideration a payment of \$4,900 made to defendants, defendants, having asked no affirmative relief, were not required to file a cross-bill in order to authorize the court to consider their original equities in determining whether in equity and in good conscience they were liable for any amount to complainant notwithstanding the mistake.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 67, 71-75; Dec. Dig. § 19.*]

4. COMPROMISE AND SETTLEMENT (§ 19*)—VACATION—MISTAKE—EVIDENCE.

In a suit to set aside a compromise and settlement agreement for complainant's mistake in eliminating from consideration a payment made to defendant of \$4,900, it appearing that, notwithstanding such mistake, defendant had already sustained more than half the loss under a contract between the parties, resulting from the fault of one or the other, or probably both, the court properly determined that defendant had no money which in equity belonged to complainant, and that it was therefore not entitled to a vacation of the settlement.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 67, 71-75; Dec. Dig. § 19.*]

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by Armour & Co. against S. Renaker and others. From a decree for defendants (191 Fed. 48), complainant appeals. Affirmed.

At the close of extended business dealings between the parties complainant's (appellant's) books showed an indebtedness to it from defendants (and associates), amounting to about \$4,000. Defendants denied some items and claimed off-sets or counterclaims, all to such an extent that the net balance, due from complainant to them, was about \$7,500 (allowing credit to complainant only for the same payments which it had charged on its books). Negotiations resulted in an offer by complainant that it would pay to defendants \$1,500 in full settlement of all claims both ways. Defendants accepted this offer, the payment was made, and all parties joined in a written contract of mutual compromise and satisfaction. Later complainant discovered that from its books and from its statements rendered it had omitted one payment of about \$4,900 which it had made to defendants; and the evidence fairly requires the conclusion that defendants, when they accepted the offer and closed the compromise contract, knew that complainant was laboring under this mistake. Complainant filed this bill, asking that the settlement be surcharged with this sum of \$4,900, and that it have judgment against defendants for this amount. Proofs were taken covering, not only the matter of the mistake and the settlement contract, but also the entire original dispute. The District Judge, though convinced of the mistake and that (not improbably) the defendants knowingly took advantage thereof, yet was not satisfied that upon the whole matter complainant had suffered any injustice, or that defendants had any money which rightfully belonged to complainant. He therefore dismissed the bill.

Brown & Nuckols and T. L. Edelen, all of Frankfort, Ky., for appellant.

J. T. Simon, of Cynthiana, Ky., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. We find three questions of law and one of fact presented by this record. They are whether a complainant, under such a situation, may surcharge a settlement without reopening the original dispute; where the burden of proof is when the matter is reopened; whether a cross-bill was necessary; and whether the evidence justified the final conclusion of the District Judge.

[1] 1. This was not the case of a mere mistake in figures where the parties were settling an account according to some exact methods of computation. The matters in dispute on both sides were largely or wholly unliquidated and incapable of liquidation by an accountant. They involved estimates of expenses and of damages, and the only settlement possible was by "lump sum" method. It is found as a fact by the District Judge, and is obvious enough, that the defendants would not have made the settlement on the basis which they did, if modified by the sum of this mistake. If complainant's account and demand had been rectified and increased by this sum, defendants might or might not have made some further concessions than they did make. No one knows. In such a situation we think it is very clear that the settlement cannot be merely surcharged and then enforced. If it made a decree on this theory, the court would be making, for the parties, a contract which they never made, and which it

is not likely they ever would have made. When a dispute of such a character is compromised and settled, and when one party is acting under a material mistake of fact, and the other party knows of such mistake and keeps silent, the party who is misled by the mistake is entitled (no other conditions forbidding) to have the settlement vacated and the parties restored to their original situation; but that is the extent of his right, and that was the extent of complainant's right to relief in this case.

[2] 2. The question of burden of proof seems to have been practically important. The damages claimed by defendants would be difficult to establish according to strict rules of proof; and if the settlement had not been made, and the defendants had been compelled to bring suit or affirmatively to establish their demands on a counter claim, they might have been, in part, unable to make the necessary proof, and so might have failed. The present litigation finds the money, the right to which is disputed, in the hands of defendants. It has been voluntarily paid over by complainant. True, it is not entirely accurate to speak of this payment as voluntary, since it was affected by the mistake, but it was within the sum which defendants were in good faith demanding and within the claim which they might have established or which complainant might eventually have conceded. We think the District Judge was right in putting upon complainant the burden of showing with reasonable clearness or certainty that it had been injured, and that the substantial equities of the parties required some repayment to it—in other words, the burden of showing its rightful and equitable title to the money in dispute as well as the merely legal right which might, *prima facie*, flow from the fact of payment by mistake.

[3] 3. Defendants filed no cross-bill, and their answer does not set up all the claims which their proof developed. It is now urged that for lack of cross-bill the court could not consider defendants' original equities. This position is not well taken. Defendants are not seeking to impeach or reform any contract, or to have any affirmative decree in their favor. They are defending. Their proofs only indicate reasons why the existing situation shall be let alone, and why complainant is not entitled to relief in equity. This does not call for a cross-bill. Further, complainant, by its bill, did not ask specifically the only relief to which it was entitled, viz., a general re-examination of the dispute, it prayed relief to which it had no right, it has no standing except under its prayer for general relief, and it cannot complain if the court, upon which it had by its complaint and its prayer conferred general jurisdiction of the subject-matter, proceeded to dispose of the whole controversy upon the proper legal theory.

[4] 4. Upon the question of fact involved, we see no occasion to revise the conclusion reached by Judge Cochran. If the contract had been carried out to the letter by both parties and the mistaken double payment had not been made, defendants would have been entitled, at the end, to receive some \$14,000. Including the \$1,500 final payment made and the \$4,900 error, they still suffer more than half the loss resulting from the fault of one or the other or (probably) both. The

District Judge gave exhaustive study to a very extended record, and his conclusion is:

"Yet, notwithstanding this certain mistake on plaintiff's part, I am much persuaded that the plaintiff ought not to recover. This is not because the mistake was not mutual. I do not understand that in such a case as we have here it is essential that the mistake be mutual. It is because, under the circumstances, it is not equitable that plaintiff should recover. It seems to me that \$1,500 is no more than plaintiff should have paid defendants in settlement. The evidence makes clear that the plaintiff was at fault. * * * It also satisfies me that plaintiff had no right to deduct most, if not all, the items which it claimed the right to deduct in both accounts from the amount due defendants. As it is, the defendants have stood more than one-half of the loss on the four shipments in question, and I think that was enough for them to stand. I am quite sure that knowledge on the part of defendants that plaintiff was advised as to the true state of the matter as to which it was mistaken would not have led them to consent to any better settlement than they did."

It results that the decree should be affirmed, with costs,

CHASE v. FARMERS' & MERCHANTS' NAT. BANK OF BALTIMORE

(Circuit Court of Appeals, Third Circuit. January 14, 1913.)

No. 1,644.

BANKRUPTCY (§ 391*)—RIGHTS OF CREDITORS—ACTION ON PROVABLE CLAIM.

The pendency of bankruptcy proceedings is not in itself a bar to an action against the bankrupt on a provable debt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637-655; Dec. Dig. § 391.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Joseph Buffington, Judge.

Action at law by the Farmers' & Merchants' National Bank of Baltimore against Howard A. Chase. Judgment for plaintiff, and defendant brings error. Affirmed.

John Lisle and Sam'l Scoville, Jr., both of Philadelphia, Pa., for plaintiff in error.

F. B. Bracken, of Philadelphia, Pa., for defendant in error.

Before GRAY and McPHERSON, Circuit Judges, and RELLSTAB, District Judge.

J. B. McPHERSON, Circuit Judge. On April 12, 1911, the Farmers' & Merchants' National Bank of Baltimore brought suit to recover more than \$11,000 from Howard A. Chase, the maker of three promissory notes dated respectively August 8, September 4, and October 6, 1906. The affidavit of defense set up the following facts as—

"* * * a just, true, and complete defense to the cause of action as set forth in plaintiff's statement of claim.

"Defendant alleges: That heretofore and on or about the 27th day of March, A. D. 1907, he was duly adjudicated an involuntary bankrupt by proceedings commenced against him in the District Court of the United States

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the Eastern District of Pennsylvania. That in the course of said proceedings Chester N. Farr, Jr., was duly elected as trustee in bankruptcy of the estate of this defendant and has qualified as such, and that the said bankruptcy proceedings are still pending and undetermined, and that said trustee has never filed his account or been discharged as trustee of defendant's estate. That the claim on which this suit is based was included in the schedules filed by this defendant in said bankruptcy proceedings, being one of the debts specified by this defendant in said proceedings. That your deponent is informed and believes that the claim on which this suit was brought was duly proved and filed by the plaintiff in this suit in connection with said bankruptcy proceedings. That this suit has been brought subsequent to the institution of these bankruptcy proceedings and after a trustee of defendant's estate was elected, and that the debt on which this suit is founded is one which is dischargeable in the event of defendant's obtaining his discharge in said bankruptcy proceedings."

The affidavit was held to be insufficient, and judgment was entered for the full amount of the claim. In thus deciding we think the District Court was clearly right. It will be observed that the affidavit does not aver the granting of a discharge, or even the pendency of an application therefor. As the record of the bankruptcy proceedings is not in evidence, we can only conjecture why averments of such obvious importance do not appear. The silence of the affidavit can be accounted for by supposing either that no application for discharge was ever made, or that the discharge was refused; but we shall not assume either explanation to be correct, although it is certain that the situation has not been completely disclosed. In such an affidavit the defense is presumed to be stated as strongly as possible, and we might therefore be justified in supposing as much as this, at least—that for some reason no application for a discharge was ever made, and that no application can now be made after the lapse of more than 18 months since the adjudication. But, even if we take the aspect of the case most favorable to the defendant, the utmost we can presume is that, as the bankruptcy proceedings are still pending and undetermined, there is a possibility, unlikely as it may be, that the bankrupt may still obtain a discharge. Such a situation, however, is in itself no bar to a suit like the present. We find nothing in the act to prevent a creditor from bringing his action upon a provable claim, even after adjudication. If a suit antedate the adjudication, section 63a(5) (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]) allows it to be prosecuted to judgment; and reasons may readily exist to make even a postdated suit desirable, e. g., to avoid the possible bar of the statute of limitations, or to liquidate the claim, or to fix a secondary liability on another person. Enforcement of the judgment in such a suit presents a different question, but with that we are not now concerned. The creditor is now asking, not for execution, but merely that judgment be entered in his favor, and to that we see no objection. The act does not forbid it, and (as we have just stated) there may be good reasons by a creditor should be allowed to reduce a provable claim to judgment, even by bringing suit after adjudication. In one of the common pleas courts of Pennsylvania a closely similar situation has been satisfactorily discussed by President Judge Endlich (*Reading Trust Co. v. Boyer*, 15 Pa. Dist. R. 45), and, indeed, we hear of no

decision to the contrary in any court. *Re McBryde* (D. C.) 99 Fed. 686, cited by the learned judge below, supports the present suit.

To permit such an action may perhaps be discretionary; the argument in favor of the bankrupt can hardly go farther than that; but, even if this be so, we can only say that nothing appears to show an improper exercise of the court's discretion.

The judgment is affirmed.

CHASE v. NATIONAL BANK OF COMMERCE.

(Circuit Court of Appeals, Third Circuit. January 14, 1913.)

No. 1,658.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Joseph Buffington, Judge.

Action at law by the National Bank of Commerce against Howard A. Chase. Judgment for plaintiff, and defendant brings error. Affirmed.

John Lisle and Saml. Scoville, Jr., both of Philadelphia, Pa., for plaintiff in error.

F. B. Bracken, of Philadelphia, Pa., for defendant in error.

Before GRAY and McPHERSON, Circuit Judges, and RELLSTAB, District Judge.

J. B. McPHERSON, Circuit Judge. For reasons given in *Chase v. Farmers' & Merchants' National Bank of Baltimore*, 202 Fed. 904, this judgment is affirmed.

CHASE v. FIRST NAT. BANK OF ENGLISHTOWN.

(Circuit Court of Appeals, Third Circuit. January 14, 1913.)

No. 1,659.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Joseph Buffington, Judge.

Action at law by the First National Bank of Englishtown against Howard A. Chase. Judgment for plaintiff, and defendant brings error. Affirmed.

John Lisle and Saml. Scoville, Jr., both of Philadelphia, Pa., for plaintiff in error.

F. B. Bracken, of Philadelphia, Pa., for defendant in error.

Before GRAY and McPHERSON, Circuit Judges, and RELLSTAB, District Judge.

J. B. McPHERSON, Circuit Judge. For reasons given in *Chase v. Farmers' & Merchants' National Bank of Baltimore*, 202 Fed. 904, this judgment is affirmed.

CHASE v. FIRST NAT. BANK OF JAMESBURG.

(Circuit Court of Appeals, Third Circuit. January 14, 1913.)

No. 1,660.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Joseph Buffington, Judge.

Action at law by the First National Bank of Jamesburg against Howard A. Chase. Judgment for plaintiff, and defendant brings error. Affirmed.

John Lisle and Saml. Scoville, Jr., both of Philadelphia, Pa., for plaintiff in error.

F. B. Bracken, of Philadelphia, Pa., for defendant in error.

Before GRAY and McPHERSON, Circuit Judges, and RELLSTAB, District Judge.

J. B. McPHERSON, Circuit Judge. For reasons given in *Chase v. Farmers' & Merchants' National Bank of Baltimore*, 202 Fed. 904, this judgment is affirmed.

In re PATTERSON.

(Circuit Court of Appeals, Sixth Circuit. February 14, 1913.)

No. 2,278.

BANKRUPTCY (§ 340*)—CLAIMS—ALLOWANCE.

Where, during the four years following dissolution of a firm by the death of the senior member and the intervention of bankruptcy, the widow was paid by the continuing partner, from the business in cash and merchandise, \$4,100, and the only showing as to the value of the deceased partner's interest which descended to the widow was the value at which it was inventoried in the settlement of the deceased partner's estate, which was \$1,480, such amount having been paid to the widow in good faith and not being recoverable, in addition to the losses reasonably to be inferred from bankruptcy, would be regarded as having satisfied the widow's interest in the firm.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

Appeal from the District Court of the United States for the Eastern District of Michigan; Alexis C. Angell, Judge.

In the matter of bankruptcy proceedings of Jesse D. Patterson, doing business as R. S. & J. D. Patterson. From a decree affirming the referee's order, and allowing a claim of Evelina E. Patterson, the trustee appeals. Affirmed in part, and, as modified, remanded for further proceedings.

Moore & Wilson and J. A. Muir, all of Port Huron, Mich., for appellant.

C. L. Benedict and E. E. Stockwell, both of Port Huron, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. This is an appeal from a decree affirming an allowance by the referee of a claim of Evelina E. Patterson against the estate of the bankrupt, J. D. Patterson, in the sum of \$7,480 and interest. J. D. Patterson, engaged in business under the name of R. S. & J. D. Patterson, was adjudged bankrupt and James A. Muir was elected trustee in 1908. The claim in dispute as originally filed was for \$16,436.62. According to the proof of claim, the consideration in part was a loan of \$3,000 by claimant to the bankrupt, represented by his promissory note to her order dated October 1, 1907; the re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mainder was the purchase price of a stock of jewelry, etc., stated to have been bought by the bankrupt of his father, R. S. Patterson (since deceased), supplemental proof being made stating that the sum owing on such purchase at the death of deceased was \$12,041.46. For some time prior to September, 1903, R. S. Patterson and J. D. Patterson were copartners, trading under the name of R. S. & J. D. Patterson, at Port Huron, Mich. R. S. Patterson died testate in February, 1904, and claimant is his widow, sole legatee, and executrix, and the mother of the bankrupt.

Written objections were filed by the trustee and certain creditors to the allowance of this claim. Several issues of fact arose upon these objections. One was whether in September, 1903, J. D. Patterson purchased the interest of R. S. Patterson, in the copartnership business; another was whether the claimant became a partner in the business after the death of her husband. If in his lifetime the father sold his interest in the partnership to his son, the widow's right as sole legatee extended to whatever sum remained unpaid. If such sale did not take place, the effect of the death was to dissolve the partnership, and the effect of the will was to vest in the widow the undivided interest of the testator in the partnership assets. If in either event stated the widow entered into copartnership with her son, it is urged that the \$3,000 claim in effect represents a loan to the firm and so to herself. The evidence is conflicting both as to the alleged sale by the father, and the subsequent partnership between the mother and son. The conclusions of the referee upon the evidence were against the theory of sale by the father or of partnership of the mother; and we are unable to discover any sufficient reason under the facts and the applicable law to disturb the confirmation of either of these conclusions.

However, we cannot sustain the portion of the award depending on a supposed sale or conversion of the undivided interest of the widow in the assets. The evidence was meager and unsatisfactory touching the value of the portion bequeathed. In the opinion of the referee it was worth \$4,480. This value was fixed by appraisers, as shown in an inventory filed by the executrix in the probate court of St. Clair county. She never asked for an accounting and none was ever made as to her interest; and, apart from this appraised value, no steps were ever taken to have such value ascertained. The widow permitted her share to remain in the business from the time of the death of her husband until the institution of the bankruptcy proceedings, a period of about four years. The trustee claims that she has received the value of her interest. An account contained in a ledger used in the business and offered in evidence as the account of claimant shows that during the period mentioned she received from the business in moneys and merchandise upwards of \$4,100. If there be added to this such losses as are reasonably to be inferred from the bankruptcy, we are constrained to believe that the widow has received the substantial value of her portion; but there is nothing to indicate that the payments to her were not made in good faith, and believed by both to be

rightful, or that any evasion of the bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) was contemplated by either; and so there would be no room for demanding repayment. We do not think she understood the nature of the claim she presented, so far as it related to her alleged share in the assets. She was more than 70 years of age, afflicted with serious infirmity of hearing, and without business experience. We might remand for a more complete hearing, but, looking to the interests of the creditors, including those of claimant, we are convinced that all will be benefited if this litigation is brought to a close. One object of the bankruptcy act is dispatch in the administration of estates; another is economic administration.

The claim upon the promissory note, with interest, as allowed by the referee and confirmed by the court below, must stand; the remainder of the claim will be denied; and the decree below is accordingly modified with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

TAXICAB CO. OF MEMPHIS v. PARKS.

(Circuit Court of Appeals, Sixth Circuit. March 4, 1913.)

No. 2,297

MUNICIPAL CORPORATIONS (§ 706*)—STREETS—USE BY TAXICABS—INJURY TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Plaintiff, having alighted from the front right-hand door of a street car at a street intersection, was struck by one of defendant's taxicabs, which was overtaking and passing the street car at a rapid rate, before plaintiff could reach the curb. One side of the taxicab was within two feet of the curb, and there were but eighteen inches between the other side of the cab and the side of the car. *Held*, that a request to charge that if plaintiff did not look to see whether there was any vehicle coming, or, looking, saw the taxicab, and nevertheless started to cross in front of it, he was guilty of contributory negligence, was properly refused for failure to take into consideration the fact that plaintiff might have found himself in a place of apparent peril, where a prudent man might have thought the safest thing to do was to attempt to reach the curb.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by Robert W. Parks against the Taxicab Company of Memphis. Judgment for plaintiff, and defendant brings error. Affirmed.

Trezevant, Bartels & Trezevant, of Memphis, Tenn., for plaintiff in error.

Caruthers Ewing, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DENISON, Circuit Judge. Parks, as plaintiff below, recovered a judgment against the Taxicab Company for personal injuries resulting from the negligent driving of one of the defendant's taxicabs. The street car on which Parks was a passenger had stopped at the further side of a street intersection, and Parks alighted from the front, right-hand door. Before he reached the curb, he was struck by a taxicab, which was overtaking and passing the street car, and (as plaintiff testifies) was running very fast.

The Taxicab Company, conceding that the meritorious questions of fact were decided against it by the jury and that the charge of the court was generally correct, complains solely that the court refused the defendant's requested instructions on the subject of contributory negligence. These instructions were, in substance, that if plaintiff, before starting to cross the space from the street car to the curb, did not look to see whether any vehicle was coming, such failure to look was of itself contributory negligence which would bar the recovery; and that, if he did look, saw the approaching taxicab, and nevertheless tried to cross in front of it, then, again, a recovery would be barred.

To support its position, the Taxicab Company relies upon the familiar rule which puts upon a pedestrian about to cross a city street some duty of care in the matter of looking out for approaching vehicles (Elliott on Roads and Streets, pp. 667, 668), and especially relies upon *Kauffman v. Nelson*, 225 Pa. 174, 73 Atl. 1105, in which this rule is applied to one who has alighted from a street car and is about to cross to the curb. We think it unnecessary to consider, in detail, the line of such cases, or to examine whether the Pennsylvania case, upon its facts, seems rightly decided. They all, either in express terms or by necessary implication, include, as an element of the situation, the fact that plaintiff was in a place of safety, and from that place stepped into the danger zone. In the instant case, although one side of the passing taxicab was within two feet of the curb, yet there was not more than eighteen inches between the other side of the cab and the side of the street car; indeed, perhaps even this space was lessened by the projecting car step or door. From this physical situation it follows that, unless plaintiff was bound to look back down the street before he stepped from the car to the pavement (and this is not claimed), it may well be that when he saw the cab coming, if he did see it, he found himself in a place of apparent peril where a prudent man might have thought the safest thing to do was to attempt to reach the curb. The same considerations would apply to the supposition that he did not look. This condition is not included in either of defendant's requests on the subject; and, for that reason, if for no other, their refusal was not error. Defendant was entitled to appropriate instructions on this subject, but its requests went too far.

The judgment is affirmed, with costs.

NEMCOF et al. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. March 7, 1913.)

No. 1,618.

INDICTMENT AND INFORMATION (§ 196*)—OMISSION—IMPERFECTION IN MATTER OF FORM.

Where an indictment for conspiracy to conceal assets of a bankrupt from his trustee omitted to charge a conspiracy with the bankrupt, and did not allege that defendants had conspired, not only with each other, but with "other persons to the grand inquest unknown," such defect, when objected to for the first time after conviction, would be regarded as one of form only within Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720), and therefore not fatal.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 628-635; Dec. Dig. § 196.*]

Gray, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; James B. Holland, Judge.

Charles Nemcof and another were convicted of conspiracy, and they bring error. Affirmed.

John Monaghan, E. Clinton Rhoads, and David Serber, all of Philadelphia, Pa., for plaintiffs in error.

Jasper Yeates Brinton and John C. Swartley, both of Philadelphia, Pa., for the United States.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. The unusually full and elaborate indictment that is now attacked as fatally insufficient, although in one particular only, was found a true bill on December 13, 1910. If it be carefully scrutinized, a pleader's omission may perhaps be discovered; but, if such there be, it could have been easily cured if (as they should have done) the defendants had promptly objected. The defect was as manifest then as it is now, but for almost a year they made no complaint. Apparently they had no doubt concerning the nature and scope of the charge, and saw no need to subject its language to the exacting test that we are now urged to apply. Even when the case was called for trial in September, 1911, they neither demurred nor moved to quash, but pleaded "not guilty," and took an active part in the contest that followed. This lasted for eight or nine days, and resulted in a verdict of conviction. Then for the first time, after a prolonged trial upon the merits to which no error is assigned, they made known their objection to the indictment on the ground of insufficiency, and moved to arrest the judgment. Failing to convince the District Court, they renew the objection here.

The controversy affords an excellent example of trial with limited liability, for it is clear that, if sentence could never be imposed on the indictment, the defendants ran no real risk in taking the chance of a favorable verdict. The narrowness of the ground upon which their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contention rests is apparent from the frank concession that the indictment would be unquestionably good if the pleader had simply added the phrase (usually inserted to comply with the customary form) that the defendants had conspired, not only with each other, but also with "other persons to the grand inquest unknown." Their position will appear in the following quotation from the brief; the same concession being made in several similar passages:

"We do not contend that under no circumstances could the defendants have been prosecuted for conspiracy to commit an offense under the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3418]). All that we contend is that they cannot be so prosecuted unless the bankrupt Granich is a party to the combination. If he was, the indictment should have so alleged.

"Had it charged that the conspiracy was between the defendants and the bankrupt Granich, or between the defendants and 'divers other persons,' a method recognized by law as a means of including conspirators not being prosecuted, and which would have included and been tantamount to an allegation that the conspiracy was with the bankrupt Granich, then the acts of the bankrupt as well as of the other conspirators would have been contemplated. If done, such acts would have been criminal as to one of the conspirators, to wit, Granich, and so made the conspiracy criminal as to all. On consummation of such a conspiracy section 29b (1) would have been violated because one of the conspirators, the bankrupt, would be guilty of concealment from his trustee and could be indicted under section 29b (1)."

Summarized, the argument is this: The charge is conspiracy to commit a crime. The crime is the concealment of assets from a trustee in bankruptcy. This offense can only be committed by the bankrupt himself; but the bankrupt is neither named as a conspirator (although the indictment clearly sets forth his participation), nor is he included by a formal averment embracing "other persons," etc. Therefore the defendants have been improperly convicted of conspiring to commit a crime that neither one nor both of them could commit, either separately or together, unless they conspired with the bankrupt himself. And, as a conspiracy with him is not charged in direct and precise terms, the final result is said to be that the indictment fails to set out an indictable offense.

We shall not attempt to follow the earnest and elaborate argument that was made on behalf of the defendants. In our opinion it is somewhat belated, and it certainly has not satisfied us that the smallest injustice has been done. The omission complained of seems to fall fairly within the spirit of Rev. Stat. § 1025 (U. S. Comp. St. 1901, p. 720), and to be a "defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." A situation much like this is discussed in *Cohen v. United States*, 157 Fed. 651, 85 C. C. A. 113, and we are content to concur in substance with the Court of Appeals of the Second Circuit. We may note, also, that timely objection had been taken there by demurrer in the Circuit Court. *United States v. Cohen*, 142 Fed. 983. Neither court was convinced that the objection should prevail.

The judgment is affirmed.

GRAY, Circuit Judge, dissents.

C. H. LAWRENCE & CO. v. SEYBURN, Collector of Internal Revenue.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1913.)

No. 2,370.

1. APPEAL AND ERROR (§ 730*)—ASSIGNMENTS OF ERROR—INSTRUCTIONS—REVIEW—RECORD.

Charges given will not be reviewed, where the assignments of error state no facts proven or in issue to enable the appellate court to determine whether the charges were material or relevant to the issue submitted to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013-3016; Dec. Dig. § 730.*]

2. INTERNAL REVENUE (§ 16*)—ADULTERATED BUTTER—TAXATION—INTENT.

For a dealer in adulterated butter to be liable to the internal revenue tax imposed by Act Cong. May 9, 1902, c. 784, 32 Stat. 193 (U. S. Comp. St. Supp. 1911, p. 1339), it is immaterial whether the dealer knowingly engaged in the business or not.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 16.*]

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by C. H. Lawrence & Company against Edward I. Seyburn, as Collector of Internal Revenue for the District of Louisiana, to recover taxes assessed against plaintiffs as wholesale dealers in adulterated butter and paid under protest to avoid threatened prosecution for penalties. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Jno. D. Rouse, Wm. Grant, and W. B. Grant, all of New Orleans, La., for plaintiff in error.

Charlton R. Beattie, U. S. Atty., of New Orleans, La., for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. [1] The first and second bills of exception upon which the first four assignments of error are predicated show no state of facts proven or in issue for the court to determine whether or not the court's charges to the jury specially excepted to were material or even relevant to the issue to be submitted to the jury, and therefore neither of the said assignments is well taken.

[2] For a dealer in adulterated butter to be liable to a tax by the United States under the statute approved May 9, 1902, c. 784, 32 Statutes at Large, p. 193 (U. S. Comp. St. Supp. 1911, p. 1339), it is immaterial whether or not the said dealer "knowingly" engaged in the business.

We find no reversible error in the transcript, and the judgment of the District Court is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
202 F.—58

BILLINGS, U. S. Com'r of Immigration, v. HAM

(Circuit Court of Appeals, First Circuit. February 13, 1913.)

No. 932.

ALIENS (§ 31*)—CHINESE LABORERS—DEPORTATION—IMMIGRATION ACT.

Chinese laborers are not exempted from the general provisions of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 499), providing for the deportation of aliens unlawfully entering the United States by the Chinese Exclusion Acts, and hence Chinese laborers unlawfully in the country and held for deportation under warrant issued by the department of commerce and labor under the Immigration Act were not entitled to discharge and trial under the Exclusion Acts.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 92; Dec. Dig. § 31.*]

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

Appeal from the Circuit Court of the United States for the District of Massachusetts; Francis C. Lowell, Judge.

Petition for writ of habeas corpus by Guy A. Ham to obtain the release from custody of certain Chinese aliens named Wah Gan, Moy Dep, Woy Sang, and Chin Quon, held by George B. Billings, United States Commissioner of Immigration, under a deportation warrant. From a decree granting the writ, the commissioner appeals. Reversed, with directions.

William H. Garland, Asst. U. S. Atty., of Boston, Mass., for appellant.

Guy A. Ham, of Boston, Mass., pro se.

Before DODGE, Circuit Judge, and ALDRICH and BROWN, District Judges.

PER CURIAM. The four alien Chinese, on whose behalf the appellee's petition for habeas corpus was brought, were held in custody by the immigration commissioner at Boston. On habeas corpus the Circuit Court discharged them, because the commissioner's only authority for holding them was a warrant issued by the Department of Commerce and Labor, under Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 499). The court regarded that act inapplicable to their case, and held them entitled to trial under the Chinese Exclusion Acts. Since the commissioner's appeal now before us was taken, the question involved has been settled in his favor by the Supreme Court. *U. S. v. Wong You*, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354. The Immigration Act of 1907 is there held applicable to Chinese aliens illegally coming to this country, notwithstanding the special acts relating to the exclusion of Chinese. The discharge was therefore erroneous.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The judgment of the Circuit Court is reversed, and the case remanded to the District Court, with directions to vacate the orders entered October 3, 1910, discharging Wah Gan, Moy Dep, Woy Sang, and Chin Quon, and to remand them to the custody of the commissioner

UNITED STATES LIGHT & HEATING CO. V. SAFETY CAR HEATING & LIGHTING CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1912. On Petition for Rehearing, January 8, 1913.)

No. 1,870.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BRUSH MECHANISM FOR DYNAMOS.

The Bliss patent No. 707,754, for a brush mechanism for dynamos, claim 6, which is a broad claim, is void for anticipation in the prior art. Also *held* not infringed, if conceded validity after the filing of disclaimer in October, 1912.

On Petition for Rehearing.

2. PATENTS (§ 324*)—SUIT FOR INFRINGEMENT—REVIEW BY APPELLATE COURT—EFFECT OF DISCLAIMER.

A Circuit Court of Appeals, which had adjudged a claim of a patent invalid, may grant relief to the complainant by authorizing the enforcement of any equities arising out of a disclaimer filed before the issuance of its mandate, intended to avoid the ground of invalidity found.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600-606; Dec. Dig. § 324.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaatt, Judge.

Suit in equity by the United States Light & Heating Company against the Safety Car Heating & Lighting Company. Decree for defendant, and complainant appeals. On rehearing. Affirmed.

For opinion below, see 191 Fed. 846.

The appellant is complainant below in a bill filed charging infringement of its patent No. 707,754, issued to W. L. Bliss August 26, 1902, for "brush mechanism for dynamos," and the appeal is from a decree dismissing the bill for want of equity. The invention and its use are thus mentioned in the specifications:

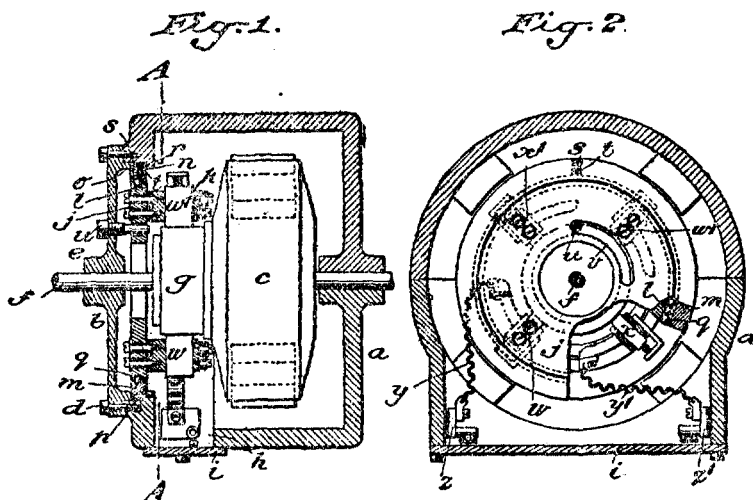
"My invention relates to brush mechanism for dynamos, with the object in view of providing automatically for the constant polarity of a dynamo in whichever direction it may rotate and notwithstanding changes or reversal of the direction of the rotation.

"The invention may be applied to all dynamos the direction of the rotation of which is required to be or liable to be reversed, but the polarity of which is required to be constant; but it is especially applicable to dynamos deriving motion from running-gear of railway vehicles for the purpose of charging storage batteries or furnishing a direct electrical current for the illumination of such vehicles."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The drawings exhibited are referred to as follows:

"Figure 1 is a view in vertical section from front to rear through the casing of the dynamo, showing the supports for the rotary armature and commutator and the brush-holder in relation thereto as it appears in use; and Fig. 2 is a transverse section taken on the plane of the line A A of Fig. 1, the front cover of the casing being removed."



The claims are 12 in number, but the charge of infringement is limited to the sixth (and broadest) claim which reads as follows:

"(6) Brush mechanism for dynamos comprising a rotary ring, a stationary ring, a raceway intermediate of the two rings, bearing-balls located in said raceway and serving to hold the rings in rotatable relation with each other, brush-holders carried by the rotary ring and means for limiting the rotatory movement of the said rotary ring, substantially as set forth."

Two defenses are set up: (1) Invalidity of the above claim in suit; and (2) noninfringement thereof under any reasonable interpretation of such claim.

Upon final hearing of the issues before Judge Kohlsaat, his opinion, as filed, sustains the defense of noninfringement. It presents an instructive review, as well, of the patent specifications and of the contentions for and against the validity of the claim relied upon, as follows:

"The patent has 12 claims, of which claim 6 may be termed the broadest. The device 'is specially applicable to dynamos deriving motion from running-gear of railway vehicles for the purpose of charging storage batteries or furnishing a direct electrical current for the illumination of such vehicles.' The dynamo comprises the casing, the armature structure, including associated armature, shaft and commutator, and brush mechanism. Complainant's counsel claim a brush construction which constitutes a unitary and easily removable device. By the removal of the plate *i* in the casing, the brush-carrier may be inserted and removed. By means of a removable plate in the bottom of the casing, the brushes may be manipulated and the armature blocked in position, when desirable, in order to remove the hub formed in the casing from the axle pressure. 'The brush-carrier,' according to the specification, p. 1, line 59, 'consists of an annular inner ring *j*, upon which are secured and properly insulated therefrom the brush-holder *k*. The inner ring *j* has a semicircular groove or ball-race *l* formed on its periphery. The inner ring *j* is mounted within an outer or stationary ring *m*, having on its

inner wall a semicircular groove or ball-race. The outer ring *m* may be held securely in position within the front opening in the casing *a* back of the cover *b* by permitting the outer portion of its inner face to rest against an annular flange *n*, formed around the margin of the opening in the casing, and its outer face engaged by an annular flange *o*, extending from the inner face of the cover *b*. The pressure of the cover on the outer ring may be secured by means of one or more screws *p*, extending through its margin into the flange *n* of the casing.

"According to complainant, the primary function of the balls in the raceway is to lock the two rings in position, although the usual benefits of a ball-bearing are incidentally secured.

"With regard to the stop mechanism, it is stated in the specification, p. 2, line 20, that 'the reciprocating rotary movement of the inner ring *j*, carrying the brushes, is limited by means of a stop-pin *u*, having a screw-threaded engagement with the cover *b* and extending inwardly within a curved slot *v*, formed in the ring *j*. The length of the slot *v* is such as to permit the ring *j* to rock the required distance to shift the brushes and give the necessary lead, and in the present instance, where the machine is a four-pole machine, this distance is equal to or a little more than a quadrant.'

"When the armature is reversed, the rotary ring, carrying the brushes, through frictional contact of the brushes with the commutator, will be moved therewith, until intercepted by the stop-pin. This rotary movement of the brushes will cause them to exchange position with relation to the commutator, causing the polarity of the brushes to remain constant.

"The reversal of the direction of the current results, in the main, from change in the running direction of the car, from whose axle the dynamo is driven. Such reversal in the running direction of the car causes a reversal of the dynamo armature, and, necessarily, a reversal of the direction of the current, unless prevented. If a reversal of direction in rotation is accompanied by a proper reversal of the brush position, the two reversals, says complainant's expert, Miller, 'will, so to speak, counteract each other, so that the current will flow from the dynamo in the same direction as before.' The proper position for the brushes in a dynamo running in one direction is somewhat off of the theoretical axis of commutation; the neutral points being shifted slightly in the direction of rotation. The angle between the two points is termed the 'angle of lead.' In making allowance for this angle of lead, it is necessary that the brushes be swung around the commutator a sufficient distance to make the substitution of position of brushes plus the angle of lead. In a four-pole device this would be 90° plus a small angle. This idea is, of course, not new with complainant.

"Defendant denies the validity of the patent in suit, and in support of its contention cites Bliss' prior patent No. 525,836, granted September 11, 1894, for a self-adjusting brush for dynamo-electric machines; Crompton & Swinburne patent No. 5168, of 1886, for improvements connected with the electric lighting of trains; Ball patent No. 675, of 1891, for a new improved regulator for electric generators and motors; Lake patent No. 11,133, of 1891, for improvements relating to dynamo-electric machines and electric motors and to apparatus connected therewith; Ball patent No. 444,487, dated January 13, 1891, for regulator for dynamo-electric machines; Wheeler patent No. 575,918, of June 26, 1897, for brush-carrier for dynamo-electric machines; Vicarino patent No. 662,580, of November 27, 1900, for apparatus for electrically lighting railway carriages, etc.; Philfeldt patent No. 327,408, of September 29, 1885, for ball-bearing for velocipedes; and Herman patent No. 426,271, of April 22, 1890, for fifth wheel.

"The earlier Bliss patent No. 525,836 has the brush-carrier, commutator, and stop mechanism arranged so as to reverse the position of the brushes. The brush-carrier is in the form of a cross-bar, having an opening at its center to receive a hub or sleeve which supports the axle of the generator. This sleeve is stationary. There is no roller-bearing between the cross-bar and the sleeve. The two rings, the one stationary and the other rotatable, of the patent in suit, it is claimed, serve the same purpose as the inner surface of the cross-bar opening and the exterior periphery of the sleeve-bearing.

Complainant concedes that the latter patent involves the principle of the former, but insists that it constitutes an improvement thereof, so as to secure superior as well as new results. These latter consist, in part, in the facility afforded for removing the brush-carrying ring with brush-holders attached, and for providing ready access to the brushes; this being desirable in cases where the casing is secured beneath the floor of a car or other vehicle. The new features, as compared with the device of the earlier patent, seem to consist of the casing with its removable plates, the substitution of a rotatable brush-carrying ring in lieu of a rotatable brush-carrying arm, a nonrotatable outer ring, co-operating with the inner rotatable ring instead of the axle-bearing sleeve or hub; the latter having been transferred to the casing, and being no part of the brush device, and ball-bearing and locking between the rings secured through the raceway, constructed by grooving the inner face of the outer nonrotatable ring and the periphery of the inner rotatable ring.

"Complainant insists that the use of the raceway and balls for locking the two rings together is new in the dynamo art. There is also the alleged novel adjustments of the parts, which constitute a unitary brush mechanism without which the openings in the casing would be of little value.

"None of the elements is, in itself, new, though complainant insists that the locking feature of the raceway and balls is not shown to have been specifically claimed in the prior art. Roller bearings are shown in the R. E. Ball British patent No. 675, of 1891, as an anti-friction device between two rings, one rotatable and one stationary, and 'serving to hold the rings in rotatable relation with each other.'

"In the British patent to Lake, No. 11,133, of 1891, is shown a brush-holder which includes in its elements a support mounted upon anti-friction rollers, which travel in a cylindrical groove, forming the bearing between the arm and the journal.

"Roller bearings between brush-carrying rings and a stationary frame are shown in Wheeler patent No. 575,918, of 1897, and in other patents above enumerated.

"A fair construction of the two Ball patents, the Herman patent No. 426,271, of 1890, the Philfeldt patent No. 327,408, pertaining to velocipedes, the Lake British patent of 1891, and Wheeler patent No. 575,918, of 1897, relating to a brush-holding device, makes it plain that there is little novelty in the locking or guiding feature of the raceway and balls as an independent element. Nor is there novelty in the large rotatable ring, if that may be said to be a feature of claim 6. It is found in the Wheeler patent No. 575,918, above cited. The means of the Bliss patent for gaining access to the brush mechanism is one not involving in itself any invention. So, as above stated, the novelty must be found, if it exists, in the combination of old elements. This may not be deduced from a more convenient arrangement than that of the prior art, but in a new result—the outcome of a new conception as applied to the brush mechanism art.

"To cease to use the bearing-sleeve as an element of the brush-carrier necessitated the addition of a new brush-carrier bearing—an additional element. Were the nonrotatable sleeve or hub of the prior Bliss patent enlarged to the dimensions assumed to (be) called for by the patent in suit, thereby necessitating a large rotatable ring to co-operate with it, that would scarcely be ground upon which to predicate invention. Nor would the interposition of an anti-friction device tend to create patentable novelty. The substitution of two bearings for one would, of itself, not amount to invention. In the patent in suit the inner ring is rotatable. In the prior Bliss patent it is the outer ring which rotates. That modification is not patentable. The claim in suit makes no mention of the relative location of the two rings with regard to which is rotary and which stationary. Nor does it call for rings of any particular size. While this is true, yet there is shown substantial advancement upon the prior art in the arrangement of the parts, largely due to mechanical skill, but possessing a degree of novelty which, in an art so subtle as that here involved, should be recognized as patentable, but so limited as to protect only the particular device of the patent. With this qualification the claim sued on is held to be valid.

"Defendant's brush-holder is carried by a rotary yoke mounted upon a bearing formed integrally on the main end-bearing casting. This, defendant insists, is exactly like the bearing which complainant's expert Miller depicts in the drawing, 'Miller sketch of brush-shifting mechanism of the prior art.' It cannot be removed as a unit. The whole end plate must first be removed. This carries the brush-carrier, which must therefore not be a part of a unitary body. In defendant's device the brush mechanism is not removed functionally from the sleeve or hub which carries the generator axle, and is not independent thereof. Defendant's structure seems to resemble somewhat the devices of the Ball and Lake patents in the matter of bearings. This feature alone would relieve it from a charge of infringement of the claim in suit as above limited. There are other differences, such as the absence of a removable bottom plate and stop. The complainant fails to show infringement. The bill is therefore dismissed for want of equity."

W. Clyde Jones, Arthur B. Seibold, and Edwin B. H. Tower, Jr., all of Chicago, Ill., for appellant.

Frederick P. Warfield and C. H. Duell, both of New York City. N. Y., and H. S. Duell, of Yonkers, N. Y., for appellee.

Before BAKER and SEAMAN, Circuit Judges, and HUMPHREY, District Judge.

SEAMAN, Circuit Judge (after stating the facts as above). [1] The Bliss patent in suit, No. 707,754, is for "brush mechanism for dynamos," disclosing an obvious improvement of the patentee's earlier invention, shown in patent No. 525,836, issued in 1894; and it may well be assumed for the present consideration, as contended by counsel in support thereof, that "the structure of the second patent constitutes an ingenious reorganization of the structure of the first patent." Its specifications set forth 12 claims, while the charge of infringement in controversy is predicated alone on the sixth claim, which reads:

"Brush mechanism for dynamos comprising a rotary ring, a stationary ring, a raceway intermediate of the two rings, bearing-balls located in said raceway and serving to hold the rings in rotatable relation with each other, brush-holders carried by the rotary ring and means for limiting the rotatory movement of the said rotary ring, substantially as set forth."

The defense of invalidity, for alleged anticipations of the means thus claimed, is directed solely to the broad terms of the sixth claim, and raises no question affecting the other claims of invention in the structure as described in the specifications. Thus the issue of validity—elaborately discussed in the arguments of counsel—is narrowed to the inquiry whether invention appears to authorize monopoly over any "brush mechanism for dynamos comprising" the elements described in this claim.

The invention of the patent and its application are thus stated at the outset of the specifications:

"My invention relates to brush mechanism for dynamos, with the object in view of providing automatically for the constant polarity of a dynamo in whichever direction it may rotate and notwithstanding changes or reversal of the direction of the rotation.

"The invention may be applied to all dynamos the direction of the rotation of which is required to be or liable to be reversed, but the polarity of which is required to be constant; but it is especially applicable to dynamos deriving motion from running-gear of railway vehicles for the purpose of

charging storage batteries or furnishing a direct electrical current for the illumination of such vehicles."

These general definitions of the subject-matter are applicable to the earlier Bliss patent, without reference to other prior patents in evidence, and the novelty of the structure thereafter described must reside in the improved means and results produced in the above-mentioned "reorganization" of the prior structure. For analysis of such means as specified, we are content to refer to the description contained in the opinion filed by Judge Kohlsaat, as appended to the foregoing statement; and we concur in his conclusion that patentable invention may appear in the provision and arrangement of elements in the device of the patent, although not of the broad nature and scope contended on behalf of the appellant.

We do not understand, however, the invention thus assumed to be applicable for support of the sixth claim in suit. The stress of the contention therefor rests on the provisions of the device for access to the parts and removability (bodily), for correction or repair, as thus pointed out in the specifications:

"Among the prominent advantages of the structure hereinabove set forth special attention is called to the simple manner in which the brush-carrying ring, with brush-holders attached thereto, may be bodily removed from the front of the casing by simply removing the cover *b* and releasing the outer ring *m* from the casing, the conductors *y* and *y'* having been previously disengaged from their binding-posts by the operator working through the opening in the bottom of the casing covered by the plate *i*. The opening *h* in the bottom of the casing furthermore admits of the operator inserting a support under the armature *c* to block it in position to permit the cover *b*, with its bearing-hub *e*, to be slid off the shaft without permitting the latter to be displaced or strained by the removal of the bearing-hub *e*. The removable plate *i* also furnishes ready access to the brushes without removing any part of the structure except the stop-pin *u* and the release of the conductors *y y'*, since the removal of the stop *u* permits the disk *j* to be turned completely around, bringing each of the brushes into position to be manipulated through the opening *h* in the bottom of the casing. This is of very great importance where the casing is secured beneath the floor of a car or close to a ceiling where access at frequent intervals can only conveniently be had from beneath."

In respect of these provisions and features of the device, neither of them is fairly defined in any element or elements of claim 6, while each and every thereof is aptly embraced in other of the patent claims; and it is obvious that the claim in question is framed to exclude the use of the several elements thus named, or their equivalents, in any brush mechanism for dynamos, as patentable subject-matter, independent of the above-mentioned provisions.

We are impressed with the view that the elements of the claim constituting the brush-holder mechanism are anticipated by the earlier Bliss patent, within the broad sense on which the claim must rest, leaving only the provision and use of the well-known anti-friction means of ball-bearings for its differentiation therefrom in such sense. But, whatever may be deemed the force of that patent, for the purposes of the inquiry, we believe the Wheeler patent in evidence (No. 575,918, issued in 1897, for a "brush carrier for dynamo-electric ma-

chineses"), in like sense, discloses every element of claim 6. Its specification states:

"My invention relates to a means of mounting the brushes of a dynamo-electric machine so that the lines of contact are visible, the brushes easily removable, and that the connecting-cables may be dispensed with and the brushes can be simultaneously thrown off from or onto the commutator. In order to effect this, I mount the brushes on two rings insulated from each other and mounted on the frame of the machine at the inner end of the commutator, and carriers on the rings extending over the commutator, on which the brushes are mounted. I also provide means for moving the rings around to set the brushes and a system of connecting rods to lift all the brushes at once. The two ends of each of these connecting-rods are separate pieces of metal adjustably united by a turnbuckle of insulating material."

As shown by specifications and drawings (Fig. 1), the brushholder consists of two rings, one stationary and the other rotary. Its inner rotary ring *k* carries the brushes. The outer ring *b* is stationary, and with its guides *n* and grooved rollers *m* interposed in the rotary ring permits the rotation, while preventing lateral movement; and its shifting screw *o* limits the movement of the rotary ring. Thus every element mentioned broadly in claim 6 is met by this patent, inclusive of the anti-friction means of grooved rollers, as the well-known equivalent of "bearing-balls," located and used alike. As may well be observed, the important features of the casing and mountings (for access and removability) are not mentioned therein, but are expressly included as subject-matter in various other claims of the patent.

We are of opinion, therefore, that other patents and exhibits cited by way of defense do not require discussion; that the foregoing reference is sufficient for anticipation of the broad claim in suit; and that such claim cannot be upheld for support of the charge of infringement, so that the issue raised of infringement thereof in fact by the appellee's brush mechanism does not require consideration.

The decree of the Circuit Court, dismissing the bill for want of equity, conforms to the foregoing conclusion of law; and it is affirmed.

On Petition for Rehearing.

The appellant, having petitioned for a rehearing of the above-entitled appeal, wherein the opinion of the court, filed at the present term, directs affirmance of the decree below, further petitions for relief in the cause, predicated on an alleged disclaimer filed by the appellant in the Patent Office subsequent to the filing of the above-mentioned opinion herein. A certified copy of the instrument referred to is produced, which describes the patent in suit, and thereupon purports to disclaim as follows:

"Your petitioner therefore hereby enters its disclaimer to so much of claim 6 of said patent as may describe a brush mechanism in which the stationary ring is not separable from the armature with its commutator and from the body of the field magnet casing, so that the brush mechanism may be bodily removed without dismembering the rotary and stationary rings and the bearing-balls which lock or tie them together, and in which the means for limiting the rotary movement of the rotary ring is not such as to permit movement sufficient to change the respective positions of the brushes with relation to the commutator to cause the polarity of the brushes to remain constant, regardless of the direction of rotation of the armature of the dynamo. Thereby limiting said claim 6 to a brush mechanism in which the stationary ring is separable from the armature with its commutator and from the body of the field magnet casing, so that the brush mechanism may be bodily removed

without dismembering the rotary and stationary rings and the bearing-balls which lock or tie them together, and in which the means for limiting the rotary movement of the rotary ring is such as to permit movement sufficient to change the respective positions of the brushes with relation to the commutator to cause the polarity of the brushes to remain constant, regardless of the direction of rotation of the armature of the dynamo."

SEAMAN, Circuit Judge (after stating the facts as above). [2] Relief is sought by the appellant's petition to escape the ruling of this court for affirmance of the decree below by reopening the cause for hearing upon the effect of a disclaimer filed by the appellant in the Patent Office pending the mandate upon the appeal. An objection is urged that this court is without jurisdiction to authorize such relief, because it is founded on new matter "appearing in the case for the first time," and that it "is an original matter which should be determined by the District Court prior to any consideration thereof" herein. But we believe such contention to be untenable. If the disclaimer set up in the petition affords ground for relief in the present cause, it can be granted only through action (by leave or otherwise) of the appellate court, as the authority of the District Court after appeal becomes limited to execution of the mandate (*In re Potts*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994); and no doubt is entertainable that relief may be authorized by this court to enforce any equities arising under a disclaimer so presented. See *American Soda Fountain Co. v. Sample*, 136 Fed. 857, 70 C. C. A. 415.

The question, therefore, whether the disclaimer set up in the petition presents equitable ground for reopening the cause plainly arises for determination before issuance of the mandate. On behalf of the appellee it is contended that the instrument filed as a disclaimer is not authorized, within the meaning of the statute (sections 4917, 4922, Rev. St. [U. S. Comp. St. 1901, pp. 3393, 3396]), "since it does not disclaim any distinct part of the specification or claim of the patent in suit, but disclaims merely the interpretation of the claim which this court has held to be necessary." Without specifying any distinct claim or part thereof as surrendered, the disclaimer, so called, is plainly framed and directed to incorporate in the claim the appellant's interpretation of various elements of the "brush mechanism" there mentioned, so that the claim shall be read in conformity with the meaning for which its counsel contended throughout the argument on the appeal for reversal of the decree. For answer to the crucial inquiry above stated, however, we believe it to be unnecessary to determine either the sufficiency or effect of this instrument by way of ascertaining the meaning or force of the claim in controversy. So no discussion is required of the various contentions of counsel, either as to the effect thereof, or whether the ruling in our opinion, as heretofore filed, against the validity of such claim is consistent with the present disclaimer, or could rightly be affected thereby.

Laying aside all of these questions as to the force of the disclaimer to require interpretation of the claim, for relief under the petition, we may assume, for the purpose alone of the present inquiry, that it is not only effective to that end, but affixes a definition of the terms of the claim which furnishes support for its validity, notwithstanding

the prior patents referred to in our opinion. The benefit of this assumption, however, cannot relieve the claim of the limitations imposed by the prior art evidence, and that evidence in the record we believe to be conclusive for the narrow scope of any invention which may thus be found in the claim, as the opinion below (upholding its validity) clearly points out, with references to the prior patents. With the claim so limited in the monopoly which may thus be predicated thereon, the appellee's "brush mechanism" in evidence is plainly distinguished from the patent device, departing therefrom in several means and functions, so that, under the above hypothesis, these departures, as sufficiently referred to in the opinion filed below, furnish ample support for dismissal of the bill.

Irrespective, therefore, of our conclusion against the validity of the claim in suit, the petition to reopen the cause is denied; and the petition for a rehearing is likewise overruled.

GREVER v. UNITED STATES HOFFMAN CO. et al.

UNITED STATES HOFFMAN CO. et al. v. LASANCE.

(Circuit Court of Appeals, Sixth Circuit. February 14, 1913.)

Nos. 2,374, 2,336.

1. PATENTS (§ 26*)—INVENTION—NEW RESULT.

Where a transposition of parts, accompanied by some adaptation, gets a new coaction and a new result, it may be invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

2. PATENTS (§ 35*)—INVENTION—EXTENT OF USE.

Where there has been extensive use, and defendant has copied, patentee is entitled to the benefit of the doubt on question of utility of his change.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. § 35.*]

3. PATENTS (§ 163*)—INFRINGEMENT—CONSTRUCTION OF CLAIMS.

Where a patent was granted on the contention and argument of the applicant that his device was distinguished from a prior reference in a certain particular, he cannot insist that such feature is immaterial to establish infringement.

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CLOTHES-PRESSING MACHINE.

The Hoffman patent, No. 928,199, for a clothes-pressing apparatus, was not anticipated and discloses invention; also, *held* infringed by one machine and not infringed by another.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 238; Dec. Dig. § 163.*]

Appeals from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Suits in equity by the United States Hoffman Company and others against Edward C. Grever and against August Lasance. Decree for complainants in first case and defendant appeals, and for defendant in second case and complainants appeal. Affirmed on both appeals.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Hoffman and the Hoffman Company brought, in the court below, two infringement suits based upon patent No. 928,199, issued to Hoffman July 13, 1909, on application filed December 1, 1904, for a clothes-pressing apparatus. Grever, defendant in No. 2,374, was using a device admitted to be broadly similar to Hoffman's and his defense was that the patent was invalid. Lasance, defendant in No. 2,336, used a machine claimed to differ essentially from that of the Hoffman patent, and his defense was noninfringement. The District Court adjudged the patent valid, and entered a decree against Grever; but thought the Lasance machine was outside of the patent, and in that case dismissed the bill. The defeated party in each case appeals.

The essentials of pressing clothes—moisture, heat, and pressure—are obtained in the most elementary form, by the weight of a hot iron on the upper surface of a moistened cloth interposed between the iron and the garment. Hoffman provided an apparatus having a table, or buck, upon which the garment was to be placed, and having hinged, above this buck, a presser plate which could be raised or lowered on its hinge. The face of the presser plate was full of fine openings, and carried, on its upper side, a steam chamber connected with a steam supply. The garment to be pressed is placed on the buck, the presser plate is brought down thereon, downward force is extended through a foot lever or other means, and, at the same time, steam, under pressure, is admitted to the chamber in the presser plate and driven out through the fine openings onto the upper surface of the garment. The presser plate is also independently heated, and it is claimed that the entire operation of moistening, pressing, and sufficiently drying is performed at one stroke of the depressing pedal, and almost instantaneously.

The patent contains 16 claims. Hoffman alleges that some of these are infringed by Lasance, and all of them by Grever. The first claim fairly expresses the broadest aspect of the claimed invention, and is all that need be quoted for the purposes of this opinion. It is:

"1. In a garment pressing machine, a supporting bed for the garment, a foraminous presser plate permanently associated with and movable toward and from the upper surface of the bed, and means for projecting steam through the foraminous presser plate while the latter is in its pressing position."

W. F. Murray, of Cincinnati, Ohio, for appellant Grever.

Arthur Stem, of Cincinnati, Ohio, for appellee Lasance.

F. W. Cameron, of Albany, N. Y., for United States Hoffman Co.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1, 4] As in every controversy involving validity and infringement, we must determine two questions: First, did the patentee in fact make any real advance in the art, and if so, what was its full extent? Second, applying to his contract with the government, as summarized in his claim, the settled rules of construction, can that contract reasonably be read as granting to him such a monopoly of his actual advance as will include defendant's embodiment? So we must, in this case, as usual, first examine the state of the art and then construe the claim.

The closest earlier structure is found in a German patent to Bossen, No. 59,423, published October 19, 1891, and this presents the clear question whether Hoffman merely transposed the parts of the Bossen machine, or whether he accompanied this transposition by such a reorganization and adaptation as to invoke a new operative interrelation. As this question is decided one way or the other, the Hoffman patent is void or valid. In the Patent Office, the Primary Examiner held to

the former view and persistently rejected all the broader claims; on appeal, the Board of Examiners in Chief adopted the latter view, and directed the patent to issue.

The Bossen device was, primarily, intended for pressing garments which had been in a dye vat, and in order to smooth out the wrinkles, rather than for pressing garments in a tailor shop to shape them; but this distinction is not of vital importance. Bossen had the supporting bed or buck and the superposed, hinged, heated presser plate. The supporting bed consisted of a plate full of fine openings, having beneath it a chamber supplied with a steam connection. The described method of operation was that the garment should be placed on the supporting bed, the steam should be turned on from below and allowed to pass up through the openings in the surface plate and saturate the garment, and then the heated presser plate should be lowered and allowed to remain a few moments. As a matter of first impression, Hoffman only transposed Bossen's foraminous plate and steam jet from the buck to the presser head; and it is clear that neither this transposition nor an increase in the pressure or temperature of the steam used, nor a decrease in the time of steam exposure, would, of itself, constitute invention.

We come, then, to the theory of distinction by which Hoffman was able to overrule the Primary Examiner, and which is the only clear theory of distinction presented to us. His garment to be pressed or shaped lies with its surface or nap side upward. It is this nap side with which the shaping and drying hot presser plate comes in contact. When the steam comes from below, it must penetrate the thickness of the fabric, and of the linings, if any, and often must penetrate double thicknesses of lining and fabric, before it can reach this surface which is to be pressed; in other words, there must be measurable saturation of the whole, before the surface can be slightly moistened. When the steam comes from above and is not long continued, it will not saturate the garment, but will affect only the upper surface; and not only will this be put in the best condition to be affected by the pressing, but such operation avoids that saturation through and through, which will call for a more difficult and delayed drying than is here required. Here, the moistening is so comparatively slight that the same brief heating pressure which shapes also dries.

This is Hoffman's theory of the operation. It involved a new thought not called out in Bossen's machine or operation and not obvious therefrom. It was not merely a reversal of parts, but a discovery that, by the reversal of parts, and adaptation that was simple enough after the reason for the change was observed, he could get a new result, and that the parts so combined would coact in a different manner; and from such new coaction and such new result it follows that there was invention, and the patent is valid. *Star Works v. General Co.* (C. C. A. 6) 111 Fed. 398, 49 C. C. A. 409.

[2] Comparison of the two machines, with the aid of common knowledge as to the operation of steam and heat, does not absolutely demonstrate that the described differences are very vital, or that the nov-

elty of the result is substantial and practical rather than vague and theoretical. We confess to some doubts on this subject. However, the patentee is entitled to the benefit of such doubts; they pertain to the question of utility; and where the device has gone into very extensive, public use, as here, and where the defendant has adopted the very construction involved, as Grever has, a doubtful question of patentable utility is foreclosed. *Diamond Co. v. Consolidated Co.*, 220 U. S. 428, 440, 441, 31 Sup. Ct. 444, 55 L. Ed. 527.

We see no necessity for deciding whether Grever infringes the narrower claims. A decree on the broadest claims, 1 and 16, will give Hoffman full relief.

[3] Lasance has a machine which is quite clearly a reversion to the type of Bossen. His steam comes into the garment from below, through the foraminous surface of his stationary supporting bed, and it must penetrate and saturate the garment before it reaches that surface with which the superposed, hinged presser plate comes in contact. He clearly avoids the letter of the Hoffman claim, because he has no superposed "foraminous presser plate" which is "movable toward and from the surface of the bed." At the same time, if the claim was entitled to the broadest range of equivalents and was without limitation in the prior art, there would be no difficulty in finding infringement, under the familiar rule already referred to that a mere transposition of parts will not enable an infringer to escape. It would be a natural impression to think that Lasance has followed the teachings of Hoffman, except in an immaterial particular. He has the same parts operating apparently in the same general way and producing the same final product. However, the fact is that the one particular in which Lasance has not followed the teachings of Hoffman is the very particular which Hoffman insisted was essential to build up for him an invention over Bossen, and a failure to follow in this respect is a vital failure. Hoffman cannot, at the same time, say that a reversal of parts is material when he is defending against Bossen, and of no consequence when he is attacking Lasance. This situation is within the spirit, though perhaps not within the letter, of the rule that the construction which would not anticipate cannot infringe. *American Co. v. Streat* (C. C. A. 4) 83 Fed. 700, 706, 28 C. C. A. 18; *Cleveland Co. v. Chicago Co.* (C. C. A. 3) 135 Fed. 783, 68 C. C. A. 485.

Some other alleged distinctions in operation between Bossen and Hoffman are pointed out in addition to the one we have discussed, and it is attempted to predicate invention on these differences, and so to avoid the claim limitation necessarily to be implied if there was only the one distinction. We are not satisfied that these additional matters have real existence, but we are saved from further study of them by another consideration. The claim of the patent, read literally, is limited to a structure having the foraminous presser plate swinging from above. The most that can be said for complainant is that the claim is ambiguous and might receive another and broader construction. We find, then, that throughout the long arguments to the Primary Examiner, and in his presentation of the matter to the Board, Hoffman insisted that he was entitled to a patent

over Bossen just because and only because he did apply his steam to the upper surface, with slight penetration, instead of from below, with saturation. The Board accepted this view and granted the patent because of this view. In other words, on the theory that there is room for more than one construction of the claim, it was solicited by Hoffman and granted by the Patent Office upon the theory, carefully expressed by both, that it had a particular meaning. It is true an argument of a solicitor in the Patent Office does not, of itself, work an estoppel; but this was not merely an argument that, for one reason or another, the application disclosed invention over the reference; it was in substance a statement that the phrases "upper surface" and "foraminous presser plate" in the claim must be construed as distinguishing the claim from a device which *did not*, and so limiting the claim to a device which *did*, apply the steam from the upper or surface side. It seems clear that, just as in any written contract the construction put upon its language by both parties at the time of its making is admissible to solve any ambiguity which may rest in the finally selected language, so, upon that principle, if upon no other, Hoffman must be confined to a construction of his claim which will not include Lasance. *Goodyear v. Davis*, 102 U. S. 222, 227, 26 L. Ed. 149.

Upon the argument, it was suggested that the Lasance machine could be used by laying the garment face down and allowing the lower member to serve as a presser plate, thus accomplishing exactly what Hoffman did. There is no evidence that the machine ever was so used, and that method of use seems highly awkward, if not practically impossible. We do not think it necessary to consider the problem which would be presented by a machine adapted and intended to be used for practicing the Hoffman idea of surface moistening, as distinguished from saturation, but moistening the surface that is placed downward instead of that which is placed upward. The Lasance is not such a machine. It will be time enough to consider that question, if such a machine is ever built and works well enough to justify an infringement suit.

In the Lasance case, the decree below is affirmed; in the Grever case, the fourth paragraph of the decree may be modified so as to refer only to claims 1 and 16, and so modified, is affirmed. In each case, appellee will recover costs in this court.

FAULTLESS RUBBER CO. v. STAR RUBBER CO.

(Circuit Court of Appeals, Sixth Circuit. February 14, 1913.)

No. 2,269.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—NURSING NIPPLE.

The Miller patent, No. 926,011, for a nipple for nursing bottles, claim 1, while vague in some of its terms, *held* not anticipated, and to disclose patentable invention construed in the light of the specification and drawings; also infringed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 157*)—CONSTRUCTION OF CLAIM.

In determining whether the language of a claim is too vague, the inquiry must be whether, taking into account the specification and approved aids to interpretation, it is reasonably possible to determine what the claim does or does not cover.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229-232; Dec. Dig. § 157.*]

3. PATENTS (§ 118*)—VALIDITY.

A patent should not be held invalid only because its language may be too vague for application to some possible future case.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 170, 170½; Dec. Dig. § 118.*]

Appeal from the Circuit Court of the United States for the Northern District of Ohio; Wm. L. Day, Judge.

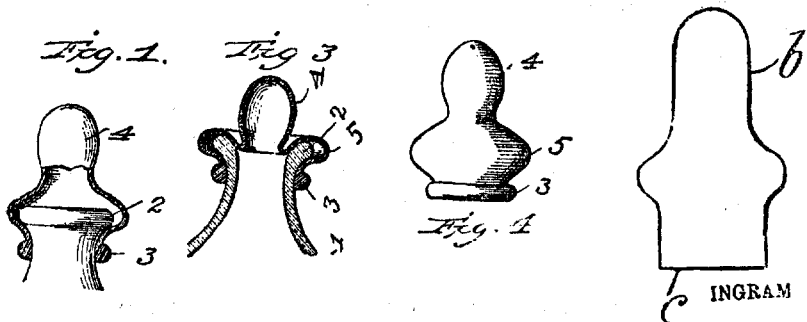
Suit in equity by the Faultless Rubber Company against the Star Rubber Company. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 191 Fed. 982.

The Faultless Rubber Company owns patent No. 926,011, issued to it June 22, 1909, as the assignee of Thomas W. Miller. The subject-matter is a nipple for nursing bottles. The specification states as one of the objects "to prevent any contraction of the opening from the body portion into the mouthpiece of the nipple under compression of the same." The claim said to be infringed is claim 1, reading as follows:

"1. A nursing nipple, embodying a mouthpiece, a neck, and an intermediate body portion flaring from said neck to receive the bead of the bottle neck, the upper wall of said body portion projecting inwardly at an acute angle from its point of greatest width to form a substantially flat wall, the diameter of the opening from said body portion into the mouthpiece being relatively small in comparison with the diameter of said body portion."

Figures 1, 3, and 4 of the drawing, showing the device when applied to and separate from the bottle, are here reproduced; as is **also the Ingram** nipple, the closest single approximation in the earlier art.



The nipple made by defendant is not distinguishable from that shown by the patent, and the record involves only the question of validity. The district judge thought that no patentable invention was involved, and dismissed the bill.

P. B. Hills, of Washington, D. C., for appellant.

Clarence E. Humphrey, of Akron, Ohio, and George W. Rea, of Washington, D. C., for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1] It was common to find in such nipples, and in combination in one device, a mouthpiece and a neck and an intermediate body portion flaring from the neck to receive the bead of the bottle neck. The invention in this case must be found, if at all, in adding to this combination two features: First, that this intermediate, flaring body portion should have its upper wall projecting inwardly at an acute angle from its point of greatest width so as to form a substantially flat wall; and, second, that the opening from the body portion into the mouthpiece should be relatively small in comparison with the diameter of the body portion. It must be said, also, that the record shows nipples which had the opening from the body portion into the mouthpiece smaller than the diameter of the body portion; indeed, this was common. There were also nipples which had, at a point considerably above the bottle neck, and not adapted to receive its bead, a portion flaring out and then sharply in again. There is no one which has the upper half of the bottle neck enlargement dropping in sharply from its widest point and shaped more nearly like a very flat cone than like a hemisphere or a swelling tube, and having the mouthpiece opening contracted as greatly as in the drawing of the patent. To use this form of body portion enlargement, in this association with the bottle neck, and in connection with the small opening to the mouthpiece, constituted a new combination. However, this conclusion is not determinative. Many combinations of old elements are novel combinations and yet involve no inventive thought.

During its prosecution before the primary examiner, the claim read thus:

"A nursing nipple embodying a mouthpiece and bottle engaging neck and an intermediate body portion, abruptly flaring both from said neck and from said mouthpiece and forming an abrupt angle at the point of greatest width."

This claim was finally rejected on reference to the most pertinent of the same anticipations now relied upon. On appeal, the board of examiners sustained the primary examiner, but recommended the allowance of a claim which became the first claim of the patent when issued. This history shows that the board thought the application disclosed invention, but that the invention was not stated precisely enough to identify it as distinguished from the prior art, and recommended this claim as its idea of the proper formulation of the invention which had been so made. The earlier claim provided that the body portion should be abruptly flaring from both the neck and the mouthpiece, forming an abrupt angle at the point of greatest width. The board evidently thought this "abrupt flare" and "abrupt angle" differed only in degree from Ingram, and sought for language to express the peculiarities of construction which resulted in the observed difference in operation; hence came the requirement that the upper wall of this enlarged portion should be "substantially flat" and the mouthpiece should be "relatively small."

We agree with the board that the specification and drawings disclosed a novel combination giving a useful, new result, and entitled to protection by patent. One practical difficulty which Miller sought to avoid was the collapsing of nipples while in use. Evidently, a mere tube, when bent sharply to one side or when pushed inwardly so as to make a bend, would collapse and close. It is the patentee's theory that in the Ingram nipple the enlarged body portion is still so characteristically a tube that, if the mouthpiece is pushed inwardly or bent to one side, either the opening into the mouthpiece or the two together will collapse; while, in the Miller device, this upper part of the enlarged body portion is so predominantly a diaphragm that it cannot break over, and instead, it yields longitudinally to a push or pull (see Fig. 3), and, when the mouthpiece is turned sidewise, the diaphragm also turns. The arch of Ingram would resist against a sidewise bend of the mouthpiece, and the opening into the mouthpiece would collapse, but the diaphragm yields and the mouthpiece remains open. This result, as a new and useful result, seems probable enough on inspection of the patent and the earlier patents, and observation of samples, as far as they were submitted to us, confirms this idea. In any event, the utility of the new combination is probable enough, evidenced, as it is, by extensive public adoption, so that the defendant who has copied cannot be heard to deny such utility. *Diamond Co. v. Consolidated Co.*, 220 U. S. 428, 440-1, 31 Sup. Ct. 444, 55 L. Ed. 527.

Undoubtedly, the changes made by Miller were, in physical form, very small and closely approximate to those mere changes in form or in degree which are not patentable; and the case is near the margin line. Controlling precedents cannot be cited, but the cases on the Grant rubber tire patent show an instructive analogy. The same general point of view which led this court in *Goodyear Co. v. Rubber Tire Co.*, 116 Fed. 363, 53 C. C. A. 583, to hold that patent invalid might not unnaturally be so applied to this case as to reach the same result; while that view of what, in a given case, constitutes invention, which led the Supreme Court to reach a contrary result on the Grant patent (*Diamond Co. v. Consolidated Co.*, *supra*), might well have similar effect as applied to the facts on this record.

[2] The language of the claim presents a question not free from difficulty. Such language must be sufficiently intelligible to mark the boundaries of the monopoly; and we have held that a claim was invalid which, when fully construed, called for a "thin" plate. *Bullock Co. v. General Co.*, 149 Fed. 409, 79 C. C. A. 229. This case and its underlying principle suggest the serious question whether the requirement for a "substantially flat wall" and a "relatively small" mouthpiece opening are fatally vague, in the absence of any statement how far the wall may vary from a state of absolute flatness or what the proportions should be between the extreme body portion and the mouthpiece opening.

We do not understand the *Bullock Case* as holding that the claim must always carry within itself everything necessary to determine its concrete applicability, or as intended to be in conflict with the principle that the specification, drawing and claim constitute one instrument, each part of which must be construed with reference to every

other part. If words in the claim, normally importing the exact limit to which they reach, may, by their context, be given a broader or a narrower application than very literalness implies, so must words which in form allow a margin of uncertainty be interpreted by their context so as to fix the limits of their real meaning. The inquiry must be whether, taking into account the elasticity of meaning added by the specification to definite words of claim or the limits of elasticity fixed by the specification for a superficially indefinite claim, it is still reasonably possible to determine, by the claim itself and by the approved aids, what the patent does or does not cover.

In the present case the specification says, and with evident reference to the declared object above recited, that:

"The substantially flat and comparatively wide upper wall of said body portion will still yield evenly under compression whereby any contraction or choking of the opening therefrom into the mouthpiece will be prevented."

In this connection the "substantially flat" wall means a wall flat enough to act in this manner and to accomplish this result, or, it might be said, a wall characterized by diaphragm-like yielding rather than by arch-like resistance. This interpretation furnishes sufficient certainty for applying the requirement of a "relatively small" mouthpiece opening. Clearly, this opening must be large enough to permit the flow of the milk. Clearly, too, if it was almost as large as the extreme diameter of the body portion, there would not be enough of this body portion left intervening between the mouthpiece opening and the extreme diameter to permit the characteristic action. Clearly, too, the mouthpiece opening must be small enough, and therefore stiff enough, so that, when the mouthpiece is tipped sidewise, the circular opening will distort the diaphragm and remain open rather than itself be collapsed and closed.

[3] The nipple shown in complainant's patent and the nipple made by defendant come well within these limitations. It may be that one could be constructed which, with all the permissible aids to interpretation, could not be classified as within or without the claim. It will be time enough to meet such a case when it arises. It is at least as probable that such a construction would be either mechanically impossible or commercially worthless. The Supreme Court has now firmly established the rule that a statute will not be held broadly invalid because its general language extends to some class, as to which its operation would be constitutionally forbidden. It will consider no such question, until the objection is made by one of the class which has the right to complain. It seems matter of fair analogy to say that a patent shall not broadly be held invalid only because of the possibility that in some future case its language may be too vague for intelligent application, when, in the only case which has arisen, and perhaps the only case which ever will arise, there is no such difficulty. The fact that a man's title to the edge of his field is doubtful is no defense to a trespasser on that part where the title is clear.

There should be the usual interlocutory decree for injunction and accounting; and the record will be remanded for that purpose, with costs of this court to appellant.

INTERNATIONAL CURTIS MARINE TURBINE CO. et al. v. WILLIAM
CRAMP & SONS SHIP & ENGINE BLDG. CO.

(Circuit Court of Appeals, Third Circuit. December 20, 1912. Rehearing
Denied March 5, 1913.)

No. 1,622.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—STEAM TURBINE.

The Curtis patent, No. 566,969, for an elastic-fluid turbine, covers an improved turbine of the impulse type, theretofore represented solely, so far as a practical mechanism was concerned, by the invention of De Laval, which, owing to the high speed developed, could be utilized only in turbines of small size, while the opposite or reaction type was similarly represented by that of Parsons, which, owing to various defects, could be applied only to those of large size. While these inventors were pioneers in the art, and their inventions noteworthy and meritorious, Curtis succeeded in blending the advantages and avoiding the disadvantages of both, and his patent discloses a principle and means of operation applicable to turbines of all sizes consisting, "broadly stated, of pressure-staging an impulse turbine, the velocity compounding thereof and the abstraction at each passage of the steam of substantially all, or the principal part, of the vis viva developed at the preceding stage." Such patent was not anticipated and discloses invention of high order; also, *held* infringed.

2. PATENTS (§ 235*)—INFRINGEMENT—MACHINERY—SIMILARITY.

The test of infringement of a patented machine is not its physical appearance, but the principle on which it operates.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. § 235.*]

3. PATENTS (§ 16*)—INVENTIONS—ELEMENTS.

The inventive element of a patented device or machine may consist in the conception of a novel abstract idea, or in the practical means of applying what has theretofore been but a mere abstract idea. In the former, the conception of the abstract idea necessarily involves the details of utilizing it; but in the latter, it does not.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 14, 15; Dec. Dig. § 16.*]

4. PATENTS (§ 312*)—SUIT FOR INFRINGEMENT—PROOF OF INFRINGEMENT.

Where a defendant, in its proposal for a government contract, which was accepted, specified a machine which as described would infringe complainant's patent, the court is justified in finding infringement, in the absence of evidence from defendant showing what it did in fact furnish.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 543-549; Dec. Dig. § 312.*]

5. PATENTS (§ 328*)—VALIDITY—STEAM TURBINE.

The Curtis patent, No. 595,435, for an elastic-fluid turbine, claims 1 to 4, inclusive, covering generically the use of cut-off devices in a steam turbine of the impulse, pressure-staging type, whereby different chambers can be operated or by-passed as desired, are void as too broad in view of the prior steam art.

6. PATENTS (§ 288*)—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

A court of equity is not without jurisdiction of a suit for infringement of a patent because the alleged infringement by defendant consists in its contracting to furnish the infringing devices to the United States government as a part of the equipment of a naval vessel, and entering upon the work of their construction, nor is it deprived of jurisdiction to hear and decide the suit because prior to the hearing the devices were installed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and delivered to the government, and an injunction cannot properly be granted.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 460-466; Dec. Dig. § 288.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Suit in equity by International Curtis Marine Turbine Company and Curtis Marine Turbine Company of the United States against William Cramp & Sons Ship & Engine Building Company. Decree for defendant, pro forma, and complainants appeal. Reversed.

See, also, 176 Fed. 925.

C. Bradford Fraley, of Philadelphia, Pa., and Richard N. Dyer and Frederick P. Fish, both of New York City, for appellants.

Dickson, Beitler & McCouch, of Philadelphia, Pa., and Edwards, Sager & Wooster, of New York City, for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the International Curtis Marine Turbine Company, the owner of certain patents, and the Curtis Marine Turbine Company, exclusive licensee thereunder for marine propulsion, brought suit against the William Cramp & Sons Ship & Engine Building Company for infringement thereof. The claims involved are 1 to 11, inclusive, of patent No. 566,969, granted September 1, 1896, to Charles G. Curtis for an elastic-fluid turbine, and the first four claims of patent No. 595,435, granted December 14, 1897, to said Curtis for an elastic-fluid turbine also.

[1] In order to secure an early hearing by a full bench by this court, and with its consent, a formal decree was entered by stipulation. On appeal the cause is now really heard at first instance and finally by this court. This, together with the fact that the patents involve the novel and important subject of steam turbines, accounts for the length of this opinion. A rotary steam engine had long been the engine builder's goal, for the advantage thereof, as contrasted with a reciprocating movement in machinery, is apparent. In the hydraulic field the rotary principle had long been effectively used in wheels and in many effective types of turbines, which are really jacketed water wheels. In this latter branch the advance was marked, and the conservation of power, simplicity of parts, saving of space, and other desirable features of water turbines seemed to point out the method by which steam could be similarly employed to move turbines. Theoretically the analogy between the use of steam and water in the same mechanical form of structure seemed clear. But the analogy was a mere surface one. In reality steam and water are, from the standpoint of motive power, essentially different. The motive power of water is gravity, that is, pressure exerted in one direction, while that of steam is expansion, that is, pressure exerted in all directions. The laws of hydraulics, as applied to water wheels, were well known and comparatively simple, while, as the outcome proved, the laws of steam as

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

applied to turbines were not known or appreciated. Moreover, water is unchanging in volume under different pressures; thus the velocity of the flow or jet of a stream is in inverse proportion with the cross-section of path provided for it. But when velocity is developed by diminution of pathway, it must be at the expense of a local deficit of pressure. Whenever the path contracts, velocity increases and pressure diminishes by a determinable amount. But with steam all is different. Only in few instances does steam act in the same way as water, and even where it does there is always present an intricate and mathematically inexpressible relationship between steam volume and pressure to complicate the relation between cross-section of path and velocity of flow. Experience has further shown that steam turbines involve further perplexities in the form of absorption of energy caused by virtually every bend, change of cross-section, and tiny eddy. That steam could be used as a propulsive rotary force was, of course, well and long known. From the record before us we learn that a crude form of steam turbine was described by Hiero of Alexandria 120 years before Christ which used steam as a kicking or propulsive force from which the discharging wheel reacted in the same way that rearwardly discharged water drives in the opposite direction an ordinary rotary lawn sprinkler. So also, as early as 1629, the turbine of Branca, an Italian, showed how steam could be jetted against a vane to produce forward rotary motion. But while these two, almost forgotten, instances strikingly show that the two broad principles of operation on which, as we shall see, all modern turbine development is based, were thus known, no practical and efficient steam turbine, working on either principle, was developed prior to 1884. And this absolute dearth of outcome cannot be attributed to lack of effort; for in 1896, the date of the first patent in suit, Sosnowski's Treatise "Roues et Turbines a Vapeur" gave a list with illustrations of 300 prior steam turbines. But apart from those of two inventors, Parsons and De Laval, referred to below, no one had, in this broad field of effort, produced a practical and efficient device. The magazine Engineering, in an issue of August, 1894, said:

"Most engineers who are approaching middle age can remember when the idea of making a successful steam turbine was classed with the search for the philosopher's stone. It was known of course that such a motor could be readily made to work, but the consumption of steam was excessive because the motive fluid left the apparatus at a high velocity and with much of its energy unutilized. * * * What was wanted was to construct a wheel that would run several times as fast as the spindle of a mule, and most mechanics regarded the matter as impossible."

The experts appointed by the Court of Commerce of the Canton of Zurich, Switzerland, in certain litigation involving steam turbines, reported to that court that "the art of steam turbines was first brought into existence by Parsons and De Laval." Indeed, this is in substance conceded by respondent's expert, who, in answer to the question whether he agreed with the statement made by Neilson, in his work on Steam Turbines (4th Ed. 1908), that the Parsons and De Laval turbines were the only two turbines which had been made on other than an experimental scale up to 1895-96, said:

"Limiting your question to steam turbines I should answer it that the Parsons steam turbine and the De Laval steam turbine are the only ones that I know of that were being manufactured prior to 1896, that are being manufactured for commercial use to-day."

Passing by, therefore, the fruitless effort of prior inventors, we take up the practical and effective stage of the art with Parsons and De Laval. Parsons, the real pioneer of one branch of the art, was a British subject who in his English patent, No. 6,735 of 1884, gave the world its first effective steam turbine. A study of this patent shows that Parsons disclosed no undiscovered law of nature or any novel principle of operation. His basic principle of operation was the simple principle of reaction shown in prior devices; but, his being the first real practical and efficient device in a barren field of effort, Parsons has been justly regarded as the pioneer of the steam turbine art. As well said by one of complainants' witnesses:

"It can therefore be said that, although Parsons did not introduce principles not known prior to his invention, he designed an efficient reaction turbine; whereas, in all the structures devised previously no efficient conversion of the energy of the steam into mechanical work was possible."

To the same effect is the testimony furnished by respondent in the address of Rateau, a French savant, in his Chicago address in June, 1904, who, in speaking of the production of an unworkable speed where steam expansion takes place in a single stage of a single wheel, says, evidently, from the context, referring to Parsons:

"A consideration of these circumstances has induced inventors to divide the expansion of the steam into successive stages, and thus to produce turbines with multiple wheels, which are nothing but a series of simple turbines mounted upon the same shaft and driven successively by the same current of steam. This design of multiple turbines is by no means novel. It will be sufficient to mention the name of Tournaire, a French mining engineer, whose theoretical description to the Academy of Science in 1853 of a reaction turbine with multiple wheels is surprising when the description is compared with the Parsons turbine brought into use 30 years later."

Parsons provided a large outer shell or chamber provided with a central shaft and adapted to receive steam peripherally at one end and exhaust at the other. Mounted on the shaft were a large number of sets of moving vanes properly angled, through which the steam passed as an annulus, thereby imparting motion. The outer ends of the moving vanes of each set fitted closely to the shell, prevented steam escape, and necessitated it going through the intervane passages. Following each set of movable vanes were corresponding sets of stationary vanes attached to the shell at substantially such an opposite angle as deflected the steam and caused it to pass through a succeeding set of movable vanes, so co-related to the first movable set as to aid in revolving the shaft. The power of steam to impart motion is based on pressure, and pressure is but expansion restrained. It follows therefore that, in the principle of operation of Parsons' turbine, as the steam passed from the high pressure end of the chamber through the successive sets of movable vanes to the exhaust it expanded, decreased in pressure and imparted rotary motive power to the movable vanes. And just as in a common lawn sprinkler the passage of the

water through a turned passage caused the wheel to kick or react in a contrary direction, so in Parsons' turbine the expansive force of the volume of steam passing through a revoluble vane, angled at the discharge, reacts and causes the vane to rotate in a course opposite to the line of discharge. It is this drop of pressure, and the consequent different stages of pressure between the inlet and outlet side of the movable vane, that characterizes and is the differentiating earmark of reaction turbines. This drop pressure, as the underlying principle of the reaction turbine, is well set forth by complainant's expert, who says:

"The essential difference between reaction and impulse turbines is the one as to how mechanical work is obtained from the energy of the steam. In both types of turbines the initial energy is in the shape of steam under high pressure, either in a dry or saturated or superheated condition. In a reaction turbine this steam is permitted to pass through a number of rows of buckets in such a manner that the pressure of the steam on the entering side of the bucket is quite different from the pressure of the steam upon the leaving side of the bucket, and rotation, that is, mechanical work, is secured, due to the drop of pressure of the steam in passing through the bucket."

It follows therefore, as stated in Jude on the Theory of Steam Turbines (London, 1906) p. 16, and conceded by respondent's expert:

"In the reaction turbine there is a transformation of potential energy into kinetic energy within the rotating member."

Such turbines have other characteristics. For example, from this pressure drop in reaction turbines it follows that the entire steam passage between the movable vanes must be filled with steam, and, as stated by M. Rateau:

"It is of course necessary, in order to produce a good dynamic efficiency, to operate in such a manner that the peripheral speed of the turbine be not much inferior to the circulation speed of the steam."

It will thus be seen that what Parsons did was to take the well-understood principle of a reaction turbine and its single chamber with a single wheel which operated at an unworkable speed, and by increasing the number of such wheels in effect subdivide an entire chamber into a number of separate, pressure-staged sections, for such, in reality, was the effect of the pressure being different on the opposite sides of every set of movable vanes. It will, of course, be noted that the Parsons or reaction pressure turbine operated on a fundamentally different principle from a turbine, for example, of Branca's type. In the latter the propulsive force is the impact or impulse of a jet of steam against the movable vane. The steam is blown against the vane in the form of a jet in a manner resembling the impulse given to a projectile by an explosion in the barrel of a gun. This is well stated by complainant's expert, who says:

"The powder charge on being fired develops a large pressure in a confined space similar to the pressure of steam in a boiler and steam pipe. The projectile is forced outward by the expansion of this charge; that is, the pressure energy available is utilized in producing movement of the projectile. The projectile is moved by the reaction of the charge just as the buckets of a reaction steam turbine are moved, due to the reaction of the steam. In both the gun and reaction turbine the energy in the form of pressure acts by reaction upon the piece on which work is to be performed, in one case causing

linear motion, in the other case circular motion, and in both cases the initial pressure drops to the pressure of the exhaust or atmosphere. The energy represented by the drop of pressure from initial to exhaust is used to produce mechanical work. In both the gun and reaction turbine an important requirement for an efficient conversion of pressure energy into work by the reaction principle is close clearance between the moving and stationary parts so as to prevent leakage of the pressure energy. After the projectile leaves the gun it possesses velocity energy. This is similar to the velocity energy of the steam jet as it leaves the nozzles of an impulse turbine. The nozzles give the steam a large velocity at the expense of the pressure energy of the steam; that is, the steam in passing through the nozzle drops in pressure from the initial pressure to the exhaust pressure and in expanding to the exhaust pressure produces a high velocity of the steam."

It will thus be seen that the impulsive force is created, not in the vane passage, but in the passageway into the chamber. This is conceded by respondent's expert, who, following Jude's work cited above, says:

"In the impulse turbine the transformation of potential energy into kinetic energy takes place wholly or only in fixed passages prior to entry into the rotating member."

As therefore vane motion in impulse turbines is caused by the jet impulse as distinguished from the expanding volume of the passing steam in a reaction turbine, it follows that the entire vane passageway of the former need not be filled. It also follows that the jet speed must be greater than the vane speed; otherwise no power would be drawn from the jet by the vane. It is proper to say that, in making these general statements as to these two types of turbines, we have not overlooked the fact that reaction turbines may have some impulse and impulse ones some reaction. But such respective reaction and impulse are negligible. The matter is well stated by complainant's expert, who says:

"The facts of the case are that it is an accepted fact among all engineers conversant with the steam turbine art that the impulse turbine derives its power chiefly from the impulse effect of the steam; some impulse turbines may work with a very slight reaction effect and that all reaction turbines abstract work chiefly from the reaction force of the steam, although every reaction turbine has a small amount of impulse due to the velocity of steam flowing through the turbine. This is absolutely necessary because, if there was no velocity of flow, steam would not pass through a reaction machine. The velocities in a reaction turbine are extremely low, and therefore the impulse effect is small, whereas the velocities in an impulse turbine are extremely high and the reaction effect or pressure drop of the steam while passing through an impulse turbine is so slight that it is entirely negligible."

But up to and succeeding Parsons, patented impulse turbines had been as inefficient as reaction ones had been before Parsons made the latter practical. This inefficiency of impulse turbines was due to the characteristics of steam subjected to the structural limitations, the restricted passageway which created the jet. This is clearly explained by complainant's expert, who says:

"When water, steam, or any other fluid in a reservoir approaches constricted outlet, it must do so along converging lines. Although there may be no converging solid walls and the outlet may be even a plane orifice, the cross-section of the path of the fluid, converging simultaneously toward the outlet from all directions, is a decreasing one. Hence the fluid undergoes accelera-

tion as it approaches. To supply the kinetic energy involved in this acceleration, its pressure must decrease. In the case of water, as already noted concerning the Pelton (water) wheels of the west, there is no known limit to the intensity of pressure which can be converted completely and efficiently into velocity by such a simple constriction of path. With steam, however, this conversion can proceed only until the initial pressure has fallen by some 43 per cent., *with a conversion of something like 15 per cent. of the available potential energy into kinetic form. Beyond this point, no further reduction of pressure against the outlet can further accelerate the flow.* The reason for this is that the reduction in pressure upon the steam approaching the outlet leads to an increase in its volume, and this increased volume accentuates the congestion. Up to the so-called 'critical' point, this increase of congestion is not enough to more than hinder and complicate the acceleration. At the critical point, however it becomes prohibitive. The steam expands too rapidly to get out of its own way, until the constriction has been passed. * * * The critical pressure occurs with fair constancy, at about 43 per cent. of the initial absolute pressure. The critical velocity is usually found between 1,350 and 1,400 feet per second ranging upwardly toward 1,500 feet under high initial pressures and downwardly toward 1,300 feet under initial pressures below atmospheric. The critical area varies widely, from small under high pressure to large under low pressure."

Stating this in terms of plain working result, the impulse turbine of the old art could only utilize 15 per cent. of the potential possibility of steam, a result which, apart from other objections, barred its practical use. It will thus be seen that no matter what the form of prior impulse turbines, or how instructive and prophetic, read in the light of after discoveries, the statements of their inventors may appear, they were all in reality and necessarily ineffective, because they were, in the then knowledge of steam, based on a principle of operation that could only end in failure. In this barred state of the impulse turbine art came the great, radical and, at the time, inconceivable disclosure of De Laval. Like all great inventions it was simple, but with that simplicity was a practical change that scientifically and commercially was startling. Mechanically all De Laval did to the impulse turbine was simply to diverge the outlet end of the steam passage; in steam dynamics his great discovery was that, beyond the critical point of steam, velocities can be accelerated at the expense of pressure energy, if the pathway is diverged. Before his disclosure it was supposed, and not without some basis for such supposition, that a diverging nozzle would retard steam from creating kinetic energy, for such seemed the effect of a diverging outlet on a jet of water, and we now know that an extension of De Laval's diverging nozzle beyond limits now well understood makes his process ineffective. So revolutionary was De Laval's theory that the application for an American patent upon it was met by the objection of the Patent Office that:

"The object of applicant's alleged invention will apparently be defeated by the construction shown and claimed, since the fall of pressure due to expansion will necessarily lessen the velocity of the steam at the point of impact with the wheel, and consequently the 'vis viva' of the steam will tend to be a minimum rather than a maximum."

To this De Laval replied, saying:

"The characteristic feature of applicant's invention may be expressed in a few words, thus: He expands the steam *before* it reaches the turbine and converts its pressure into velocity before the steam is required to do any

work, while heretofore the steam was principally expanded in the turbine or other engine which was actuated by the pressure of the expanding steam. Applicant has made the discovery that by a flaring nozzle practically all the pressure can be converted into velocity, while before it could only be expanded down to 57.7 per cent. of the initial pressure, and that a jet can be produced which is no longer capable of expansion, but which has an enormous velocity and the vis viva of which can be economically utilized."

Since, as will hereafter appear, the patent of Curtis is based wholly on a turbine of the De Laval type, the fact of De Laval's absolute departure from all prior inventive effort is vital to a just appreciation of what Curtis subsequently did to supplement and utilize De Laval's discovery. This warrants our dwelling in such detail on the revolutionary character of De Laval's work. This is fairly stated by complainant's witness, who says:

"De Laval's original application, which was filed May 1, 1889, was met by the examiner by complete skepticism as to its operativeness. The effect of the conical convergence of the nozzle was held by the examiners to be the exact opposite of that alleged by De Laval. Further, the figure 57 per cent., which appeared in the application as a measure of the pressure which could not be converted into velocity in the ordinary converging nozzle, was not understood by the examiner and an explanation was called for. The applicant was obliged to reply at length. The figure '57 per cent.' was supported by a reference to the treatise on thermodynamics by Prof. Herrmann, of Chemnitz (Berlin, 1879). The examiner's misapprehension as to the action of the diverging nozzle was explained by pointing out that even Prof. Zeuner, who was then one of the greatest living authorities on thermodynamics, had committed himself in his publications to the same error—an error, indeed, which was then universally prevalent. * * * This debate continued year after year, and might have extended indefinitely had not the showing made at the Chicago World's Fair removed the question from the field of academic dispute. The patent was finally allowed June 4, and issued June 26, 1894."

De Laval's diverging nozzle resulted in producing an impulse machine of a phenomenal character in that the now utilized power of the steam produced a speed beyond all past experience and so high as not to be permissive on account of stress on revolving parts.

But noteworthy and meritorious as were the contributions of Parsons and De Laval to the turbine art, their labors still left many serious objections to their turbines, which they were unable to remove. As has been justly said in testimony quoted below, this was not to be wondered at. In the reaction turbine, as we have seen, the steam is not jetted, but is admitted at initial pressure around the whole periphery of the chamber or substantially so, and the creation and imparting of its kinetic power depends on its passage through interspaces of the movable vanes, for such steam as does not go by that passage is lost. To insure, therefore, such intervane passage and to prevent passage through the clearance between the ends of the moving vane and the chamber shell, is imperative. Owing to contraction and expansion and other causes, this was attended with grave difficulty and sometimes resulted in stripping the revolving vanes. Clearance escapes, owing to the principle of operation of a reaction turbine, could not be avoided. They could only be measurably minimized by the most careful construction. Moreover, the intrachamber, drop-pressure feature of the Parsons chamber subjected it to the mechan-

ical objection of axial or endwise thrust. This was due to the fact that there was a difference in pressure—a pressure drop—between the inlet and outlet side of the vane. As the relative proportion of clearance loss to vane-capacity increased as the vane diminished in height, the reaction turbine was restricted to large sizes. All this is clearly shown by complainants' witness, who says of the Parsons turbines that:

"Relying as it did upon reaction, (it) developed its power by the pressure of the steam upon its vanes. There was a drop in pressure between the inlet and exit of each vane; consequently, clearance spaces must be as fine as possible, in order to prevent excessive leakage. At the time rotative speeds were very high compared with machinery other than steam turbines. Consequently, it was extremely delicate and sensitive to derangement by steam erosion, intrusion of foreign substances, etc. The fact that it relied upon reaction also necessitated a vane speed virtually equal to the steam speed. This need for high peripheral speed prohibited the reduction of wheel diameters. Therefore, since the current of steam must occupy the entire periphery simultaneously, the radial dimension of the steam current in the earlier stages of the machine was narrowly restricted. This minuteness also exaggerated the relative part played by the clearance spaces and their leakages."

While these objections of clearance, axial thrust, and prohibitive use of small wheels due to the use of the reaction principle were avoided by use of the impulse principle in De Laval's turbine, yet its use also disclosed serious objections, due to its principle of operation. The tremendous speed it developed forbade utilization of that speed in large wheels and necessitated the non-economic practice of counteracting or neutralizing it in the small wheels where it could be used. It should here be noted, as throwing light on the novel character of Curtis's subsequent work, that this excessively high speed of turbines was accepted as necessarily incident and the whole trend of the engineering profession was to accept it as such. Thus in respondent's proofs Rateau's address (heretofore referred to) says:

"The Girard screw-wheel, which succeeded so well as a hydraulic motor, has given no public results, as a steam apparatus. The failure of the tests which I just related should not, of course, be in the least surprising. The problem was in fact difficult to solve, *because, in order to secure an economical operation, it is absolutely necessary to attain very high speeds of rotation.* * * * If steam turbines are compared with ordinary motors, both advantages and disadvantages are found. I would emphasize as the principal disadvantages of turbines resulting from the great velocity of rotation: (1) Heating of the bearings; (2) *the difficulty of driving shafts rotating at lower speeds;* (3) the difficulty in using a condenser. I put aside for the moment the question of consumption of steam."

De Laval himself sought in different ways to control the high speed he generated. In order to lessen the strain on parts he devised a flexible central shaft so small in diameter that when running at very high speed such shaft and the whole rotating unit did not rotate around its geometric center, but tended to approach the center of gravity of the rotating system. As it was impossible to operate machinery by direct connection with the high-speeded turbine, he was driven to devise special reducing gears which were bulkier than the motor. Indeed, as showing the grave nature of the speed problems which were never overcome, it will be noted that the only effort of De Laval, as shown

in his German patent, No. 84,153, to eliminate rather than accept these nonworkable speeds, was his device to reduce the velocity of the jet itself before it entered the wheel vane by mass compounding it with some passive liquid such as superheated water or other desired fluids to reduce its acceleration in the nozzle. In the same line of relief, Bollman, of Austria, in his patents in many countries in Europe beginning in 1894 and ending with his American patent, No. 584,203, of 1897, sought to introduce a mixture of air. In his work on the Steam Turbine (2d Ed. 189) Stodola says:

"The majority of the older patents showed lack of knowledge of the steam flow. One idea especially led inventors on in spite of constant failure; to decrease the velocity of the steam by mixing it with fluids or gases."

After showing that, even if they had succeeded, "there must be (in a particular one cited) a loss of kinetic energy that would amount to one-half to three-fourths of the available work," Stodola says:

"As patents are being taken up to the present time on this useless idea, it is well to investigate it somewhat more closely. The mixing of fluids must give, besides the loss due to shock, a poor performance in the blade channels, because the individual drops of the 'rain of this mixture' must become separated from the steam mass on account of the sharp bending of its path."

Notwithstanding, then, the elimination in De Laval's impulse turbine of the objectionable features of wheel clearance, axial thrust, and nonuse in small wheels which lessened the efficiency and scope of the Parsons reaction turbine, the De Laval impulse wheel was, by its high speed, also restricted in scope in that such speed prohibited its use in large turbines and prevented its use in small ones except when accompanied by supplemental speed-reducing gearing. It will thus be noted that, great as the contributions of Parsons and De Laval were to the turbine art, the devices of both had grave limitations. On the one hand, De Laval could not utilize all the kinetic force his impulse turbine could call into play; and, on the other hand, the limitations of axial thrust and clearance measurably counteracted and inefficiently lessened the kinetic energy the Parsons reactive type produced. The practical result was the restriction of Parsons to the field of large turbine effort, of De Laval to small, and that a field for further inventive effort remained is foreshadowed by respondent's proof where Rateau in his Paris address of 1890, already referred to, says:

"Is it then impossible to properly satisfy at once these two conditions: *To utilize high speeds of flow* and avoid too great losses in power? Probably not. I am even convinced that for this class of motor, as in the case of hydraulic motors, it will be possible without too great difficulty to obtain an efficiency of 75 per cent. *However this may be, the scheme which will give this result is yet to be found.*"

[2] In this state of the art Curtis devised the turbine covered by patent 566,969, and, before discussing what the device of that patent is, let us state clearly what it is not. So far as turbines meet the eye they are all substantially similar, but the real test of a machine is not its physical appearance, but the principle on which it operates. Now of the Curtis device a few things are basic. Its principle of operation is not by pressure, for Curtis has no intrachamber change or stage of

pressure, and because it has no pressure passages it has no clearance and no axial thrust. Manifestly, therefore, it is not a reaction turbine, and the pressure principle of operation of that machine was not used in it. It follows therefore that, whatever the success of Parsons in developing that principle was in reaction turbines, it did not anticipate or pre-empt the field of impulse turbines to which Curtis addressed himself. On the other hand, while Curtis's is an impulse machine, patterned after and indeed making De Laval its avowed foundation, and using the diverging nozzle invention of De Laval to create kinetic force, yet, at a vital point, a radical departure is made from De Laval, and on that departure Curtis's device rests. For the principle of operation of Curtis's turbines is such, and herein lies his novel and valuable contribution to the impulse turbine art with its nonclearance, nonaxial thrust, simple and rugged parts, that instead of extracting *initially*, as De Laval has done, a kinetic force so great as to require neutralization or reduction, he only extracts, and that by degrees, such power as is needed—a process termed hereafter pressure staging—and as such requisite power is so extracted by degrees he utilizes the whole of such extracted power by a process hereafter called velocity-compounding. If these facts be established, it follows that Curtis was not anticipated by either Parsons or De Laval, that he gave to the art a low-speed, impulse turbine, which while using the general principle of pressure staging as Parsons had done, so used it as to avoid clearances, axial thrust, and exclusion from the field of small turbines, and, while extracting kinetic power as De Laval had done, avoided the creation of high speeds, wasteful non-use of potential power, and exclusion from the field of large turbines. His device was more; in that, in a turbine of simple parts and rugged construction, Curtis combined the excellencies and avoided the faults of both his predecessors. This in no wise reflects on the merit of those pioneers, as is conceded by complainants' expert. Indeed, how radical was the departure of Curtis from prior developments is simply but forcibly summed up in Curtis's own testimony. He says:

"After giving the subject a great deal of thought, it seemed to me that it would be possible to devise a machine which could be run at a much lower speed of revolution than any turbine which I was aware of, that would have an even higher efficiency, sufficiently high to enable it to take the place of the steam engine in large units. At the same time the machine could be made very rugged and mechanically simple, and the necessity for small blade or bucket clearances eliminated. I remember being very much struck with the fact that no machine having these characteristics had yet been produced, although a great amount of thought and experiment seemed to have been devoted to the subject."

He then in effect adds with commendable frankness that he took up the problem, not as one of pioneer work, but only as an improver on De Laval, saying:

"I was particularly impressed with the fact that no turbines had been built, based upon the principle of staging or pressure compounding, what might be called generally the De Laval type of turbine, and it seemed to me that this principle offered the true solution of the problem."

It thus appears that the goal Curtis had in view was an impulse turbine which would work efficiently at a shaft speed so low as to not re-

quire speed-reducing gear, but would conserve the potential power of the passing steam until its use was really required. To do this he devised the novel scheme of subdividing, in an impulse turbine, the available energy of the steam, in transit, into a number of steps or stages. This was done by producing several successive chambers connected by diverging or parallel nozzles. In this way it will be seen that, instead of using one chamber and one nozzle whereby the steam was expanded from initial to exhaust pressure, Curtis took what was the exhaust steam of De Laval's single chamber (which exhaust steam, as we have seen, had additional unutilized kinetic power which De Laval failed to utilize), and by means of interchamber nozzles he so treated the steam that it could be re-used in a second nozzle and chamber, and, indeed, in successive ones, with the result that he utilized, in stages, the kinetic energy which De Laval had lost. It will then be seen that he subdivided the available energy steam, which De Laval found of non-available speed, into a number of pressure steps or stages, so that a single nozzle would no longer have to expand the steam from initial to exhaust pressure, but a series of nozzles could successively expand it to intermediate stages until it finally dropped to exhaust pressure. The result of these subdivision stages of pressure reduced the steam velocity of an impulse turbine to a practical bucket speed instead of attempting, as De Laval did, to increase his bucket speed to equal high steam speed. De Laval's turbine attained commercial efficiency by reason of his use of a rotating element which permitted extremely high bucket speed. But Curtis's attained commercial efficiency by such a relatively low bucket speed as required no special mechanical expedients and thereby secured an economical co-ordination of steam and bucket speed. But his disclosure was more than the mere duplication of De Laval's nozzle and chamber. Curtis co-ordinated his own several pressure stages so as to secure such subdivision of energy between the chamber stages that while taking the steam in succession and operating with the same shaft speed the several stages were adapted to give an efficient abstraction of energy. Thus the several stages, while operating separately in an efficient manner, also co-ordinately and collectively operated to give over-all efficiency. This co-ordination involved such a proportioning of the nozzles and buckets of the several stages that the several stages, while under conditions of fixed shaft speed rotation, were nevertheless adapted to accommodate the steam flow, at the successively diminished pressure, so that the steam speed produced by the successive nozzles bore substantially the same relation to the bucket speed of all other stages. This was more than the mere physical duplication of De Laval's single chamber. It is true it involved the thought of the duplication of chambers, but to that duplication it coupled the inventive, novel, and practical disclosure of utilizing pressure by stages in impulse turbines, and so co-ordinating that subdivided pressure in successive chambers that while using the steam in chamber-succession and operating at the same shaft speed the several steam stages were adapted to give an efficient abstraction of energy, and while each individual chamber operated efficiently they all operated collectively and harmoniously to give a total of over-all

efficiency. "This," as was well said by complainants' witness, "involved such a proportioning and relation of the nozzles and buckets of the several stages that the stages were under these conditions of fixed shaft speed rotation, adapted to accommodate the steam flow at the successively diminished pressures, and also so that the steam speed produced by the successive nozzles should bear substantially the same relation to the bucket speed for each stage as for all the other stages."

It will thus be seen that Curtis efficiently and for the first time practically co-ordinated different pressure stages in an impulse turbine and effected such a subdivision of energy between the stages that the different chambers, while utilizing the steam in transit at different stages and on the same shaft, were by their interchamber, jet connection, adapted to secure and utilize an efficient and complete abstraction. While each, in a sense, operated independently, yet their co-ordination was such that all worked unitedly to give a satisfactory total efficiency. The mode of doing so Curtis clearly outlined in his patent:

"The method by which the turbine of my present invention operates consists in converting the pressure of the fluid into vis viva by stages and utilizing the vis viva developed at each stage by passing the fluid through rotating vanes, the speed of revolution of which is adapted to abstract substantially all or a large portion of the velocity. In practicing this method I first convert a definite amount of the initial pressure of the fluid into vis viva by passing a jet of fluid through a nozzle or passage properly proportioned to give the desired result, and I deliver the flowing jet to a movable element of the apparatus consisting of one or more circular ranges of vanes forming passages through which the jet passes and in which its direction of flow is changed, so as to extract its velocity wholly or largely whereby the vis viva developed in the nozzle or passage is wholly or largely converted into mechanical rotation. The fluid issues from this movable element into a stationary passage, which is so proportioned as to convert a further definite amount of the pressure remaining in the fluid into vis viva, and which delivers the fluid in a jet to the second movable element consisting of one or more circular ranges of vanes, by which the direction of the flow of the jet is changed, and its velocity is again wholly or largely extracted, whereby the vis viva developed in the intermediate passage is converted wholly or largely into mechanical power. The energy of the fluid may be converted into mechanical power in two or more such steps or stages, but it is essential that the various stages be so co-ordinated that the flow through the apparatus shall be continuous. To this end the successive working passages to which the jet is admitted in the movable elements of the apparatus are enlarged in cross-section and correspond in size with the discharging ends of the successive stationary passages, and in each element in which vis viva is developed provision is made for carrying the same mass of fluid as is admitted to the first nozzle or passage, having regard to the volume and velocity. * * * The velocity developed and utilized at each stage may be the same, in which case the speed of the several movable elements will also be the same; or the former may not be the same, in which case the latter will also vary. The movable elements may be mounted on the same or different shafts. If they are mounted on the same shaft but have different rates of motion, their diameters should be different, so that the speed at the shaft may be the same. * * * The pressure of the fluid jet is not reduced during its passage through the utilizing vanes, except to the extent necessary to supply what may be called the 'frictional consumption of energy' in the passage through the vanes. The passage must be enlarged in proportion thereto. * * * K is a pipe or conduit leading from the steam boiler or other source for supplying the fluid under pressure. This pipe terminates in a nozzle L which may have diverging sides, as in Fig. 1, or parallel sides, as in Fig. 2."

Practical working directions are also given:

"For purposes of illustration we will assume that the apparatus of Fig. 1 is designed to work between a boiler pressure of one hundred and fifty pounds and an exhaust pressure of two pounds, these pressures being absolute and not by gauge (this exhaust pressure corresponding to about twenty-six inch of vacuum). The pressures existing at the discharging ends of the nozzle *L* and of the nozzles of the intermediate stationary passages *M*, *N*, and *O*, will be such as to develop practically equal velocities at the delivery end of each of these nozzles, this velocity being, roughly, seventeen hundred feet per second. The apparatus of Fig. 2 is intended to represent a noncondensing turbine, operating between a boiler pressure of one hundred and fifty pounds (absolute), and an atmospheric exhaust, say sixteen pounds pressure. In this case the pressures at the discharge ends of the nozzle *L* and of the nozzles of the intermediate stationary passages *M*, *N*, and *O* will likewise be such as to develop practically equal velocities at each nozzle, and in this case such velocity will be roughly thirteen hundred feet per second."

It will thus be seen that the question whether a divergent or non-divergent expansion nozzle is required depends upon whether or not the velocity for which it is designed is above or below critical velocity, or, what is the same thing, upon whether the lower pressure into which the steam is delivered at each stage is less or more than 58 per cent. of the higher pressure from which the steam is delivered. If the velocity desired is less than the critical velocity, the fall in pressure will be to a lower pressure, which is more than 58 per cent. of the higher, and therefore a divergent nozzle will not be used, as a straight nozzle will give all the velocity required. On the other hand, if a higher velocity than the critical is desired, the fall in pressure must be to a point less than 58 per cent. of the higher pressure, and a divergent nozzle is needed to fully convert such fall of pressure into velocity.

A second disclosure of Curtis's patent was velocity-staging or velocity-compounding. Prior to Curtis's patent it had been suggested that the potential velocity remaining in the exhaust steam from De Laval's turbine should be utilized by a second or third application of the jet to a second or third set of vanes. From this it is contended that Curtis's velocity-compounding is simply the multiplication of De Laval's single vanes. Had this been all Curtis did, we may assume that De Laval or other inventors would have so duplicated. But the very fact they did not is in itself proof that more than mere duplication was involved in the intervening years between De Laval and Curtis. In point of fact no one prior to Curtis showed how such duplication could be practically done and with good reason, for we now know that, in the absence of since discovered knowledge in the steam art, no such duplication was possible. At that time the knowledge of steam friction and rotation losses was not such as to make possible the utilization of succeeding velocity stages in impulse turbines. Indeed, before the possibility of such utilization could exist, a knowledge of steam friction and rotation was a *sine qua non* to determining the proper design of buckets of succeeding rows; and, in fact, the angles of the guide vane edges and also the angles of the bucket of a second and succeeding rows depend on the velocity of the steam at such point. Undoubtedly the proofs show that in 1895 Sosnowski, in a paper on De Laval's turbine read before the Civil Engineering Society of France, suggested

the velocity-compounding of that turbine. He stated that the steam on leaving the first row of buckets could be redirected against the second row, and in this way steam velocity, that would otherwise be lost, could be utilized. But neither he nor any other engineer showed how this could be practically accomplished. Public statement of such desiderata, in the absence of any solution, evidences the need of invention to answer it. And such inventive act had to await further knowledge in the steam art before it had any possible working basis. As said by one of complainant's witnesses:

"It was not until after the experiments of Odell in 1904, described in Stodola's *Steam Turbine*, p. 134, and experiments by Stodola (see page 130), that the losses due to steam friction and the rotation losses were sufficiently determined to enable a correct design of a single pressure stage impulse turbine having two or more velocity stages. * * * No practical use was made of the velocity-compounding suggestion nor could have been made, until it was made by Curtis, when his pressure-compounding scheme made velocity-compounding feasible."

And by another:

"This plan of repeated application of a steam jet to moving vanes, commonly called 'velocity-compounding,' is now known to have been always impracticable when applied to a jet embodying kinetically the entire energy of the steam because of the very great friction losses involved when steam speeds were so very high. When these steam speeds had been suitably reduced by pressure staging, however, as now provided in the Curtis specification, the velocity-compounding of an impulse turbine became, for the first time, profitable and practicable."

Indeed, the seemingly inevitable loss of residuary potential velocity in the exhaust steam of a single impulse turbine was recognized by De Laval himself, for in an article by Olssen, published in the *Swedish Engineering Journal*, *Teknisk Tids Krift*, of February 11, 1893, and republished in a pamphlet distributed by De Laval at the Chicago Exhibition, is described the function of an ejector which partially exhausted the pressure within the chamber whereby supposed additional efficiency of the turbine was thought to result. Simply stated, the velocity-compounding of Curtis's patent consists in venting the force of the steam jet on two or more successive sets of movable vanes in a single, pressure-staged chamber, and Curtis for the first time instructed the art how, by means of suitably designed movable and stationary vanes, a jet could be efficiently carromed and recarromed from successive movable to stationary vanes in such a chamber. Why the effect of this double or triple division of a jet upon two or three vanes in a pressure-staged chamber is such as to make three such velocity stagings reduce periphery speeds as much as nine pressure staged chambers is to us inexplicable, but such is its really wonderful effect. Velocity-compounding is thus set forth in the patent:

"I deliver the flowing jet to a movable element of the apparatus consisting of one or more circular ranges of vanes forming passages through which the jet passes and in which its direction of flow is changed, so as to extract its velocity wholly or largely, whereby the vis viva developed in the nozzle or passage is wholly or largely converted into mechanical rotation. The fluid issues from this movable element into a stationary passage, which is so proportioned as to convert a further definite amount of the pressure remaining

in the fluid into vis viva, and which delivers the fluid in a jet to the second movable element consisting of one or more circular ranges of vanes, by which the direction of the flow of the jet is changed, and its velocity is again wholly or largely extracted, whereby the vis viva developed in the intermediate passages is converted wholly or largely into mechanical power. The energy of the fluid may be converted into mechanical power in two or more such steps or stages, but it is essential that the various stages be so co-ordinated that the flow through the apparatus shall be continuous."

This brings us to the question: Was Curtis's disclosure of thus pressure staging an impulse turbine alone or the combining of such pressure staging with velocity-compounding inventive? After a patient and thorough study of this record, we are satisfied it was. When Curtis started the work which eventuated in this patent, the steam turbine problem was involved in complexity and uncertainty. The pioneer work of Parsons and De Laval was based on machines wholly unlike in basic principle of operation, and this dissimilarity rather tended to confuse and mislead those who sought improvements in lines common to both. Indeed, as noted in the earlier part of this opinion and justly stated by complainants' witness:

"* * * The successes and distinctive spheres of these two leaders tended to lead away from the path Curtis followed of blending the advantages and avoiding the disadvantages of both. Each of these inventors and those who followed the path of each would be led in the same way—had had too great success along his own line to think of abandoning or fundamentally modifying, or departing from, the basic principle that had led him to success. Instead, each naturally went ahead to perfect the details devised to overcome the defects developed by the application of his basic principle—De Laval in devising reducing gear, flexible shaft, and the reduction of speed by mass-compounding his working fluid; Parsons turning to his balance piston against axial thrust in place of the median-steam introduction of his original disclosure and striving to minimize clearance steam escapes. Designers, less original than these turbine leaders, naturally also looked at the art from the standpoint of one or the other of these men and worked for a future along these lines."

The situation is in our judgment most fairly summarized by a witness of complainants, who says:

"The laws of steam action in these turbines was but dimly perceived, except that speeds must be kept down; and since, in the entire history of steam motors up to that date, the desideratum had always been to get rotative speeds up, past experience served only to puzzle rather than to help. The state of public opinion at that date may be had by a glance over the pages of the papers by Mr. K. Sosnowski, civil engineer, presented to the Société d'Encouragement Pour l'Industrie Nationale in 1896 (revised and published in book form in 1897 under the title '*Roues et Turbines à Vapeur*'), which was generally accepted by later writers as historically sound. Almost every conceivable combination and arrangement had been proposed or tried, but more or less blindly, and with universal futility. All that was plain, as the result of this, was that departure from Parsons or De Laval toward any novel principle of action must call for a thorough redesign of the entire machine and a departure into unknown territory."

As we have seen, Parsons and De Laval were pioneers in their several spheres; but they did not block the way to further advance. Curtis's advance consisted in giving to the art a device which, by its construction and mode of operation, avoided difficulties individually incident to both Parsons' and De Laval's turbines. Compared with Par-

sons, he eliminated clearances and avoided axial thrusts; compared with De Laval, he avoided the wasteful method of creating high speed initially and neutralizing it by reducing gear, but, obtaining low speed initially, he extracted the whole working force of the steam. As compared with both, he mechanically compacted his working parts and space into smaller compass and in his turbine disclosed a principle applicable, as Parsons' was, to turbines of large size, and applicable, as De Laval's was, to those of small size. He gave the art a type of turbine which efficiently and for the first time showed working results different from any theretofore disclosed in the turbine art. We are clear in the conclusion that his device was not the work of a mere constructor in his art, but that of a reconstructor, who brought originality of conception, unlooked for and unsuspected lines of action, and created novelty in the disclosures he made. These features, coupled with his departure from beaten paths, and the novel and useful results he obtained by methods not before known, evidence the inventive nature of his work. We have no hesitation in holding his patent valid unless anticipated. In the prior art we limit ourselves to the measure of the scope of alleged anticipation contended for by one of respondent's experts, who said:

"The true state of the art in 1896 is that represented by Morehouse, Harthan, Mortier, and De Laval, plus the same developed knowledge on which Curtis relies."

Now there is no proof that any of these produced a practical efficient turbine, and there is a statement by the same witness, "I do not know that the machines of Harthan, Tournaire, and Morehouse were ever put into practical use, nor do I know if at their respective dates the engineering knowledge as to steam flow through nozzles, etc., was adequate to permit successful practical use of these machines," which virtually admits they did not. A British patent, No. 144, of 1858, followed by an American one, was granted to the Harthans for a motive power engine to be worked either by air or steam, "whereby the expansive and reactive force of the propelling medium is brought into play." A study of this patent shows that the Harthans did not purport to disclose any new principle of operation, but their device was based on the form of their buckets and the general arrangement of their machinery. If those features involved any new principle of operation, the patentees neither knew nor claimed it, or, indeed, anything save their peculiar bucket form, for they say:

"We are aware that rotary engines, consisting of wheels having a number of projections formed or fitted into their peripheries and actuated by the impingement of steam or air against such peripheral projections or chambers, have long been known in this country, and therefore we lay no claim to the principle of such arrangement * * * but what we consider to be novel and original and therefore claim * * * is: Firstly, the system or mode of obtaining motive power by causing steam or air to impinge upon a series of chambers with *curved bottoms* arranged round a wheel, at or near the periphery thereof, as herein described."

A study of the patent shows that these curved bottom chambers, which the Harthans regarded as peculiar to their wheel, are particularly described. Their device is described as made:

"* * * With a number of *peculiarly* constructed projections forming chambers somewhat similar to the buckets of an overshot water wheel. * * * The bottom or lower part of each chamber is made of a curved or nearly semicircular form, the curve commencing immediately at one side of the mouth, and terminating in the same lateral line, so as to extend from side to side of the chamber, or in the direction of the axis of the wheel * * * a jet or jets of steam is or are brought to play into these spaces or chambers entering therein nearly at a tangent to the periphery of the wheel. * * * The steam or air on issuing from the jet enters the spaces or chambers on one side, impinges against and passes over surfaces of the curved bottoms thereof, and issues out on the other side of the spaces nearly in an opposite direction to that at which it entered, thus imparting its force to the wheel by pressure and reaction and causing it to revolve."

These and other references thereto show that the operative element which characterized the Harthan turbine was the curved bottom of their chamber, and that all other features to which allusion is made were mere incidents thereto. The device left no impress on the art during the years that passed before Parsons first utilized the turbine, and we are therefore warranted in accepting, as an explanation of its nonuse, the statement of one of complainant's expert witnesses, who says:

"As to his simple impulse wheel, it is now common knowledge, and in Harthan's day was technical knowledge, that a jet from a converging nozzle could not convert into kinetic form more than about 15 per cent. of the energy potential in the steam. Hence the net efficiency of a wheel driven thereby could not exceed 10 or 12 per cent., a quite useless figure."

It is contended, however, that Harthan's disclosed velocity compounding in their wheel, and in support thereof attention is called to their language:

"Fig. 6 represents a detail of a third modification, where we propose to employ two wheels *CC'*, each precisely similar to the wheel in the last described arrangement, both of such wheels being fast on one shaft *D*. A space is left between the contiguous falls of these wheels for the reception of four or more returning chambers *d, d*, the bottom of which are curved in a direction opposite to that of the bottoms of the chambers *c, c*, in the wheels. * * * The jet on being first introduced impinges against the curved bottoms of the chambers in the wheel *c'*, and is then diverted against the fixed chambers *d, d*, whence it is again diverted onto the curved bottoms of the chambers in the second wheel *c*, and finally passes off by the escape pipe in the manner described."

To the lay mind and apart from all expert speculation in the matter it would seem that, when Harthan's single impulse wheel was not practically efficient, a mere suggestion of employing two wheels "each precisely similar to the wheel in the last described arrangement" would tend rather to duplicate than eliminate the objections to the one. But laying aside this simple lay view and taking up the speculative one, it seems to us that the very most that may be said of Harthan's is the statement of Stodola, in the 1910 edition of "Die Dampfturburen," that:

"The predecessors of Curtis are John and Ezra Harthan in their English patent, No. 144, of 1858 (Fig. 695). The use of two velocity stages in an impulse turbine is here for the first time clearly proposed, the enlarging of the cross-section, and, moreover, even the divisions of the drops in pressure are particularized."

[3] But assuming they were predecessors, wherein did they precede Curtis? Stodola says they suggested for the first time the use of two velocity stages in an impulse turbine. But there are some inventions the inventive element of which consists in the conception of the novel abstract idea as contrasted with others wherein the invention consists in the practical means of applying what had theretofore been but a mere abstract idea. In the former the conception of the abstract idea necessarily involves the details of utilizing it. In the latter it does not. Here, as Stodola says, the Harthans for the first time may have clearly proposed two velocity stages in an impulse turbine, but coupled with the proposal were no practical, efficient means of obtaining such stages, and tested by the common sense truism, by their fruits ye shall know them, we are unable to find in the disclosures of this patent, or by any results flowing therefrom, anything to minimize the value of the work of such men as Parsons, De Laval, and Curtis, who entered a field that, inventively, was then barren. Nor does it serve to minimize the work of these men to say there was no call for high speed turbines, and therefore the quiescence of the art from Harthans to Parsons has no significance. For it will be observed, as the current of events narrated above shows, that when the call for turbines came Parsons had years and years of patient pioneer work in the field of reaction turbines following even the grant of his patent, before it was commercially and successfully applied, while in the impulse field De Laval's work was, as we have seen, so revolutionary that his disclosure was regarded as an impossibility by the patent authorities. In the face of the expenditure of such subsequent study and effort by engineers of all countries, to now contend that the vital features of pressure staging and velocity-compounding were anticipated, disclosed, and utilized by Harthans in a fruitless patent wherein the only characteristic claim was for curved bottom buckets, is a contention to which we cannot assent. On the contrary, we adopt, without here discussing the reasoning and illustration thereto warranting, the contention and conclusions of a witness for complainants, who says:

"As to Harthan's velocity-compounded wheel, even if it were equipped with a De Laval nozzle, it could not be passably efficient when built according to Harthan's instructions. Harthan specifies that the two wheels, and the intermediate guides as well, are to be alike; whereas, it was well known even in 1858 that abstraction of vis viva in successive stages can be accomplished efficiently only when the first, second, and third sets of vanes are markedly dissimilar. * * * As to Harthan's list of possible modifications, he plainly classes them of quite incidental value. All but the last we now know to be trivial in their import. As to the last suggestion, for the connection by piping of a number of separate casings in each of which rotates an impulse wheel, through which casings the steam passes in series from boiler to condenser, * * * we now know that such a series of turbines would be practically inoperative. Its adjustments of relative pressures and speeds would be such unstable equilibrium that the slightest of the ordinary variations in actual service would put it out of commission. * * * In contrast with this, Curtis' invention, as disclosed in patent 566,969, lay in first defining the problem in hand as the simultaneous reduction of wheel speeds, steam leakage, and delicacy of structure, and then in describing the combination of pressure staging with impulse action, aided by velocity-compounding as the means thereto."

We next turn to the American patent to Moorhouse, No. 195,630, of 1877, for which same device his British patent of 1876 was granted, which is alleged to anticipate the pressure staging of Curtis. There is no statement in the patent as to whether Moorhouse's principle of operation was to be applied to reaction or impulse turbines, and whether he made use of the pressure or velocity of the steam. There is no reference anywhere to any jet, or impulsive action of steam. On the contrary, that his turbine was operated by pressure difference, rather than by velocity, is indicated where he says:

"The openings in the dividing plates between the several compartments are arranged so that the driving fluid, in its passage through them, operates upon the vanes or buckets upon the turbine wheel in the compartment into which it is passing, and the turbine wheel is thus with a force proportioned *to the difference in pressure of the driving fluid* in the two compartments. By the novel arrangement described, the difference of pressure between each two adjoining compartments is comparatively small, and it is thus possible to actuate the turbine wheels and the driving shaft at a moderate speed, which is impracticable where high pressure steam is used to drive a single turbine."

He further adds:

"If steam of 96 pounds per square inch is admitted through the inlet pipe *h*, the openings in the first dividing plate are of such area that its pressure is reduced to 92 pounds in the second compartment; and in its passage it drives the first turbine wheel with an effective pressure of 4 pounds per square inch only. In the same way it passes through all the other compartments in succession; its pressure being reduced 4 pounds per square inch in each, but its volume being increased proportionately by expansion."

In the British patent Moorhouse states the drop in pressure is one not only to the area openings, but as well to the compartment capacity, saying:

"The openings being of such area and the compartments of such relative capacity that the steam expands to a calculated extent in its passage."

But not only does this strongly suggest that Moorhouse's was a reaction turbine, but in his British patent he refers to the description he has given in language which can be predicated on a reaction, but not on an impulse turbine, which, as we have seen, to be efficient cannot travel at over half the speed of the impelling steam. That language is:

"It is not necessary that the turbine wheels should be made to travel at the same speed as the steam which actuates them, as assumed in the foregoing description."

It is true the language following, "They may be made to travel at a less speed than that of the steam, and very good results may be obtained when the velocity of the wheels is half that of the steam," might be applied to an impulse turbine, as contended by respondent's experts; but, as it is undoubtedly referable as well to the reaction turbine of his "foregoing description," we think it would be a strained construction to apply the language in its juxtaposition to any other type of turbines, and Stodola, p. 83, says, "Moorhouse (Figs. 169 and 170) counts only upon pressure stages." We therefore conclude that, whatever principle of operation Moorhouse had in view, he threw no light on applying it to an impulse turbine. And this conclusion as to impulse turbines becomes more significant when the Moorhouse patent

is considered with special reference to De Laval's type of impulse turbine, of which type the Curtis is, as we have seen, an improvement. For it must be conceded that, whatever principle of pressure staging Moorhouse disclosed, anything he disclosed was not applicable to the high-speed impulse turbine which De Laval produced by his nozzles where there is no pressure difference at the inlet and outlet ends of the moving vanes, for, prior to De Laval, as we have seen, no one (and of course, Moorhouse) dealt with the then unknown condition of a pressure drop created solely in the nozzles. And, indeed, Gentsch, who in his Dampfturburen (an authority quoted by one of the respondent's witnesses as "a well-known member of the German Patent Office and a very high authority on steam turbines"), while classifying Moorhouse's turbine as an impulse one, wholly disassociated him and other designers from the De Laval type, saying:

"The steam which expands outside the nozzles, and which in the free jet wheels is mostly made to perform work during the period of expansion, is able to convert only a small portion of its pressure energy into current energy, so that the working of the velocity turbines hitherto discussed has not given a satisfactory economical result. * * * A better state of things was produced for the first time by the invention of De Laval."

Finding, then, as we do, that the disclosures of the Moorhouse patent had no helpful bearing or practical effect on the impulse turbine art, and supported in that conclusion by the fact that its vagueness is such that fair-minded witnesses in this record greatly differ as to what its disclosures really are, we are not warranted in attributing to it any effect in the way of vitiating, or even minimizing, the work of Curtis. We pass on to the Mortier article.

In 1890, Rateau, a French savant, read before the Society of Mineral Industries of France two papers on the Parsons turbine, which had been lately exhibited at the Paris Exposition. In his first paper, Rateau discussed that turbine, stating its advantages and disadvantages. Several members expressed their views upon it, following whom M. Mortier stated "that this form of motor utilizes the complete expansion of steam," whereupon the president inquired, "What advantage is gained by using the steam in the form of velocity instead of using it in the form of pressure?" Mortier's subsequent remarks were evidently prepared with reference to this question, and in order to gather their significance it is important to determine what the president's question raised, and how it was understood by those present, and how it was acted upon. That it meant a comparison of the worth of a reciprocating engine and some turbine is clear. But what turbine? Respondent contends it covered impulse turbines. We cannot accede to this view. The question was raised by the president, not by Mortier, and, as we have seen, was called forth by the assertion of Mortier, who was apparently completely satisfied with the Parsons turbine, "This motor utilizes the complete expansion of steam." Mortier was seeking or suggesting no other form or type of turbine, and the president, then, in substance, put the question as one between the Parsons turbine and a reciprocating engine. Certainly Rateau so understood the question, for he answers "that he intends to treat this question and to *complete* his communication (which was based wholly on the Parsons tur-

bine) at a future meeting"; and the society so understood, for its minutes state:

"Order of the day for the meeting of April 12, 1890: The Parsons' Steam Turbine."

Moreover, Rateau's subsequent paper was based on the question between Parsons and the reciprocating engine, opening with the statement:

"I wish to-day to enter upon some considerations, theoretical for the most part, which will permit me to compare *this new kind of motor* with ordinary steam engines and to arrive at an estimate as to the probable future in store for it."

As if to emphasize and limit himself to this single issue, he announces his satisfaction with the Parsons machine, saying, "New types will undoubtedly succeed one another, and there is reason to expect within a short time the complete solution of the question already fitly answered by the Parsons system," and disposed of another type (Dow's) lately introduced, which he estimates as "* * * inferior, from various points of view, to that of M. Parsons," and of which "* * *" in its present condition the system would not be of a nature to be widely introduced in practical industry." He then takes up the Parsons, as the turbine basis of comparison with a reciprocating engine and states his conclusions, which need not be quoted.

The minutes then state, "Continuing the preceding communication, M. Mortier gives the following information on the same subject." Without entering upon a discussion of Mortier's statements and calculations, it suffices to say that to us the inherent proofs of the proceedings show that they are directed to the Parsons type, which, as we have seen, was a reaction turbine. There was nothing in the subject before the society to suggest the introduction or discussion of impulse turbines. That meeting was discussing a particular reaction turbine; it was practical and efficient; and they had seen it operate. It was the contrast of this practical device with steam engine practice the society was discussing. There was no necessity for discussing impulse turbines, for no one had then produced one that was practical and efficient. And, as we have seen, no engineering basis of fact existed prior to De Laval for any speculation as to the future of the impulse turbine. If the striking effects of pressure staging and velocity-compounding impulse turbines, which afterwards gave them efficient working value, were then realized and disclosed by M. Mortier's paper, he did not claim them in his paper, his subsequent acts were in conflict with such a claim, and the engineering world ignorantly suffered years to pass and misguided efforts, in other directions, to be made in the face of such disclosures. Indeed, if Mortier's address be assumed to apply to impulse turbines and to disclose Curtis's mode of overcoming their failings, Mortier's subsequent acts are inconsistent with such assumption. When he subsequently took up the subject of minimizing the steam speed, it was not, as shown by his two French patents of 1894 and 1895, on the principal of operation now alleged to have been disclosed by him, to wit, the principle of eliminating such speed, but on the principle of controlling such speed by mixing live steam with

hot water or exhaust steam. This system, which as now known resulted in a loss of from one-half to three-quarters of available steam energy, shows that Mortier, instead of anticipating Curtis in his disclosure, followed in the lead of those inventors of whom Stodola said:

"The majority of the older patents showed lack of knowledge of the laws of steam flow. One idea especially led inventors on in spite of constant failure; to decrease the velocity of the steam by mixing it with fluids or gases."

[4] We next turn to the question of infringement. The disclosures of Curtis's patent, as we have seen, consisted, broadly stated, of pressure staging an impulse turbine, the velocity-compounding thereof, and the abstraction, at each passage of the steam, substantially all or the principal part of the vis viva developed at the preceding stage. Without discussing the proofs in detail, we may say we find these features in the respondent's turbines. The proofs show the proposals made by them to the government for equipping certain vessels with turbines and a guaranty that certain results will be obtained. We are warranted therefrom in assuming the respondents meant to comply with their representations and contract guaranties, and, in the absence of any proof by them tending to give the court light on exactly what form of turbine they are constructing, we are, under the authorities (*Peifer v. Brown* [C. C.] 85 Fed. 780; *Celluloid Co. v. Arlington Co.* [C. C.] 85 Fed. 449), justified in resting on the proofs of complainants before us. These show that the principle of operation of respondents' turbine is distinctively impulse, that it is multi-pressure staged having 32 pressure stages, 12 stages having two velocity rows each and 20 stages one row each. On the same shaft is mounted also a reversing multi-pressure staged turbine having three pressure stages with two velocity rows each and the rest with one. We agree with the deductions drawn by complainants, based on calculations on data as to bucket speed and steam speed furnished by complainants' witnesses, that the abstraction of vis viva by respondent's turbines is substantially and practically complete, the unused velocity amounting to 2.29 per cent. the energy, and this conclusion is confirmed by the standard of efficiency guaranteed to the government by the respondent under the designed full speed conditions. That when operated under other conditions such turbines might abstract lesser amounts of vis viva does not relieve the turbine of its infringing character. Being designedly made capable of infringement, its capacity to infringe warrants the conclusion that it does infringe. It is contended, however, that infringement of the Curtis patent is not established unless there is an absolute and total abstraction of vis viva. We find no warrant for this contention in the specification or claims of that patent, and we find no ground in reason or thermodynamic practice for such extreme contention. The economies of fuel, power, and indeed all motive mechanism, are necessarily only approximately perfect. Waste, loss of motion and power are incident to all mechanical, thermal, and motor operations, and the effort is to reach substantial, practical results rather than absolute theoretical ones. And such substantial abstraction was the measure Curtis disclosed in his specification.

"My object is to develop mechanical power from steam or other elastic fluid under pressure by *utilizing a large proportion of its vis viva in a turbine*, whose speed of rotation shall be low. * * * I deliver the flowing jet to a movable element of the apparatus consisting of one or more circular ranges of vanes forming passages through which the jet passes and in which the direction of flow is changed, *so as to extract its velocity wholly or largely whereby the vis viva developed in nozzle or passage is wholly or largely converted into mechanical rotation.*"

And the same thing is embodied in several claims in the words:

"Said vanes being adapted to abstract at each passage there through substantially all or the principal portion of the vis viva developed at the preceding stage."

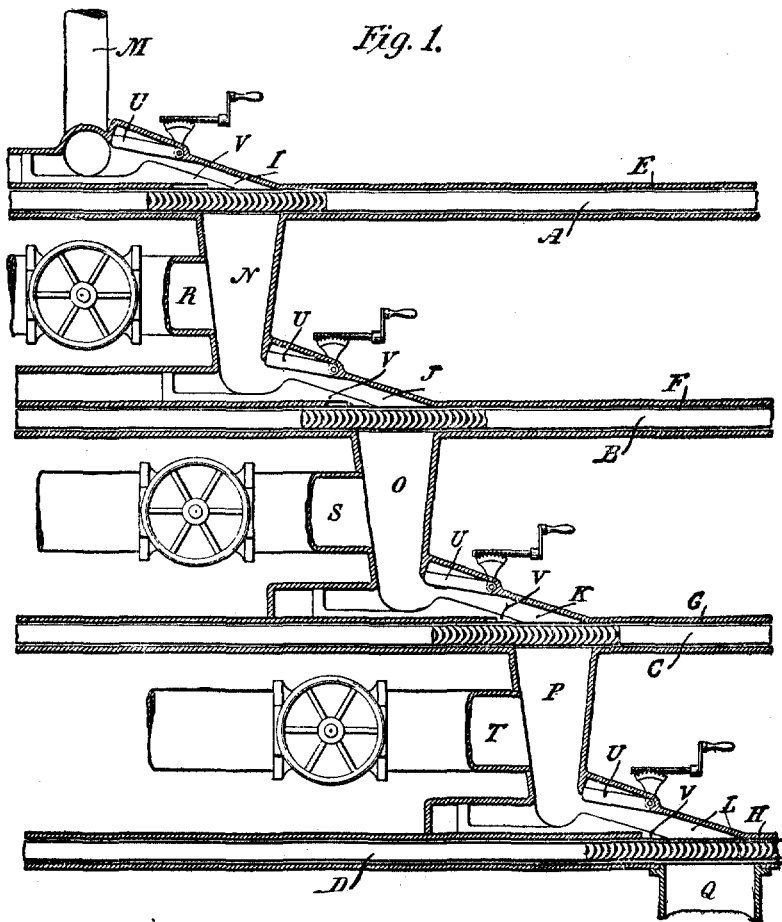
In the same way we find no warrant in the patent for restricting the nozzles or passageways to the expansion pipe. We have already pointed out earlier in this opinion that the patentee stated parallel and diverging nozzles were alternative constructions. It is contended, however, that Curtis by his definition of expansion nozzles in another application to which this patent refers so restricted himself. But the fact is that this definition was not embodied in that application when the reference was made. Its subsequent introduction in such former application was for reasons involved in that particular application, and just principles of construction do not necessitate it being retroactively applied to a patent which expressly negatived both in specification and figures any such restricted meaning. The partial peripheral introduction of the steam has been emphasized in complainants' testimony as a feature of marked advantage in impulse turbines and which distinguished them from the reaction type. In his specification Curtis lays stress on this feature as one characteristic of all his passages and as distinguished from introduction in annular form, saying:

"It is the design of my present invention, as of the apparatus of my prior application referred to, to employ at the delivery end of the nozzle and in the working passages a 'jet' of steam or other elastic fluid, i. e., a practically solid stream of fluid having an oblong form in cross-section whose thickness bears a considerable proportion to its width, so that its cross-sectional area will be large compared with its perimeter as distinguished from an annular film of elastic fluid whose cross-sectional area is small compared with its perimeter. By this means the frictional retardation is greatly reduced and the efficiency is largely increased."

It is manifest, therefore, that a turbine which while it delivers "a fluid jet to a portion of the vanes within the first shell," but not to the succeeding ones, does not infringe a claim, one of the elements of which is "intermediate passages connecting the different shells together and delivering the fluid jet to a portion of the vanes of the different sets in succession." Gauged by these general conclusions, we find that, with the exception of the seventh and tenth, all of the claims charged are infringed.

[5] We next turn to patent No. 595,435, the first, second, third, and fourth claims whereof are alleged to be infringed. The object of Curtis, as stated in his application, was "to produce an elastic turbine operating under conditions of high efficiency in which variations in speed may be effected without great variations in the efficiency of operation." This he accomplished by constructing and arranging the fluid passages

of the turbine and their connections in such a way that the elastic fluid may be caused to traverse the movable vanes a greater or less number in succession." He states, "The general plan of the elastic fluid turbine being such as is described in patent No. 566,969, issued to me September 1, 1896." The proofs show that for efficient operation the vane velocity should be about one-half the velocity of the steam action upon the vanes where the velocity is abstracted by a single set of vanes, and in like proportion if the velocity is fractionally abstracted by two or more sets of vanes velocity-compounded, and consequently, generally speaking, the vane velocity should be higher the fewer the number of stages into which the pressure drop is divided. This principle is used by Curtis, whose device, shown in the accompanying figure 1, is so arranged that the number of stages into which the pressure drop is divided may be varied according to the rotary speed at which it is desired the motor should be driven; a less number of stages being used for higher speeds and a greater number for lower speeds.



The wheels or sets of vanes, which are described as mounted on a common shaft, are contained in separate casings, and the steam from the boiler is delivered to the nozzle *I*, to act upon the vanes in the first casing, in which the pressure is lower than in the boiler, and from which the steam passes by passage *N* through the nozzle *J*, in passing through which it expands and acquires velocity and enters the second casing to act upon the wheel vanes therein, and so on to the third and fourth casings, from which the fully expanded steam is delivered through the exhaust passage *Q*. Provision is made for controlling the steam passages so that the steam may be made to have a less number of expansion stages; this provision being shown in the foregoing figure as afforded by the exhaust passages *R S T*, each provided with a shut-off valve. These passages respectively communicate with the connecting passages *N O P*, between the successive stages so that, if, for example, the valve and exhaust passage *T* is open, the steam will exhaust at the end of the third stage, and the fourth stage and parts pertaining thereto will be cut out of action. By the division of the pressure drop into three stages, the velocity of each stage will be increased as compared with that produced when four stages are used, being about four-sevenths instead of one-half of the velocity due to the total drop. Similarly, if the valve in the passage *S* were opened, steam would exhaust at the end of the second stage and the velocity in the two stages would be about five-sevenths of that due to the total drop, and if the valve in the passage *R* were opened the entire pressure drop would be used at a single stage, giving a steam velocity, and consequently an efficient wheel velocity almost double that produced when the four stages are used. It will thus be seen that what Curtis really disclosed is simply taking and equipping with cut-off devices, a multi-staged turbine of the type of the patent we have already described, and fitting it with devices whereby different chambers could be operated or bypassed as desired. The particular means employed by him are embodied in claim 6, which is not charged to be infringed. Assuming, for present purposes, that such device is patentable and that Curtis is entitled to a monopoly of a specific device embodying a combination of parts as will control the use of the several chambers of a turbine, it does not follow that he is entitled to such generic claims as are here involved and which, if sustained, would give him a monopoly of all turbines using controllable passages whereby the steam is made to act upon movable vanes a greater or less number of times in succession. In view of the recognized practices of steam control and the special character of Curtis's device, it would be a perversion of patent law and principles to make this control device of his a basis for monopolizing the whole field of steam passage control by inclusive claims such as are here involved. Accordingly, we hold these four claims invalid.

[6] It remains to consider another question presented by the record. The infringement complained of is referred to in paragraph 21 of the bill, which avers that defendant did, before the beginning of the suit—

"* * * offer in writing, accompanied by plans and specifications, to make for, and to sell to, the United States government, elastic-fluid turbines for propelling ships—or, in other words, for marine propulsion other than auto-

mobile torpedoes—employing and containing the inventions set forth in each and all of the several letters patent; that the offer so made by the defendant has been accepted by the United States government; that the defendant is at present under contract to make such infringing elastic-fluid turbines; that the work of construction of such infringing turbines is now being proceeded with by said defendant within the Eastern district of Pennsylvania, and elsewhere in the United States, for the purpose of furnishing the same to the United States government under the said contract; that all of said acts and doings by the defendant have been and are without license or allowance, and against the will of your orators and in violation of their rights; and that the defendant is threatening to carry on its aforesaid unlawful acts to a large extent in violation and infringement of the rights and privileges of your orators, and to their great and irreparable loss and injury," etc.

Accordingly, paragraph 23 prays defendant may be decreed to account and pay over all such gains and profits as have accrued or may accrue "by reason of any such infringement," and also account for and pay over all damages sustained or to be sustained "by the said unlawful acts"; and a perpetual injunction is prayed to restrain the defendant from "directly or indirectly making, constructing, using, vending, delivering, working, or putting into operation or use, or in any wise counterfeiting or imitating, the said several inventions, or in any elastic-fluid turbines made in accordance therewith, or like or similar to those which the defendant has contracted to make for the United States government in infringement of the said several letters patent," etc.

It is also prayed "that any elastic-fluid turbines or parts thereof infringing any or all of the said several letters patent mentioned, and which may be in the possession of the defendant, shall be destroyed, or delivered up to your orators or an officer of this court to be so destroyed." The bill also prayed formally for a preliminary injunction, but no motion was made for this relief. Since the litigation began, the two torpedo boat destroyers referred to have been finished and delivered to the government, and the plaintiffs do not now ask that the decree shall in any wise be directed against these vessels, or against the government in respect thereof. The bill contains no averment that the defendant is building or threatening to build infringing turbines for commercial use; only certain ships of war are involved in the suit; and for reasons to be briefly stated, we are of opinion that no injunction should now be granted. We do not agree that the court below should have dismissed the bill for want of jurisdiction. Neither the United States nor one of its officers is a party defendant, but the suit is brought solely against a private corporation that had contracted to do certain public work.

The bill was filed in 1909, and we think there was then no doubt that the court below had the right to entertain it. It had been much debated, and had been variously determined, how far an injunction might interfere with the acts of government officers, who in their official capacity were infringing or were threatening to infringe the rights of patentees. The Supreme Court had refused to permit a plaintiff to interfere with property owned by the government and in its actual possession, but no such decision had ever been made concerning property that was still in the course of preparation for public

use by a contractor with the government. The facts in *Dashiell v. Grosvenor*, 66 Fed. 334, 13 C. C. A. 593, 27 L. R. A. 67, present this situation as nearly as any other case, and it may be worthy of note that the Supreme Court took jurisdiction of that dispute on the merits, and decided the question of infringement. On the face of such a bill as is now presented, the controversy is primarily between individuals, and no reason is perceived why the equitable jurisdiction of a court does not attach. There may be sufficient reasons of public policy to induce the refusal of relief by injunction, either at a preliminary stage or after final hearing; but this is a separate question, distinct from the principal matters of dispute, and does not operate retroactively to take away the power of the court to hear and determine the controversy on its merits. The relief to which a plaintiff would ordinarily be entitled in a suit between individuals may be denied in a particular case for special reasons, as it may be denied where no question of public policy can possibly arise; but, we repeat, this of itself does not oust the court of its equitable jurisdiction to hear and decide the suit.

But since the suit was brought, the act of 1910 has been passed, and has been interpreted by the Supreme Court in the recent case of *Crozier v. Krupp*, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771. This statute, we think, furnishes a practical solution of the questions arising upon this branch of the case. Even if the plaintiffs did not disclaim the desire to interfere with the government's possession of the vessels, there is no longer any ground upon which a final injunction can be properly rested, even in a suit against a contractor with the government, where the dispute concerns such property as vessels of war. If the United States has infringed, or shall hereafter infringe, the patents that we have been considering, the act of 1910 permits the plaintiff to sue in the Court of Claims. *Crozier v. Krupp*, *supra*. And if the defendant shall undertake to infringe hereafter by making offending turbines for commercial use, relief can be obtained by another suit.

The plaintiffs are entitled to a decree sustaining patent No. 566,969 so far as indicated in the foregoing opinion, and ordering an account, but an injunction will be denied. Accordingly, the *pro forma* decree entered in the District Court is now reversed, with the costs of this court, and the case is remanded, with instructions to enter a decree in accordance with this opinion. We leave the question of costs in the District Court to be disposed of by that tribunal.

CLARK v. JACOB DOLL & SONS.

SAME v. BEHRING PIANO CO.

(District Court, S. D. New York. January 6, 1913.)

PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — ADJUSTING DEVICE FOR AUTOMATIC MUSICAL INSTRUMENTS.

The Clark patent, No. 625,744, for an adjusting device for automatic musical instruments, claims 1, 5, 6, and 7 are too broad and void for anticipation; claims 2, 3, and 4, which cover a combination of flexible tubes constituting the ducts leading from the tracker bar to the pneumatic device with an adjusting device by which the tracker bar is moved laterally at the will of the operator, were not anticipated, and disclose invention; also *held* infringed.

In Equity. Suit by Melville Clark against Jacob Doll & Sons, and same against the Behring Piano Company. On final hearing. Decrees for complainant.

Chas. S. Burton, of Chicago, Ill., for complainant.

Jas. H. Griffin, of New York City, for defendants.

HOLT, District Judge. These are two suits in equity to restrain the infringement of patent No. 625,744, issued to the complainant for an adjusting device for automatic musical instruments, such as pianos and organs. The two suits have been tried together. The device relates to that class of automatic playing musical instruments by which the notes are sounded by a strip of paper, having perforations, passed over what is called a tracker bar, having a set of ducts leading to a pneumatic device, which, in the case of a piano, for instance, operates a hammer which strikes the desired note. The patented device consists of an arrangement by which, by a screw attachment, the tracker bar can be moved at will to the right or left horizontally so as to come into correct alignment with the perforations in the music sheet. The complainant claims that prior to his device the music sheet would frequently become warped or affected by the changes in the atmosphere or other causes, so that in playing the perforations in the sheet, when revolved over the tracker bar, would not come with perfect accuracy over the ducts in the bar, with the result that an imperfect sound was created. By the complainant's device, the player, when the automatic piano or organ is being operated, can by a turn of the screw move the tracker bar to the right or to the left so as to bring it in correct alignment with the perforations in the music sheet, and the complainant claims that this device overcame a very serious defect in musical instruments of that class, and has come into very general use. The device can also be employed for the purpose of changing the key in which the music is played.

The defendant put in evidence a large number of prior patents which show many devices for shifting the frame containing the paper roll so as to bring the perforations in the paper into correct alignment with the ducts in the tracker bar, and also some patents for devices for moving the tracker bar so as to effect the same result. The com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plainant's device can be operated by a turn of the screw at any moment while the music is playing, whenever the operator sees, as the perforated paper is moving, that a slight adjustment is desirable. Most of the devices shown in the prior art are not movable at will at the choice of the operator, but are arrangements for the convenience of the maker or repairer for repairing or putting in order such an instrument, or permitting a change after one tune is played and before another is begun, so as to permit two or more distinct tunes to be provided by the perforations on one sheet. The defendant asserts that the substitution of a lateral movement of the tracker bar for the lateral movement of the frame carrying the perforated paper constitutes no invention, on the ground that, if two objects are so situated that one is required to be moved to come into correct relations with another, it is immaterial which is moved, and that a patent providing for the movement of one is anticipated by a previous patent which provides for the movement of the other.

This general proposition usually furnishes a correct rule; but I think that in this case there are obvious advantages in procuring the correct alignment by the movement of the tracker bar, instead of by the movement of the frame carrying the perforated paper, sufficient to make a device for accomplishing the correct adjustment by moving the tracker bar an invention, if there is any inherent difficulty in doing it. Originally the set of ducts leading from the tracker bar to the pneumatic device usually consisted of perforations in wood or some immovable material, so that the tracker bar could not be moved laterally, and the only portion of the mechanism which could be moved laterally was the frame carrying the perforated paper. About the time of the complainant's patent the idea was suggested of using rubber or flexible tubes connecting the ducts in the tracker bar with the pneumatic device. Such flexible tubes were suggested for use in the British patent to Smith, but that patent contained no claim for the correct adjustability of the perforated sheet to the tracker bar, and related to entirely distinct matters. Defendant also claims that the patent to Kelly shows the use of a flexible tube, but I cannot see in that patent anything to show that the tube was flexible, except that in the drawing it appears to be curved. The complainant's patent seems to be the first patent in which the idea of the use of a movable tracker bar in conjunction with flexible tubes leading from the ducts in the tracker bar to the pneumatic device is used. The fact that almost all the previous attempts to effect the adjustment were by means of shifting the frame carrying the perforated sheet shows that until the idea of using the flexible tubes was suggested any scheme of moving the tracker bar was impracticable; but I think that the complainant's device of uniting the use of flexible tubes and a tracker bar moving laterally at will was novel and constituted invention. Undoubtedly the use of flexible tubes was suggested in the Smith patent, and the idea of adjusting the holes in the perforated paper in correct alignment with the ducts in the tracker tube by a lateral movement of one or the other was old, but in my opinion the combination of the two ideas of using the flexible tubes and then adjusting the tracker bar by a lateral move-

ment at will was novel. The result is that in my opinion some of the claims of the patent are too broad and are anticipated, and that only those claims which claim the use of the flexible tubes in connection with a lateral movement of the tracker bar are valid. These are claims 2, 3, and 4. Claims 1, 5, 6, and 7, I think, are anticipated by other patents. I have no doubt that each of the defendant's devices in the suits at bar infringed. They are substantially the same as the complainant's device.

My conclusion is that there should be a decree in each case that the defendant has infringed claims 2, 3, and 4, and enjoining further infringement of those claims.

ARCHER et al. v. IMPERIAL MACH. CO.

(District Court, S. D. New York. January 11, 1913.)

1. PATENTS (§ 26*)—INVENTION—INCREASED UTILITY OF DEVICE.

Doing substantially the same thing in the same way, by substantially the same means, but with better results, is not such invention as will sustain a patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

2. PATENTS (§ 328*)—INVENTION—MACHINE FOR PEELING POTATOES.

The Archer patent, No. 999,478, for a machine for peeling potatoes, consisting of a metal cylinder having a revolving metal disk near the bottom and its inner surface coated with a granulated abradant such as emery, is void for lack of invention; the only change over machines of the prior art being the substitution of the abrading material for metallic brushes, or other means of roughening the surface.

In Equity. Suit by Samuel B. Archer and others against the Imperial Machine Company. On final hearing. Decrees for defendant.

Duell, Warfield & Duell, of New York City (C. H. Duell, F. P. Warfield, H. S. Duell, and R. W. France, all of New York City, of counsel), for complainants.

H. S. MacKaye, of New York City, for defendant.

HOLT, District Judge. This is a suit for an injunction to prevent the alleged infringement of letters patent No. 999,478, issued to Samuel B. Archer for a machine for peeling potatoes. The machine consists of a metal cylinder having a metal disk near the bottom which revolves at an angle to the sides of the cylinder, and having the interior surfaces of the cylinder and the disk coated with a granulated abradant, consisting of emery or some similar substance, in combination with the mechanism for operating the same. In practice the potatoes are put in the cylinder, and the disk at the bottom made to revolve rapidly, with the result that the potatoes are thrown by centrifugal force against the sides of the cylinder, and then fall down upon the surface of the disk, the result of which operation is that after a certain time the skin of the potato is worn off and removed. Machines embodying these general principles are old. They have been used

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for removing the skin from fruit and vegetables, and for cleaning the surface of cotton and other seeds and of cork, all proceeding upon the theory of revolving a disk at the bottom of a cylinder rapidly, thereby throwing, by centrifugal force, the contents of the cylinder up against the roughened sides of the cylinder. The surfaces of the cylinder and disk, prior to the complainants' patent, had been made rough either by the use of metallic brushes or burrs or by having holes punched in the surface, as in a nutmeg grater, or by having the surfaces striated, or arranged in lines, and the complainant, Archer, claims that he was the first to use an emery lining of the cylinder and the disk in a potato peeling machine. Such a lining had been used in some of the seed cleaning machines, and is suggested as an equivalent in some of the patents, but apparently the kind of rough surface caused by the use of a granulated abradant such as emery or corundum peeled potatoes better than any rough surface which had been previously tried. The substantial claim of invention in Archer's original application was the arrangement of such a machine in such a manner that the disk and the cylinder while in operation were made to revolve in contrary directions. The application was rejected in the Patent Office. It was subsequently amended and rejected many times, and after final rejection in its present form by the original examiner an appeal was taken to the board of examiners in chief, which granted the patent. There had been a test of different potato peeling machines made in the Navy Department, and the officers of the Navy Department before whom the test was made thought that the work done by the complainants' machine was better than that done by the other competing machines. Apparently upon this evidence the board of examiners in chief granted the patent. In the opinion filed, the board states:

"The patents to Robinson, Williams, and Mayhew disclose devices for peeling fruits or vegetables, which devices are of the same general character as that of the applicant's, but differ therefrom in the nature of the peeling surfaces; Williams and Mayhew using metal surfaces with integral projections or burrs thereon, and Robinson using a grooved or striated metallic surface. We would agree with the primary examiner that the mere substitution of a lining or coating of granulated abradant for the burrs or striations of these devices would not involve invention, if no unexpected result attended the substitution. If such a substitution resulted in the paring of the vegetables with the same degree of efficiency obtained through the use of the roughened metal surfaces and no greater degree of efficiency, the applicant would merely have substituted one well-known abradant for another. The affidavit of the applicant and the accompanying report furnished by the Navy Department, filed in this case upon May 16, 1911, and passed upon by the primary examiner in accordance with the provisions of rule 141, show that a machine provided with peeling surfaces, lined or coated with a granulated abradant, developed in a competitive test very considerable and important advantages over machines having burred or striated metal for the peeling surfaces. These results, so far as we can perceive, could not have been foreseen by those skilled in the art and clearly confer patentability upon the applicant's machine over such references as the patents to Robinson, Williams, and Mayhew, and over any references showing merely that hard granular materials have abradant qualities, such as the patents to Davis, Patterson, and De Vasson."

[1] The substance of the decision of the examiners in chief is that Archer's device showed invention over the prior art, and was patentable, because it produced a better result. But the general principle is that doing substantially the same thing in the same way by substantially the same means with better results is not such invention as will sustain a patent. *Smith v. Nichols*, 21 Wall. 119, 22 L. Ed. 566; *Roberts v. Ryer*, 91 U. S. 150, 23 L. Ed. 267; *Dunbar v. Meyers*, 94 U. S. 187, 24 L. Ed. 34.

[2] In this case, in my opinion, the employment of a granulated surface for the cylinder and disk made of emery or any similar substance is a mere obvious equivalent for other methods of roughening the surface, and the only possible difference between the complainants' machine and previous machines is that it peels potatoes rather better than the preceding machines. It works on the same principle, it does the same thing in substantially the same way, and I think that there was no invention in simply substituting a coat of emery on the inside of the cylinder and disk, instead of making those surfaces rough in some other way. It was a mere change in degree, and not in kind, and in my opinion the primary examiner in the Patent Office was correct in his decision that the patent should be refused on the ground that it showed no invention.

The bill is dismissed, with costs.

FOWLER & WOLFE MFG. CO. v. McCURM-HOWELL CO.

(District Court, S. D. New York. January 15, 1913.)

PATENTS (§ 328*)—VALIDITY—RADIATOR.

The Fowler patent, No. 609,800, for a radiator, claims 1-4 *held* void for anticipation and lack of novelty.

In Equity. Suit by the Fowler & Wolfe Manufacturing Company against the McCrum-Howell Company. On final hearing. Decree for defendant.

Ernest Howard Hunter, of Philadelphia, Pa., for complainant.

D. Walter Brown, of New York City, for defendant.

HOLT, District Judge. This is a suit to restrain the infringement of a patent, No. 609,800, granted to Arthur H. Fowler for an improvement in radiators. The first four claims only of the patent are alleged to be infringed. The patent claims, in substance, two distinct improvements, the first of which is stated to be a radiator specially adapted to be supported by the wall or wainscot, and to be composed of cast-iron sections of uniform size and shape that can be assembled to form a radiator of any length or width, requiring practically no floor space. The first four claims of the patent relate to this portion of the invention, and are the only ones relied upon in this suit. The main object of that part of the invention involved in this suit, as stated in the patent, is to construct a radiator specially adapted to be sup-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ported by the wall or wainscot, and to have it constructed in cast-iron sections, so arranged as to be joined together, and thus build up a radiator of any length or width. The first and second claims relate to the shape of the section, and the third and fourth claims relate to the method of joining different sections together. The first claim is as follows:

"1. A radiator section composed of a unitary hollow casting, consisting of four outer tubes communicating with one another at the corners, one or more intermediate cross-tubes between opposite outer tubes, and a series of connecting tubes between each intermediate cross-tube and the opposite outer tube or adjacent intermediate cross-tube."

The second claim is very similar. This claim obviously is not confined to a wall radiator, and I cannot see why, in the nature of the case, it is of any consequence how any radiator is supported. They are ordinarily supported on the floor. I do not see why any radiator could not be supported on a wall as well as on the floor, and there is nothing in the structure described in the first two claims of the patent which makes it more applicable to a wall radiator than to a floor radiator. One of the sections could serve separately as a radiator, and the only advantage for wall use of the radiator described in the patent is that such a radiator may be composed of different sections connected together, and which may be disposed in different directions at will upon a wall or about a window. Looking at the first two claims as they stand, however, they simply claim a structure which seems to have been long anticipated in the prior art. It is shown substantially in the patents to Reed, Safford, Wood, and in the Bundy Pyro wall radiator. It is also suggested in the somewhat analogous art of boiler making in the boiler used as a radiator in the Exeter Machine Works.

There was a prior suit brought upon this patent against a licensee, who, of course, could not deny the validity of the patent. The licensee was dealing in a radiator which was substantially in shape like the radiator described in the complainant's patent, except that its various connecting tubes were substantially of about the same size. In that case Judge Buffington originally held on a motion for a preliminary injunction that the defendant's radiator was substantially the same as the complainant's radiator, but upon final hearing he held that, in view of the prior art, the complainant's invention was a very narrow one, and that the claims must be interpreted in the light of the specification and drawings, which stated and showed that the top and bottom tubes were larger than the cross-tubes, and that the cross-tubes were larger than the small intermediate cross-tubes, and held that, as the defendant's radiator was not so constructed, it did not infringe. Some of the witnesses for the complainant in the case at bar lay stress on the fact that, as shown in the drawings and described in the specifications, the outside tubes are larger than any of the intermediate tubes, and the intermediate cross-tubes are larger than the tubes between the cross-tubes, and claim that such a construction is important in aid of the rapid diffusion of steam throughout all parts of the radiator, and the effective expulsion of air and water from the radiator. But the answer to all these assumptions based upon the different sizes of the

tubes shown in the drawings and described in the specifications is that no claim is made in the patent of any invention in those respects. The first and second claims in the patent apply to a unitary hollow casting consisting of tubes, and, if the claims are good, they give a monopoly of the use of such a unitary structure with tubes of any size. The fact that the specifications describe a structure with tubes of different sizes is, of course, immaterial. An invention described in specifications, but not claimed, is not protected by a patent. As the first two claims are drawn, in my opinion, they are anticipated by the patents cited and by the condition of the prior art.

The third and fourth claims relate to the method of uniting different sections of the unitary hollow casting described in the first two claims, so as to extend the size of the radiator in any direction. In my opinion, that feature of the complainant's invention is anticipated by the Hopson and Daniels patent. If it had not been, it seems to me very doubtful whether it requires anything more than mechanical skill to provide for connecting such castings one to another by an opening at the corners, as is described in the third and fourth claims.

This patent was rejected for want of novelty, after repeated amendments, by the primary examiner in the Patent Office. The case was appealed to the board of examiners in chief. I cannot clearly make out from their decision, which appears in the record in the case against the National Radiator Company (page 286), what the grounds of their decision are. After describing the questions in controversy, the decision states:

"Claims 1 and 2 are rejected as expressing, when but one cross-tube E is used, a duplication of a radiator section of the Mills patent. This we do not find to be the fact. Nor can we concur in another ground for rejection of these claims, that the 'cross-tubes serve no other function than that of radiating elements, and the particular form thereof is arbitrary.' The patents to Farnham, Blackmore, and Packer are cited to show a frame work with cross-tubes. They do not show the structure of these claims which is new has specific utilities and is clearly patentable."

With entire respect for the board of examiners in chief, I am not able to see why claims 1 and 2 do not express, when but one cross-tube is used, a duplication of a radiator section of the Mills patent, and in my opinion it is true, as the primary examiner stated, that the cross-tubes serve no other function than that of radiating elements. I concur with the primary examiner that the complainants' patent, on the citations which were before the board, should have been rejected for want of novelty. But, at all events, there are a number of patents cited upon this hearing which were not cited upon the hearings in the Patent Office, notably the patents of Reed, Safford, and Wood, as bearing upon the questions involved in the first two claims, and the patent to Hopson & Daniels, as bearing upon the questions involved in the third and fourth claims, and, in view of those patents, it seems to me clear that these claims of the complainant's patent are invalid for want of novelty.

The bill is dismissed, with costs.

VACUUM ENGINEERING CO. v. DUNN.

(District Court, S. D. New York. December 16, 1912.)

1. PATENTS (§ 79*)—VALIDITY—PREVIOUS USE IN FOREIGN COUNTRY.

Under Rev. St. § 4923 (U. S. Comp. St. 1901, p. 3396), providing that, when a patentee at the time of his application believed himself to be the original and first inventor of the thing patented, the same shall not be held void on account of the invention or discovery "having been known or used in a foreign country before his invention or discovery thereof if it had not been patented or described in a printed publication," to defeat a patent on the ground of a prior foreign use, the foreign patenting or description in a printed publication must have been prior to the patentee's application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 101; Dec. Dig. § 79.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—VACUUM CLEANER.

The Dunn and Locke patents, No. 893,853 and No. 919,369, each for a vacuum cleaner, were not anticipated and disclose invention; also *held* infringed.

In Equity. Suit by the Vacuum Engineering Company against Elias B. Dunn, doing business under the trade-name of Dunn's Improved Vacuum Systems. On final hearing. Decree for complainant.

Strong & Mellen, of New York City (L. F. H. Betts and John W. Peters, both of New York City, of counsel), for complainant.

Prindle & Wright, of New York City (Edwin J. Prindle, of New York City, of counsel), for defendant.

HOLT, District Judge. This is a suit to enjoin the infringement of two patents, numbered 893,853 and 919,369, issued to Dunn and Locke, and by them conveyed to the complainant. Dunn, the defendant is one of the original patentees. He therefore is estopped from denying the validity of the patent upon any ground. He is not prevented however, from showing by the condition of the prior art that the patent is a narrow one, for the purpose of determining the question of infringement.

[1] In this case the defendant has put in evidence a number of patents of the prior art, but none of them shows any vacuum cleaner similar to the defendant's infringing cleaner. Previous patents either have saturating tanks distinct from the suction device, to avoid the necessity of using which is the principal object of the complainant's patent as stated in it, or they show no saturating chamber similar to that used in the complainant's device. The Mullen patent undoubtedly shows practically the vacuum pump operating horizontally as in the complainant's patent, but it has not the saturating chamber shown in the complainant's patent. The Schiodt patent has no such saturating chamber, nor does it operate as in the complainant's patent, by creating the vacuum above the normal level of the liquid. Moreover, in my opinion, the Schiodt patent could not be an anticipation of the first Dunn and Locke patent, No. 893,853, because it was granted about 14 months after Dunn and Locke applied for that patent. The defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant offered testimony to show that the invention of the Schiodt patent was made before the application for the Dunn and Locke patent, but it appears that the invention was made in a country foreign to the United States. Section 4923 of the Revised Statutes (U. S. Comp. St. 1901, p. 3396) provides, in substance, that, whenever an American patentee believes himself to be the first inventor of the thing patented, "the same shall not be held to be void on account of the invention or discovery or any part thereof, having been known or used in a foreign country, before his invention or discovery thereof, if it had not been patented or described in a printed publication." I think under this section an American inventor who in good faith believes that he is the first inventor cannot be deprived of his right to a patent by reason of any similar invention made by another person in a foreign country, unless it has been patented or described in a printed publication before the American application, and that the fact, if it be a fact, that it was invented in a foreign country earlier is immaterial.

[2] The defendant's infringement in my opinion is perfectly clear. His device is essentially the same as the device shown in the second patent to Dunn and Locke, No. 893,853, the only difference being that in the defendant's device two valves are used, performing precisely the same function as one valve in the Dunn and Locke second patent. The second patent to Dunn and Locke is based upon the same principle as the first patent to Dunn and Locke. The substantial difference between them is that in the first patent the pump is worked vertically, thereby exercising a suction creating a vacuum only at one end of the stroke of the piston, and in the second patent the pump is worked horizontally, creating a vacuum at each end of the stroke of the piston. In my opinion, the first four claims of the first patent and all the claims of the second patent are infringed.

There should be a decree for the complainant as demanded in the bill, with costs.

BALDWIN v. EIDMAN.

(District Court, S. D. New York. January 3, 1913.)

1. INTERNAL REVENUE (§ 8*)—WAR REVENUE ACT—LEGACY TAX.

Liability to a legacy tax under War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, § 10, 31 Stat. 946 (U. S. Comp. St. 1901, p. 2307), is determined by the time when the legacy vests under the terms of the will, and is not affected by the fact that under the administration laws of the state the legacy did not become payable, so that its clear value could be ascertained for the purpose of assessment of the tax until after July 1, 1902, when the repeal of the act took effect.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. § 8.*]

2. INTERNAL REVENUE (§ 8*)—WAR REVENUE ACT—LEGACY TAX—LEASEHOLDS —"LEGACY ARISING FROM PERSONAL PROPERTY."

A leasehold passing under a will is not subject to the legacy tax imposed by War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464, as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

amended by Act March 2, 1901, c. 806, § 10, 31 Stat. 946 (U. S. Comp. St. 1901, p. 2307), as a "legacy * * * arising from personal property."

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. § 8.*]

3. WORDS AND PHRASES—"DISTRIBUTIVE SHARES."

The expression "distributive shares" means the shares of personal property which are distributed in case of intestacy by virtue of statutes of distribution.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2135, 2136.]

4. WORDS AND PHRASES—"LEGACY."

The expression "legacy" means a bequest of personal property.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4054-4057; vol. 8, p. 7703.]

Action by Edwin Baldwin, as sole surviving executor and trustee under the will of John Daniell, deceased, against Elizabeth Eidman, administratrix of the estate of Ferdinand Eidman, deceased, late Collector of Internal Revenue. Judgment for plaintiff.

William H. Wadhams and Frederick S. Fisher, both of New York City, for plaintiff.

Henry A. Wise, U. S. Atty., and Addison S. Pratt, Asst. U. S. Atty., for defendant.

MAYER, District Judge. This action was brought by the executors and trustees of the will of John Daniell, deceased, against Ferdinand Eidman, collector of internal revenue for the Third collection district of New York, to recover \$8,483.63 collected as taxes. The collector assumed to assess and collect the taxes in question, pursuant to sections 29 and 30 of the Spanish War Revenue Act of June 13, 1898 (Act June 13, 1898, c. 448, 30 Stat. 464, 465), as amended by the act approved March 2, 1901 (Act March 2, 1901, c. 806, §§ 10, 11, 31 Stat. 946, 948 [U. S. Comp. St. 1901, pp. 2307, 2308]). The taxes were paid by the executors under protest. The action has been duly continued by the sole surviving executor and trustee, against the administratrix of the estate of the deceased collector.

John Daniell died a resident of the county and state of New York on March 6, 1902, in possession, at the time of his death, of personal property of the actual value of \$484,780.54. His will was probated on April 23, 1902, and on that date letters testamentary were issued to the executors. The executors, on January 19, 1903, filed with the collector of internal revenue a legacy return in due form and also filed a schedule of personal property of the estate of John Daniell, deceased, showing the personal property in charge or trust of the executors.

Upon the last-named exhibit the executors indorsed a note calling attention to the fact that, in addition to the property enumerated in the schedule, there were in the estate certain unexpired Sailors' Snug Harbour leases, for 21 years, and renewals, being well-known estates for years in land lying in the city of New York, and also accrued rentals on leaseholds to subtenants, and further stating that these were not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

valued or set forth in detail in the schedules, as they were interests arising from land and not from personal property, and therefore, as the executors claimed, not subject to this tax.

The collector, on May 12, 1903, made a schedule of legacies which included the leasehold property, thereby increasing the total value of the estate from \$484,780.54 to \$693,451.40. After deducting the debts and expenses, he assessed the tax against the estate at \$7,783.15, which, together with the interest, amounted to \$8,483.63, the sum which the executors were ultimately compelled to pay.

It is agreed for the purposes of this action that the clear value of the personal property left by John Daniell, after deducting debts and expenses of administration, was the sum of \$431,659.18, and that the clear value of the leasehold estates was the sum of \$208,670.86.

On June 12, 1903, the collector served on the executors a notice of the assessment, demanding payment.

On June 18, 1903, the executors filed a claim for abatement of the taxes.

Before payment was made there was considerable correspondence between the executors or their attorneys, and the collector and others representing the government, and finally, after repeated demands for the payment, and refusal to pay, the executors, on April 25, 1904, under protest as heretofore mentioned, paid to the collector the \$7,783.15, together with interest, amounting to \$700.48, making a total of \$8,483.63. Of the \$7,783.15, the sum of \$3,130.08 was assessed and collected on the value of the leasehold estates passing under the will of said John Daniell, deceased, as a part of his residuary estate, in equal parts, to two sons.

On April 28, 1904, the executors filed a claim for the refunding of \$3,639.70 of said taxes, and on March 14, 1905, the executors made and filed a supplemental claim for the refunding of \$8,483.63. Both of these claims were rejected by the Commissioner of Internal Revenue and, in due course, on October 4, 1905, this action was commenced to recover the aforesaid taxes.

The case having been submitted upon an agreed statement of facts, the questions presented are:

First. Whether upon such facts, as matter of law, the collector of internal revenue had jurisdiction and authority, pursuant to the Spanish War Revenue Act of June 13, 1898, as amended by the act approved March 2, 1901, to levy and collect from the executors of John Daniell, deceased, any sum. If not, it is contended by the plaintiff that he should return the \$8,483.63 collected, with interest.

Second. Whether it was within the jurisdiction and authority of the collector to assess and collect, pursuant to the said act as amended, any tax upon the leasehold property, namely, the Sailors' Snug Harbour leaseholds, valued at \$208,670.86. If not, it is the contention of the plaintiff that he is entitled to recover the sum of \$3,130.08 assessed and collected on the value of said leasehold estates, with interest.

[1] First. The plaintiff contends that the collector of internal revenue had no jurisdiction or authority to collect any legacy tax because the period allowed for presentation and proving of claims against the

estate under the New York statutes had not elapsed and the net value of the estate had not been ascertained, nor had the legatees become absolutely vested in possession or enjoyment until after the passage of the Repealing Act of April 12, 1902 (Act April 12, 1902, c. 500, 32 Stat. 96 [U. S. Comp. St. Supp. 1911, p. 978]), and the Refunding and Declaratory Act of June 27, 1902 (Act June 27, 1902, c. 1160, 32 Stat. 406 [U. S. Comp. St. Supp. 1911, p. 983]), both of which took effect July 1, 1902.¹

The laws of the state of New York during the years here under consideration (1902-1905, inclusive), provided for a period of one year of ordinary administration, and prohibited the payment of a legacy by an executor or administrator until after the expiration of the one-year period from the time of granting letters testamentary or letters of administration. New York Code of Civil Procedure, §§ 2721 and 1819.

There is no direction in the will to make payment prior to the expiration of one year from the time of granting letters.

¹ NOTE.—The provisions of the several acts of Congress to be considered in this action are as follows:

Extracts from War Revenue Act.

Sec. 29. "That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say: * * * the tax shall be * * * at the rate of * * * for each and every \$100 of the clear value of such interest in such property. * * *" Act of June 13, 1898, 30 Stat. 448, as amended by Act of March 2, 1901, 31 Stat. 946.

Sec. 30. "That the tax or duty aforesaid shall be due and payable in one year after the death of the testator and shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof, in writing, to the collector or deputy collector of the district where the deceased grantor or bargainer last resided within thirty days after he shall have taken charge of such trust, and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, or in which the property was located in case of nonresidents, the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the

The "clear value" of the estate was therefore not determinable until April 23, 1903, one year after the date upon which letters testamentary were issued.

In the meantime, on July 1, 1902, the Refunding and Repealing Acts had gone into effect.

The view originally entertained by the Treasury Department was that a legacy tax was not payable until the legacy was payable (Treasury Decisions, No. 20,591 January 19, 1899, and No. 21,024 April 15, 1889) and this view had judicial support as late as 1909. *Farrell v. United States* (D. C.) 167 Fed. 639. But the *Farrell* Case is no longer authority since the decision in *Hertz v. Woodman*, 218 U. S. 205, 30 Sup. Ct. 621, 54 L. Ed. 1001.

An examination of the briefs in *Hertz v. Woodman*, *supra*, shows that the *Farrell* Case was cited and relied upon, and, indeed, the argument now presented was in substance the same as there presented.

The case at bar is not within the principle of *Vanderbilt v. Eidman*, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, where the legacy was

names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list, or statement, said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided." Act of June 13, 1898 (30 Stat. 448) as amended by the Act of March 2, 1901 (31 Stat. 946) and as re-enacted by the repealing Act of April 12, 1902 (32 Stat. 97).

Extract from Refunding and Declaratory Act.

Sec. 3. "That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereinafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two." Act of June 27, 1902, 32 Stat. 406.

Extracts from Repealing Act.

Sec. 7. "That section * * * twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and all amendments of said sections and schedules be, and the same are hereby, repealed."

Sec. 8. "That all taxes or duties imposed by section twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, prior to the taking effect of this act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty of said act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force as follows: * * *"

Sec. 11. "That this act, except as otherwise specially provided for in the preceding section, shall take effect July first, nineteen hundred and two." Act of April 12, 1902, 32 Stat. 97, 98, 99.

to be held in trust by the executors, and the legatee by the terms of the will was not to receive the principal until a later date, namely, after 1902. Here, however, the legacy vested immediately on the death of the testator. The prohibition of payment under the New York statute is simply in aid of the administration of the estate and the safeguarding of creditors. There is a marked difference between the right to demand payment of a legacy and the right to immediate possession or enjoyment under the War Revenue Act here considered. *U. S. v. Fidelity Trust Co.*, 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed. 137.

It is the right under the will which determines the legal status of the legacy, and, while the statutory proceedings to assess the tax may be postponed because of the operation of local statutes in respect of administration, such postponement is merely a matter of procedure and cannot change the legal effect of the testator's disposition. Any other construction would lead to hopeless confusion and destroy the uniform applicability of the act.

To illustrate: Suppose the payment of legacies was postponed by statute in three states for one, two, and three years, respectively, and three testators died on the same day leaving the same kind of legacies to the same class of legatees. We might then see the imposition of the tax in one case and not in the others—a result certainly never contemplated under a war revenue act where the intention was that all similarly situated were to be treated alike and subjected to the same burdens.

As was said in *Knowlton v. Moore*, 178 U. S. at page 77, 20 Sup. Ct. at page 761, 44 L. Ed. 969:

"We are therefore bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

[2] Second. The second contention of the plaintiff is that the leasehold estates are not subject to the tax because they are not legacies arising from personal property. The history of the legislation, with particular reference to the act here under consideration, has been elaborately discussed in *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969. After summarizing the origin, the development, and the theory underlying death duties, and reviewing the earlier statutes in this and other countries, and after a comparison of the act of 1898 with the act of 1864 (Act June 30, 1864, c. 173, 13 Stat. 223), the court says:

"That the provisions of the act of 1864 were in mind when the present act was drafted is apparent, since it is not disputed that the act under review, so far as the tax on legacies and distributive shares is concerned, is an exact reproduction of the original act of 1864, except to the extent that the present act contains provisions relating to a progressive increase of rates." 178 U. S. at page 69, 20 Sup. Ct. at page 759, 44 L. Ed. 969.

And again:

"The subject taxed, therefore, under the present act, is the same which was taxed under the act of 1864." 178 U. S. at page 71, 20 Sup. Ct. at page 759, 44 L. Ed. 969.

The act of 1864 was in two divisions: One, taxing real estate which was defined by the act; and, the other, taxing legacies and distributive shares arising out of personal property.

When the Congress passed the act of 1898, it was deemed sufficient for the purposes of the war revenue to take only one of these classes, and, modeling the act upon the act of 1864, it took only that part of the act of 1864 (almost verbatim) which dealt with the properties not included in those defined by the law of 1864 as real estate. The court, in *Knowlton v. Moore*, *supra*, points out that the act of 1864 was based upon the English Succession Duty Act.

"The act of 1864, however, added, in separate sections, a duty on the passing of real estate, in substantial harmony with the principle of the succession tax expressed in the English Succession Duty Act. Thus it came to pass that the system of death duties prevailing in England and that adopted by Congress—leaving out of view the differences in rates and the administrative provisions—were substantially identical, and of a threefold nature; that is, a probate duty charged upon the whole estate, a legacy duty charged upon each legacy or distributive share of personalty, and a succession duty charged against each interest in real property." 178 U. S. at page 51, 20 Sup. Ct. at page 747, 44 L. Ed. 969.

"Whilst the general plan of the act of 1864 shows that its framers had in mind the English law, this fact was conclusively demonstrated by section 127, wherein the succession or real estate inheritance tax was defined in substantially similar terms to that contained in the English Succession Duty Act. The identity of the conception embodied in the act of 1864 with that existing in England was observed by this court in *Scholey v. Rew*, 23 Wall. 331 [23 L. Ed. 99]. * * *" 178 U. S. at page 52, 20 Sup. Ct. at page 752, 44 L. Ed. 969.

As the act of 1898 took only one of these divisions, viz., legacies and distributive shares arising out of personal property, it is desirable to examine the act of 1864 and the English act with a view of ascertaining whether leasehold property is in the division relating to real estate or in that relating to legacies or distributive shares arising out of personal property. The English Succession Act (16 and 17 Victoria), chapter 51, provided:

"1. In the construction and for the purposes of this act: The term 'real property' shall include all freehold, copyhold, customary, leasehold and other hereditaments, and heritable property, whether corporeal or incorporeal, in Great Britain and Ireland, except money secured on heritable property in Scotland and all estates in any such hereditaments; the term 'personal property' shall not include leaseholds, but shall include money payable under any engagement and money secured on heritable property in Scotland, and all other property not comprised in the preceding definition of real property."

The act of 1864 (chapter 173, 13 Stat. 223) under the heading, "Succession to Real Estate," provided:

"Sec. 126. And it be further enacted, that for the purposes of this act, the term 'real estate' shall include all lands, tenements, and hereditaments, corporeal and incorporeal; that the term 'succession' shall denote the devolution of title to any real estate."

It will be noted that the English act included leaseholds within the term "real property" and used the expression "other" hereditaments. Manifestly, *ejusdem generis*, for the purposes of taxation, leaseholds were considered as hereditaments.

An examination of the English act in detail will show a logical and comprehensive scheme under which real property and interests arising therefrom or investments therein were clearly distinguished from personal property or interests arising therefrom or investments therein. Section 19 (16 & 17 Victoria, p. 259) provided:

"XIX. No legatee or other person shall, after the time appointed for the commencement of this act, be chargeable under the Legacy Duty Acts with duty, not then already due, in respect of any leasehold hereditaments of any testator or deceased person, as belonging to the personal estate of the testator or deceased."

See, also, sections 28, 29, and 30. Section 29 treats, as personalty, the proceeds of a sale of real property under "any trust for the sale thereof"; such proceeds being in the nature of a legacy, while section 21 treats as real property these cases where personal property is to be invested in real property.

Copyhold and customary are not known in this country. Washburn on Real Property (6th Ed.) § 82. In England, while copyholds are not freeholds, they are now included, as Williams says, "in what is called real property." Williams on Real Property (20th Ed.) at page 451. See page 439 et seq. Customary freeholds likewise seem to be regarded as real property. Williams, *supra*, page 454 et seq.

When, therefore, the framers of the act of 1864 were drafting that act with the English act before them, it is unlikely that they intended to introduce distinctions as to classification different from those so carefully worked out in the English act.

The English act having included leaseholds, copyholds, and customary freeholds as hereditaments or, in any event, as real property (by whatever technical name called), it was sufficient for the act of 1864 to define "real estate" as including "lands, tenements and hereditaments."

The words "copyhold" and "customary" and "heritable property in Scotland" were not applicable in this country, and obviously it was thought that "hereditaments" would cover all ownership or interests in land not comprehended within the words "lands" and "tenements."

Just as the English Parliament evidently was not considering the various interests arising out of real estate from their technical legal standpoint in other relations, but was considering what kinds of property should be taxed and in what manner, so the Congress, confronted with the necessity of raising large revenues, had in mind the separation of property into two broad divisions, namely, real estate and personal property.

The existence of special statutory or code provisions in this or any other state, defining leaseholds for special purposes, did not affect the character of such leaseholds for taxation under the act of 1864.

In one state a leasehold might have been regarded as personal property for purposes of distribution to the next of kin, while in another state it might have been regarded as real property for descent to heirs. With a diversity of treatment, in various parts of the country, of leaseholds as real or personal property, it is manifest that the Congress was not regarding the local laws in that respect.

When the Spanish War Revenue Act was passed, there were several states in which leaseholds were defined within the rules applicable to real property.

Thus, by section 3109 of the Civil Code of Georgia, 1895, it is provided:

"An estate for years is one which is limited in its duration to a period fixed, or which may be made fixed and certain. If it be in lands, it passes as realty in this state. It may be for any number of years, so that the limitation be within the rule against perpetuities."

By chapter 129, § 1, of the Laws of Massachusetts (vol. 2 of the Revised Laws of Massachusetts of 1902, p. 1258), it is provided:

"If land is demised for the term of one hundred years or more, the term shall, so long as fifty years thereof remain unexpired be regarded as an estate in fee simple as to everything concerning the descent and devise thereof upon the decease of the owner, the right of dower or of curtesy therein, the sale thereof by executors, administrators, guardians or trustees, the levy of execution thereon; and the redemption thereof if mortgaged or taken on execution; and whoever holds as lessee or assignee under such a lease shall, so long as fifty years of the term remain unexpired, be regarded as a freeholder for all purposes."

In *Cincinnati College v. Yeatman*, 30 Ohio St. 276, at page 285, it is said:

"At common law, an estate for years, renewable forever was a chattel; but by our statutes and by the decisions of our courts they are treated as real estate."

By section 8597 of the General Ohio Code it is provided that permanent leasehold estates, renewable forever, shall be subject to the same law of descent as estates in fee are subject to by the provisions of this chapter.

Without pursuing the inquiry further, it will thus be seen that, in at least some of the states, estates for years are not personal property.

But the government insists that the definition of leaseholds at common law, as chattels real, must be regarded as a controlling definition. As was said in *Wheaton v. Peters*, 8 Pet. 591, at page 658 [8 L. Ed. 1055]:

"It is clear there can be no common law of the United States. The federal government is composed of 24 sovereign and independent states, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system, only by legislative adoption."

It is true, of course, that certain rights and privileges secured by the federal Constitution are identical with those secured by the common law of England, and that they are secured to the citizens of the United States in language identical, in some instances, with that by which they were secured to the people of England by Magna Charta and the Bill of Rights; and it is natural that the United States courts, in construing these provisions, should follow the common law of England. Except, however, in such similar cases and the cases where the courts adopt propositions of the English common law because they express our ideas, the common law of England is not binding upon

the United States courts, and will be looked to only as an aid to construction.

It is useful here only as enabling us to determine whether Congress regarded personal property as including leaseholds because at common law leaseholds were so regarded. If, by reason of the history of the statute, its phraseology, and in the light of surrounding circumstances, a more likely construction must be placed upon "leaseholds," then the definition at common law is no more than any other definition, and this observation applies equally to the holdings of the New York courts upon the question as to whether leaseholds are real or personal property in various connections and as related to various rights.

When the Congress was framing the Spanish War Revenue Act, it concluded that it was unnecessary to tax real property, and therefore such part of the act of 1864 as related to real estate was bodily left out of the Spanish War Revenue Act. The act of 1898, as to personal property, was, as it were, a lineal descendant of the act of 1864 and the English Succession Act.

Further, there is in the statute an expression which indicates the intention of Congress to confine taxable legacies or distributive shares to those which arise from personal property—otherwise the words "arising from personal property" are meaningless.

[3] The expression "distributive shares" has always been regarded as meaning the shares of personal property which are distributed in a case of intestacy by virtue of statutes commonly called statutes of distribution. The New York statute of distributions, for instance, "is taken from the English statute of 22 and 23 Charles II, c. 10, which was borrowed from the 118th Novel of Justinian, and, except in some few instances mentioned in the statute, is governed and construed by the rules of the civil law, and not, as is the statute of descents, by the common law. The share which comes to a person under this statute is designated a distributive share." Redfield's Law & Practice of Surrogates' Courts (6th Ed.) § 216.

[4] The expression "legacy" means a bequest of personal property. *Orton v. Orton*, *42 N. Y. 486.

Therefore, had the statute eliminated the expression "arising from personal property," it might possibly have been argued that the common-law definition of leasehold must be accepted, and that, a leasehold being a chattel real at common law, it passed to the personal representatives and *not* to the heirs (2 Blackstone's Commentaries, c. 9, p. 142; 2 Kent's Commentaries, pt. 5, lecture 35, p. 342) and, therefore, whether by way of legacy or distributive share, was taxable because personal property.

But when the Congress added the words "arising out of personal property" it clearly meant that the source of the legacy or share must be personal property and not real estate, and that interests arising out of real estate should be treated on a different basis in the act of 1864 from those arising out of personalty and should be excluded from the act of 1898 because not needed for revenue purposes.

There is another consideration which I think has an element of persuasion. The act of 1898 provides an elaborate scheme of taxation,

in respect of which the mathematical computations are simple and automatic. Thus, under what was called "special taxes," persons in various occupations paid a specific sum. For instance, brokers were required to pay \$50; bankers, \$50 or more, dependent upon amount of capital employed; proprietors of billiard rooms, \$5 for each table. Under the heading "tobacco, cigars, cigarettes and snuff," a tax of so many cents per pound, etc., was levied. Tobacco dealers and manufacturers were taxed on a plan whereby the computation, upon a truthful return, would be automatic. What were called "stamp taxes" likewise required only automatic calculation—similarly, medicinal and other articles and preparations and the tax on persons and corporations engaged in refining petroleum and sugar. There is no reason why any different principle should be applicable to legacies and distributive shares of personal property referred to in sections 29 and 30. The act expected that administrators, executors, or trustees would properly administer their duties, and that, in the administration of estates in various localities throughout the country, the probate courts would determine how much was to be distributed, either by way of legacy or distributive share. Assuming that to be done which the law presumes will be done, there was nothing for the collecting officers of the government to do except to make their ministerial mathematical calculation in accordance with the percentages of the statute. It was never contemplated that any tax laid under this act should be based upon a valuation made by the collecting officer unless the persons whose duty it was to furnish the appropriate reports to the government failed in that duty.

In other words, the scheme of taxation in 1898 was not to include property concerning the value of which there might be an honest and great variance of opinion such as the value of a leasehold, but to have a simple source of taxation in respect of which the tax could be readily and accurately computed.

The difference in the duties of the collectors in regard to personal and real property well demonstrates this proposition.

Under section 30 of the act of 1898 and section 125 of the act of 1864, the collecting officer need only check up the return and, by simple arithmetic, find if the figures are right.

Under section 147 of the act of 1864, the collecting officer has the authority of appraisal of real estate and may place his own valuation on real estate, "but it shall be lawful for the assessor or assistant assessor, if dissatisfied with such account, * * * to assess the duty on the best information he can obtain. * * *"

Certainly there is no species of property in regard to which there may be a greater diversity in estimate of value than a leasehold, where one must consider location, character, or change of neighborhood, expiration of term, and other elements.

It seems to me, therefore, that whether the act of 1898 be regarded as having been fundamentally modeled on the English Succession Act, or whether the words "arising from personal property" be regarded as a strict limitation as herein pointed out, or whether the act of 1898 by its whole scheme and construction would necessarily exclude lease-

holds, the conclusion must be the same; and, in any event, where the doubt is substantial as in this case, it must be resolved, in favor of him upon whom it is sought to impose the tax, and the statute must be strictly construed against the United States. *Eidman v. Martinez*, 184 U. S. 578, 583, 22 Sup. Ct. 515, 46 L. Ed. 697.

For the reasons stated, the plaintiff is entitled to judgment for the sum of \$3,130.08, with interest.

In re BUCHNER.

(District Court, S. D. Illinois. August, 1912.)

1. MORTGAGES (§ 174*)—PRIORITY—ASSIGNMENT—RELEASE WITHOUT NOTICE OF ASSIGNMENT.

A bankrupt conveyed certain real property to F., receiving back a mortgage to secure notes for part of the price, payable to the bankrupt as trustee, and on the same day F. reconveyed the property to the bankrupt subject to the mortgage, which the bankrupt assumed. The first deed and mortgage were recorded, but the second was not. After this the bankrupt borrowed money from a bank and deposited the notes and mortgage as collateral. The bank did not procure an assignment of the mortgage nor have the same recorded, and after this the bankrupt, needing more money, procured F. to apply to a trust company for a loan on the same property; the bankrupt releasing the first mortgage, and F. executing a new mortgage to the trust company for the new loan, and the trust company having no notice of the deposit of the first mortgage as collateral. *Held*, that the trust company having used due diligence in making its loan, and the bank having failed to procure and record its assignment, the trust company's mortgage was prior in right.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 413-416; Dec. Dig. § 174.*]

2. COURTS (§ 367*)—MORTGAGES—PRIORITY—WHAT LAW GOVERNS.

Priority of mortgages executed in Illinois on land located in that state is to be determined in accordance with the decisions of the Illinois Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*]

3. MORTGAGES (§ 169*)—ASSIGNMENT OF FIRST MORTGAGE—FAILURE TO RECORD—NOTICE.

A bankrupt conveyed certain property to F., receiving back a mortgage and notes for part of the price and a reconveyance by which the bankrupt assumed payment of the mortgage. The bankrupt, having recorded the mortgage, but not the reconveyance, deposited the mortgage and notes with the I. Bank as collateral security for a loan. The bankrupt deposited the unrecorded deed with the F. Bank to protect F. against liability on the mortgage, after which the notes and first mortgage were sent by the I. Bank to the F. Bank for collection. The bankrupt, needing more money, procured F. to apply to a trust company for a loan on the same property and procured the same by releasing the first mortgage and having F. execute a new mortgage to the trust company, which sent the proceeds of the loan to the F. Bank for payment to the bankrupt on receiving the new mortgage and a release of the old one. It did not appear either that the notes held by the I. Bank came into possession of the same officer of the F. Bank who acted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the trust company or that knowledge that the notes were unpaid was in the mind of the officer of the F. Bank who conducted the transaction for the trust company. *Held*, that the fact that such notes were in the possession of the F. Bank for collection and were unpaid did not charge the trust company with notice through the F. Bank that the original debt secured by the first mortgage was unpaid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 386-388; Dec. Dig. § 169.*]

4. MORTGAGES (§ 300*)—DESCRIPTION OF MORTGAGEE—MORTGAGEE AS TRUSTEE—RELEASE.

Where a mortgage was executed to a person "as trustee," but did not describe any trust duty or relation, a release executed by the mortgagee without the use of the word "trustee" was available to discharge the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 864, 870, 899, 900, 902-905, 907-912; Dec. Dig. § 309.*]

5. MORTGAGES (§ 134*)—MORTGAGED PROPERTY—TITLE.

A mortgagor of land in Illinois is the legal owner of the mortgaged property as to all persons except the mortgagee, in whom the legal title vests only for the protection of his rights.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 254; Dec. Dig. § 134.*]

6. MORTGAGES (§ 244*)—EQUITABLE ASSIGNMENT—WRONGFUL RELEASE—DEBT—PRIORITY—SUBROGATION OF BANKRUPT'S TRUSTEE—"EQUITABLE ASSIGNMENT."

Where a bankrupt, having deposited notes secured by a mortgage on real estate with a bank as collateral to a loan, later wrongfully released the mortgage in order to obtain a further loan from a trust company, the pledge of the mortgage constituted an "equitable assignment" thereof within Recording Act Ill. (Rev. St. 1911, c. 30) § 30, providing that instruments affecting title to real property shall be void as to subsequent creditors without notice until filed for record; and hence, creditors of the bankrupt having recovered judgment before notice of the wrongful release of the mortgage, the bankrupt's trustee was subrogated to their rights, which were prior to those of the pledgee bank.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 633-655; Dec. Dig. § 244.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2434-2437; vol. 8, p. 7652.]

7. MORTGAGES (§ 244*)—PURCHASE OF REAL ESTATE—RECORDED CONTRACT—CLAIM OF VENDEE—EQUITABLE ASSIGNMENT OF MORTGAGE—WRONGFUL RELEASE—"EQUITABLE OWNER."

Vendees under a recorded contract for the sale of a bankrupt's real estate are equitable owners of the land within Recording Act Ill. (Rev. St. 1911, c. 30) § 30, providing that instruments affecting title to real property shall be void as to subsequent creditors without notice, etc., so that their claim for money advanced under the contract, on bankruptcy intervening, was entitled to preference over the claim of an equitable assignee of a mortgage on the property whose assignment was not recorded; the mortgage having been wrongfully released by the bankrupt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 633-655; Dec. Dig. § 244.*]

8. MORTGAGES (§ 244*)—RECORDS (§ 6*)—WRONGFUL RELEASE OF MORTGAGE—NOTICE—RIGHT TO RECORD.

Under the Illinois Recording Act (Rev. St. 1911, c. 30), authorizing instruments which create, alter, or extinguish some right, interest, or power in real estate to be recorded, an equitable assignee of a mortgage, on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

discovering that the mortgage had been wrongfully released, was entitled to have recorded a notice of that fact, which notice, when recorded, imparted constructive notice, both of the assignment and the wrongful release of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 633-655; Dec. Dig. § 244; * Records, Cent. Dig. § 7; Dec. Dig. § 6.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Louis A. Buchner. The referee entered an order determining the priority of liens, and certain creditors filed a petition for review. Modified and affirmed.

Barber & Barber, of Springfield, Ill., for the trustee.

Ellwood & Meek, of Peoria, Ill., for the Peoria Banks.

Logan Hay and John T. Creighton, both of Springfield, Ill., for Sangamon Loan & Trust Co.

Beech & Trapp, for Gallagher & White.

SANBORN, District Judge. The order sought to be reviewed was made upon application of the trustee for leave to sell real estate and have determined the respective rights and interests of parties claiming special liens upon the real estate, and fixing the order and priority of such liens. It appears that there are certain judgments against the bankrupt rendered within four months before adjudication, and that by order of the court the trustee has been subrogated to the rights of the judgment creditors under the provisions of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]).

By his report filed May 11, 1912, the referee finds and orders that the trustee make sale free of all liens and incumbrances of certain real estate, and that certain other of the real estate shall be applied to specific liens, after due notice, and that the proceeds be distributed in a certain manner. The referee finds that the proceeds of certain of the real estate be retained by the trustee for the benefit of general creditors by reason of the subrogation of the estate to the rights of the judgment creditors. He further orders that the proceeds of certain other of the real estate shall be applied to specified liens thereon in the first instance.

It is unnecessary to state in detail the separate parcels of real estate mentioned for the reason that the referee's finding in respect to priorities governs the whole situation. Such finding is that the Sangamon Loan & Trust Company holds the first lien on certain of the property; second, judgments in favor of New Holland State Bank filed February 3, 1911, for \$2,129.25 and \$323.61, respectively, and two judgments filed on the same day in favor of T. C. Harry, trustee, for \$4,673.10 and \$760.30, respectively; third, the claim of White & Gallagher for \$1,000 paid by them to the bankrupt as part purchase price of certain of the lands in question; fourth, two judgments of the Carlinville National Bank filed February 8, 1911, for \$5,323.46 and \$2,780, respectively, a mortgage filed on the same day to the Farmers' State Bank of Middletown, Ill., for \$8,000, and a mortgage for \$2,000 to Thomas Ryan filed February 10, 1911; fifth, the claims of the Illinois National

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Bank and the Interstate Bank & Trust Company, both of Peoria, Ill., upon mortgage notes held by them respectively.

The order of the referee was made February 14, 1912, and filed May 11, 1912. On February 20, 1912, the Interstate Bank & Trust Company, now known as the State Trust & Savings Bank of Peoria, and the Illinois National Bank of Peoria, hereinafter called the "Peoria Banks," filed their joint and several petition for review, objecting to the referee's findings in respect to priorities, and in other respects. A cross-petition for review was also filed by the trustee.

It appears that for some years before the bankruptcy the bankrupt and one Paul D. Foster and others were running a coal mine at Middletown, Ill. The bankrupt, Buchner, was president of the Farmers' State Bank of Middletown, and Foster was a director in the bank. Desiring to raise money to make up losses in the coal business, and not wishing to have Buchner's connection with any loan to become known for fear of injuring the credit of the bank, on January 5, 1907, Buchner made a warranty deed to Foster of all the real property in question and proposed to be sold. As part of the same transaction Foster made a mortgage back to Buchner on the same property to secure the payment of four notes payable to Buchner, trustee, two for \$5,000 each and two for \$2,500 each, in all \$15,000, maturing January 5, 1912, at 5 per cent. per annum. The deed and mortgage were both recorded in the proper office January 9, 1907. The mortgage is in the Illinois statutory form, reciting that the mortgagor mortgages and warrants "to Louis A. Buchner, trustee." The mortgage does not describe the duties of the trustee in any way, and there was no trust relationship between the parties. On the same day Foster reconveyed to Buchner the real estate in question, subject to the mortgage which was assumed by Buchner. By agreement between the parties this deed was not recorded. There was no money consideration for the transaction, nor any apparent change of possession. Buchner retained possession and made leases to third persons.

On July 13, 1907, Buchner borrowed from the Illinois National Bank of Peoria \$6,500, referred to in the testimony as the \$6,600 debt, and deposited the mortgage and notes with the bank as collateral to the loan and any other indebtedness then or previously owing to the bank. It appears, however, that Buchner owed no other debt at that time, but was indebted upon renewals and other considerations from July 13, 1907, to the time of the bankruptcy in various amounts, at one time as high as \$17,500, and at the time of the bankruptcy amounting to \$9,689.55. The Illinois National Bank did not procure an assignment of the mortgage from Buchner, or take any other steps to give notice of their security, relying entirely upon the integrity of Buchner as mortgagee.

On July 20, 1907, Buchner deposited the unrecorded deed with the Farmers' State Bank with a memorandum certifying that the deposit was made to protect Foster against any loss or damage on principal or interest of the mortgage notes, and that if it should be necessary to sell the mortgaged property the equity should be applied on any obligation or note due from Buchner to the Farmers' State Bank.

On November 4, 1909, Buchner signed a collateral agreement with the Illinois National Bank, stating that the bank holds \$10,000 of the \$15,000 Foster loan, and also an indorsement of a note for \$2,500 made by the Middletown Coal Company, and one for \$2,500 made by Paul D. Foster and Alice Evans Foster, and that said collateral should be held as security for the entire debt. The other note of \$5,000 had been previously surrendered by the Illinois National Bank and pledged by Buchner as hereinafter stated.

In August, 1907, the Illinois National Bank returned one of the notes secured by the Foster mortgage for \$5,000 to Buchner at his request, and he thereupon pledged this note and other property to the State Trust & Savings Bank under its former name, to secure a loan for \$10,000.

On May 15, 1908, more money was needed in the mining operations or to pay debts, and Buchner procured Foster to apply to the Sangamon Loan & Trust Company of Springfield, Ill., for an \$8,000 loan to be secured upon the same property covered by the \$15,000 mortgage. In his first application Foster represented that the land was free from incumbrances, but on an abstract being procured it appeared that the land was incumbered by that mortgage, and the trust company required that the mortgage should be discharged before making any further loan. During the negotiations for the loan the trust company learned that the real estate was in the possession of Buchner through tenants, and also had knowledge that the notes aggregating \$15,000 were unpaid. On June 1, 1908, Foster executed a mortgage for \$8,000 upon the land in question to the Sangamon Loan & Trust Company, and on June 10, 1908, the latter wrote a letter to the Farmers' State Bank of Middletown stating that the trust company was making a loan to Foster for \$8,000, and that he was to pay one per cent. commission and \$5 for expenses; also, that there was inclosed in the letter cashier's check for \$7,915, "to be delivered to Mr. Foster upon his delivery to you of the notes and mortgage which he has executed; and also the delivery to you of the release of the mortgage of \$15,000 to Mr. Buchner. Please return all these papers to us. Mr. Foster is to sign the inclosed receipt for the amount." Without paying anything upon the notes for \$15,000, Buchner executed a release of the mortgage which was delivered to the Farmers' Bank, together with the new notes and mortgage for \$8,000. These were sent by the Farmers' Bank to the trust company and were delivered and recorded June 13, 1908. At the time of this transaction in the Farmers' Bank, three of the notes secured by the first mortgage, amounting to \$10,000, were in possession of the Farmers' Bank, having been sent there by the Illinois National Bank for collection. It thus appears that the officers of the same bank which acted as agent for the trust company in taking delivery of the new mortgage and release were at the same time agents of the Illinois National Bank in holding the unpaid notes.

On March 26, 1909, Buchner made a mortgage to one Dehority for \$6,000 on a small part of the property covered by the \$15,000 mortgage, being a strip 150 feet by 1,284½ feet.

February 3, 1911, the New Holland State Bank recovered two judg-

ments against Buchner in the circuit court of Logan county, Ill., for \$2,129.25 and \$323.61, respectively. On the same day there was recorded two judgments in favor of T. C. Harry, Trustee, v. Buchner, for \$4,673.10 and \$760.30, respectively.

February 6, 1911, Buchner entered into a contract in writing with D. C. Gallagher and George White stipulating to convey the real estate in question and other property to them free of liens and incumbrances for a consideration of \$27,360. This agreement was filed for record in Logan county, Ill., and on the same day a payment of \$1,000 was made by the vendees thereon.

February 8, 1911, the Carlinville National Bank recovered two judgments against Buchner for \$5,323.46 and \$2,780, respectively.

February 9, 1911, the Illinois National Bank and the State Trust & Savings Bank filed in the recorder's office a notice that the \$15,000 mortgage was wrongfully released; they having just discovered the fact of the release.

July 30, 1910, Foster gave two mortgages, one to the Farmers' Bank of Middletown for \$8,000, and the other to Thomas Ryan for \$2,000. These two mortgages are conceded to have been preferential and invalid as against the trustee.

February 15, 1911, the bankruptcy petition was filed, and the adjudication followed on March 1, 1911.

Questions of priority under Illinois law of the various liens referred to were disposed of by the referee, and have been thoroughly presented by counsel. The referee established the following order of priority: (1) The Sangamon Company mortgage; (2) the Dehority mortgage so far as the strip 150 by 1,284½ feet is concerned; (3) New Holland State Bank and Harry judgments for the benefit of the bankrupt estate; (4) White and Gallagher for their payment of \$1,000; (5) Carlinville Bank judgment and the preferential mortgages given to Ryan and the Farmers' Bank, for the benefit of the estate; and (6) the Peoria Banks. Excluding the Dehority claim because it is largely secured on land not covered by the Buchner and Sangamon Company mortgage, the total principal sum of the liens is \$49,989.72, and the property affected is worth about \$20,000. It is therefore evident that under the referee's decision the Peoria Banks will lose their whole debt, unless partly paid as a general claim against the estate. In this way they may obtain the benefit of the order subrogating the trustee to the New Holland Bank judgments, the Harry judgments and the Carlinville Bank judgments. If the Peoria Banks are to be held prior to the Sangamon Company, the latter would still be ahead of all the other claimants who, in turn, would, it is argued, be preferred to the Peoria Banks; thus presenting one of the stock conundrums of the law schools.

[1] 1. At the time it received the mortgage and release, the Sangamon Company had notice of Buchner's possession, and through that was charged with knowledge of his equitable title. It had also recently been informed by Foster that the \$15,000 debt secured by the first mortgage given to Buchner was unpaid, but did not know the debt had been assigned or the notes pledged by Buchner, unless such knowl-

edge was to be imputed to it as a matter of law by reason of its selecting the Farmers' Bank, accidentally or as a matter of convenience, as its agent to pay over the money and take delivery of the new mortgage. In addition to this, it knew from the abstract of title and Foster's statement that he was the legal owner, but that Buchner was vested with all other interests as mortgagee in possession and equitable owner by unrecorded deed from Foster. For anything appearing in the evidence the Sangamon Company, taking into account only its actual knowledge, must have supposed that Buchner still held the \$15,000 debt, and would not release the first mortgage until that debt was paid, and it must also be charged with the knowledge, from his actual possession of the land, that he was the real owner. So the case is presented of a person about to make a loan supposing in good faith that A., the borrower, is vested with the naked legal title, that B. (Buchner), mortgagee in possession, holder of the original debt and real owner, is willing to have the new mortgage made, and either obtain payment of the old debt from A. (Foster), or waive his claim as first mortgagee and allow the new mortgage to be a prior lien.

Putting ourselves as far as possible in the actual position of the Sangamon Company and the Peoria Banks (holders of the original debt, but without the knowledge of the Sangamon Company), and remembering that the Peoria Banks were negligent in not taking and recording an assignment of the mortgage, it is seen at once, I think, that the Sangamon Company took such reasonable precaution as prudence and good faith dictated. Its knowledge of Buchner's possession without notice that he had assigned the original debt greatly fortifies its position. Had it supposed he was equitable owner alone, knowing he was not a mortgagee in possession, a different case would arise, not here presented. If it had had notice that he had pledged the notes, and thus transferred the mortgage, it might even then, perhaps, be protected as a prior lienor, on the theory that one about to loan money is only required to see that prior liens are discharged. However that may be, ignorant of any assignment, supposing bona fide that Buchner still held the notes and mortgage, the Sangamon Company did everything suggested by any possible or workable standard of reasonable diligence, especially in view of the negligence of the Peoria Banks in failing to procure and record an assignment, and their trusting entirely to Buchner's honesty.

[2] The question is one of Illinois law, and is settled by the rulings of the Supreme Court of that state in favor of the Sangamon Bank. *Ogle v. Turpin*, 102 Ill. 148; *Havighorst v. Bowen*, 214 Ill. 90, 73 N. E. 402; *Mann v. Jummel*, 183 Ill. 523, 56 N. E. 161.

Keohane v. Smith, 97 Ill. 156, is the only case in Illinois fully supporting the position of the Peoria Banks; but the case is tacitly disapproved, if not practically overruled, by the later cases. The facts were that one Sullivan made a mortgage to Runyon to secure a negotiable note for \$2,000 due in five years; the money being furnished by Catharine Keohane. Runyon assigned the note to Keohane, and delivered the mortgage to her, without formal assignment or record. About a year later Sullivan borrowed \$3,000 from Smith, who en-

gaged Perkins to examine the title. Discovering the Runyon mortgage, Sullivan proposed to pay it out of the \$3,000. Sullivan and Perkins paid to Runyon the amount due on the first mortgage, without requiring delivery of the note, and Runyon released the first mortgage, but did not pay the money to Keohane. Thus Perkins, agent for Smith, was grossly negligent in not demanding from Runyon production of the note. A bill being filed to foreclose the first mortgage, the latter was held prior to Smith's lien, mainly upon the ground that Smith knew the first note was not due, and was negotiable, capable of assignment. Having paid the money to discharge it to Runyon without requiring production of the note, he was so negligent that his priority was lost. In *Ogle v. Turpin*, on the other hand, the facts were similar to *Keohane v. Smith*, except that Runyon, after negotiating the first mortgage notes, procured a quitclaim deed of the mortgaged property, and then released the first mortgage without paying the notes, making a new mortgage to a third person. The second mortgage was held prior to the first, and the case is substantially the same as the one under consideration. *Ogle v. Turpin* is approved in the later cases, particularly *Havighorst v. Bowen*, where the facts were substantially the same as here. The present rule in Illinois is so clearly in favor of the Sangamon Company's lien (apart from the question of agency), and so entirely reasonable, that it should be followed.

[3] 2. Upon the question of agency it appears that the Sangamon Company sent the money for the Foster loan to the Farmers' Bank with definite instruction to pay it over upon receipt of the new mortgage and a release of the old one. At this time the Farmers' Bank had in its possession the unrecorded deed made to Buchner, with a memorandum that it was placed there to protect Foster against any loss on the \$15,000 notes. It appears, also, that on February 24, 1908, the Illinois National Bank, at Buchner's request, sent the first mortgage notes held by it to the Farmers' Bank to permit inspection by a possible purchaser. They remained with the Farmers' Bank until about June 5, 1908, about a week before delivery of the Sangamon Company's mortgage. Upon this state of facts it is claimed by the Peoria Banks that the Sangamon Company, through its agent, is imputed with the knowledge that the original notes were unpaid at the time it delivered the money to Foster and the papers to its principal. But it does not appear, either that the notes came into the possession of the same officer who acted for the Sangamon Company, or that knowledge of the notes being unpaid was in mind a week later. *Roderick v. McMeekin*, 204 Ill. 625, 68 N. E. 473. The agent's authority was also limited quite narrowly. *Lowden v. Wilson*, 233 Ill. 340, 84 N. E. 245. It is clear that the Sangamon Company was not charged with notice that the original debt was unpaid.

[4] 3. The Buchner mortgage ran to him as trustee, without describing any trust duty or relation, while the release was made by him without the use of the word trustee. He was in no sense a trustee, and the instrument was a pure mortgage, just as though the word had not been employed. The release was therefore in proper form. Even if Buchner was a trustee, he had power to release the mort-

gage lien without payment of the debt, and without consent of its holder. This is held by *Havighorst v. Bowen*, and the other cases cited in the same connection, except *Keohane v. Smith*. But the rule does not apply if the subsequent purchaser have notice of the breach of trust. *Lennartz v. Quilty*, 191 Ill. 175, 60 N. E. 913, 85 Am. St. Rep. 260; *Vogel v. Troy*, 232 Ill. 484, 83 N. E. 960.

The lien of the Sangamon Company should therefore be held prior to that of the Peoria Banks, whose negligence in not recording an assignment of the mortgage enabled Foster and Buchner to defraud them.

The next question is whether the various judgment liens to which the trustee has been subrogated are also to be held prior to those of the Peoria Banks, as decided by the referee.

[5] 4. All the judgments being against Buchner, and not Foster, a preliminary question comes up as to the effect of the Sangamon company's mortgage as a conveyance of the legal title. It is argued that Buchner was only the equitable owner, and that the legal title was outstanding in the mortgagee; therefore the judgment creditors acquired liens only upon the equity of redemption, and had constructive notice of just what his rights were. As against Buchner the released mortgage is, of course, a valid lien, and if he had only an equitable title the judgments would, it is assumed, attach only to his right subject to the first mortgage. This question, however, is not important, for the reason that it is settled in Illinois that the mortgagor is the legal owner as to all persons except the mortgagee. The legal title vests in the mortgagee only for the protection of his interests and only for a single purpose, remaining in the mortgagor for all others. *Emory v. Keigham*, 88 Ill. 482; *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331; *Seaman v. Bisbee*, 163 Ill. 91, 45 N. E. 208; *Lightcap v. Bradley*, 186 Ill. 519, 58 N. E. 221 (reviewing prior decisions); *McFall v. Kirkpatrick*, 236 Ill. 281, 301, 86 N. E. 139. The question is complicated, however, by the fact that the record title was in Foster, while the full legal title, as to all persons other than the Peoria Banks and the Sangamon Company, was in Buchner by the unrecorded deed, of which his possession was constructive notice. The judgment creditors were charged with, and may profit by, the fact of Buchner's possession. The case is therefore left just as it would be if there were no apparent outstanding title in Foster.

[6] 5. The Peoria Banks were equitable assignees of the Foster mortgage, and thus have equities prior in time to those of the judgment creditors. They are also prior in right unless in Illinois a different rule has been established, or unless their failure to take and record an assignment was such negligence as to postpone them to the later liens. In Illinois judgment creditors and purchasers stand on equal footing with respect to prior liens or interests of which they have no notice. This is by force of section 30 of the Recording Act (Rev. St. Ill. 1911, c. 30, p. 528), which provides that all deeds, mortgages, and other instruments in writing which are authorized to be recorded shall take effect from the time they are filed for record as to all creditors and subsequent purchasers without notice. This act has been con-

strued to apply only to judgment creditors, those who, "without actual or constructive notice of a prior conveyance or incumbrance, institute such proceedings, or take such steps, as effect a lien on the land before the recording of such conveyance or incumbrance, whether the debt be prior or subsequent to them." *Martin v. Dryden*, 6 Ill. (1 Gilman) 187, 213; *Gary v. Newton*, 201 Ill. 170, 186, 66 N. E. 267; *Beck Lumber Co. v. Rupp*, 188 Ill. 562, 568, 59 N. E. 429, 80 Am. St. Rep. 190.

In regard to the failure of the Peoria Banks to procure and record an assignment of the first mortgage (they having only an equitable assignment due to the pledge of the notes), section 30 provides that title papers shall be void as to subsequent creditors, without notice, until the same shall be filed for record. This provision has been construed in *Ogle v. Turpin*, *Mann v. Jummel*, and other cases to cover equitable assignments of mortgages such as those held by the Peoria Banks. The trustee, therefore, who has been subrogated to the rights of the judgment creditors, is to be preferred to the Peoria Banks; and, as I understand the record, all the judgments were filed prior to the recording of notice of the wrongful release of the Buchner mortgage.

[7] 6. The claim of White and Gallagher for \$1,000 under their recorded contract with Buchner in point of time comes between the New Holland Bank and Harry judgments, filed February 3, 1911, and the Carlinville Bank judgment of February 8, 1911. This claim stands in all respects like a recorded judgment, and for reasons already discussed takes precedence over the Peoria Bank claims. White and Gallagher were equitable owners of the land. *Fuller v. Bradley*, 160 Ill. 51, 43 N. E. 732; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477; *Lewis v. Shearer*, 189 Ill. 184, 59 N. E. 580. These purchasers were within the protection of the Recording Act. *Allen v. Woodruff*, 96 Ill. 11; *D'Wolf v. Pratt*, 42 Ill. 198; *Doyle v. Teas*, 5 Ill. (4 Scam.) 202; *Baltimore, etc., Co. v. Brubaker*, 217 Ill. 462, 75 N. E. 523.

Further, the negligence of the Peoria Banks to record an assignment of the first mortgage nullifies the time priority of their equity as against the claim of White and Gallagher. *Rohde v. Rohn*, 232 Ill. 180, 83 N. E. 465; *Lennartz v. Quilty*, 191 Ill. 174, 60 N. E. 913, 85 Am. St. Rep. 260; *Ogle v. Turpin and Mann v. Jummel*, supra.

[8] 7. On February 9, 1911, the Peoria Banks filed in the recorder's office a notice that the first mortgage was wrongfully released, and that they had just discovered that fact. It is argued by attorneys for the trustee that this notice was not such a paper as was authorized to be recorded and therefore did not amount to constructive notice. The Illinois Recording Act authorizes instruments affecting real estate to be recorded; that is, instruments which create, alter, or extinguish some right, interest, or power in the land. The Peoria Banks had an equitable assignment of the mortgage. Their notice asserted this, and this created something which they did not have before. The Recording Act has been liberally construed in Illinois, and I think this paper should be regarded as imparting constructive notice. Deeds are authorized to be recorded only in the county where the land lies. If recorded in any other they do not operate as constructive notice. St.

John v. Conger, 40 Ill. 535. Resolutions of corporations are not authorized to be recorded. Mullanphy Savings Bank v. Schott, 135 Ill. 655, 667, 26 N. E. 640, 25 Am. St. Rep. 401. A letterpress copy of a paper otherwise recordable is not entitled to record. Lane v. Lesser, 135 Ill. 567, 581, 26 N. E. 522. The same rules applies to an unsigned copy of a recordable paper. Mack v. McIntosh, 181 Ill. 635, 643, 54 N. E. 1019.

The order appealed from should be affirmed, except that the right of the Peoria Banks should date from February 9, 1911, ahead of the two mortgages to the Farmers' Bank and Thomas Ryan. This is upon the assumption that the judgment of the Carlinville Bank was filed for record before the notice filed by the Peoria Banks.

W. A. GAINES & CO. v. ROCK SPRING DISTILLING CO. et al.

(District Court, W. D. Kentucky, at Owensboro. February 7, 1913.)

1. TRADE-MARKS AND TRADE-NAMES (§ 96*)—JUDGMENT—CONCLUSIVENESS—SUBSEQUENT REGISTRATION.

Where, in a prior suit for infringement of a trade-mark, complainants were found not to be the rightful owners thereof, it being determined that H. & Co. had previously used the mark and were entitled thereto, such determination was res adjudicata of that issue as between the parties and their privies, and was not affected by complainant's subsequent ex parte registration of the trade-mark as authorized by Act Cong. Feb. 20, 1905, c. 592, § 6, 33 Stat. 726 (U. S. Comp. St. Supp. 1911, p. 1462), and this though defendant's cross-bill for affirmative relief in such former proceeding was dismissed; the result being to leave both parties free to use the mark as they pleased.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 109; Dec. Dig. § 96.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 73*)—UNLAWFUL COMPETITION—OLD CROW.

Where defendant's right to use the words "Old Crow" as a trade-mark in the sale of whisky had been adjudicated prior to appellant's attempted ex parte registration of the name as a trade-mark, and it appeared that, while such name had been originally limited to straight whisky, both complainant and defendant had later applied it to "blends," and that complainant's registration of the mark did not limit the use of the word to straight whiskies, and defendant's labels were not such as to mislead the public to believe that the whisky put out under such name was complainant's, the predecessors of both parties having used the name for over 45 years, complainant was not entitled to enjoin its use on the theory of unlawful competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. § 73.*]

In Equity. Bill by W. A. Gaines & Company against the Rock Spring Distilling Company and others. On final hearing. Bill dismissed.

See, also, 179 Fed. 544.

James L. Hopkins, of St. Louis, Mo., and Trabue, Doolan & Cox, of Louisville, Ky., for complainant.

Luther Ely Smith, of St. Louis, Mo., and Sweeney, Ellis & Sweeney, of Owensboro, Ky., for defendants.

EVANS, District Judge. From time to time, as questions arose during the progress of this case, we expressed our views upon them in opinions then filed. Those opinions, if it be necessary or desirable, can be referred to in connection with what we may now say without repeating them.

The complainant, a corporation, by its bill, alleges an infringement by the defendants of a certain trade-mark, which, on the 20th day of July, 1909, had been admitted to registration in the office of the Commissioner of Patents under the provisions of the act of February 20, 1905. The trade-mark is familiarly known as "Old Crow," and is described in the certificate of registration as being used upon "Straight Bourbon and Rye Whisky."

Upon the allegations of the bill an injunction was prayed for, together with other relief.

On May 2, 1910, the Hellman Distilling Company tendered and asked leave to file a petition, in which it alleged that it was the transferee and successor of A. M. Hellman & Co., who long previously to the transfer to the petitioner had owned the trade-mark referred to in the bill of complaint; that the defendants Rock Spring Distilling Company and Silas Rosenfeld were petitioner's agents in Kentucky, and as such were using the trade-mark; that it had undertaken to defend them in such use, and thereupon prayed that it might be admitted as a defendant in the suit for the purpose of making such defense. The court expressed then its opinion ([C. C.] 179 Fed. 545) that the petitioner could not, in the face of complainant's opposition, be made a defendant, but that any estoppel by the former judgment referred to in the petition and presently to be described, would, under the facts therein stated, be available for the defendants.

[1] Thereafter the defendants interposed a plea to the effect that, long before the registration of the trade-mark by the complainant, the latter, on November 11, 1904, had filed its bill of complaint in the Circuit Court of the United States for the Eastern District of Missouri, at St. Louis, against A. M. Hellman & Co., a firm composed of Abraham M. Hellman and Moritz Hellman, in which it alleged itself to be the owner and proprietor of the trade-mark Old Crow, when used in connection with whisky, and, charging that the defendants were infringing it, had sought an injunction against them to prevent such use; that both sides in that suit claimed ownership of the trade-mark Old Crow; that, after the death of Abraham M. Hellman, his administrator, Max Kahn, was made a defendant, and the issues of fact were made up in that case in due course of pleading; that it was finally brought to trial in that court, whose judgment was rendered therein against said defendants who were enjoined from using said trade-mark ([C. C.] 155 Fed. 639); that the defendants in said cause thereupon prosecuted an appeal from said

judgment to the Circuit Court of Appeals of the Eighth Circuit, which court, after full consideration and argument, reversed, on April 27, 1908 (161 Fed. 495, 88 C. C. A. 437), the decree of the Circuit Court and remanded the case with directions to the latter court to dismiss the action for want of equity; and that the latter court had, by its decree, entered on July 10, 1908, done as directed by the Circuit Court of Appeals. The defendants pleaded the final judgment in that cause in bar of the present action. When the plea was set down for argument and heard the court in an opinion and judgment thereon, on May 2, 1910 ([C. C.] 179 Fed. 544), held that the plea was sufficient in law. Instead of dismissing the bill, the court gave leave to the complainant to take issue on the plea, which was done. The court also, in its opinion filed February 27, 1912, stated its reasons for giving the defendants leave to answer such parts of the complainant's bill as were not covered by the plea. This was done upon authorities cited in the opinion last referred to. The defendants, in the answer thus allowed to be filed, assailed the registration of the trade-mark upon various grounds. At the final hearing the issues thus raised, alike upon the plea and upon the answer, were heard and argued. As already stated, it will serve little or no purpose to restate the grounds of our former rulings, as the several opinions heretofore filed in the case do that with a clearness quite sufficient to indicate the bases of our several rulings; but a brief summary of the essential facts as we find them may not be amiss in disposing of the plea.

Many years ago, probably in 1835, one James Crow, in Woodford county, Ky., began the use of the trade-mark Crow or Old Crow in connection with Bourbon whisky of his own make. He continued the use of his trade-mark until his death in 1855, at which time its use was discontinued. In 1867, one Mitchell, a former employé of Crow's, in the same or in a contiguous locality in Kentucky, began the use of the same trade-mark on whisky. He did this on his own initiative and without having in any way inherited or purchased the right to use the trade-mark from Crow or his heirs or representatives. It is therefore only from Mitchell's use of the trade-mark, begun in 1867, that complainant's claim can come. But four years previously to the beginning of its use by Mitchell, namely, in 1863, the use of a similar trade-mark was begun in reference to whisky in St. Louis, Mo., by persons who have transmitted their rights to the defendants. It was out of this general state of fact that the controversy arose which was adjudicated finally in the Circuit Court of the United States for the Eastern District of Missouri. Whatever may have been the merits of the controversy which that court determined in that case we are not to inquire, nor are we to inquire into the merits of the whisky made or sold by either party thereto. The question we are to determine on this phase of the case is whether, in its essential elements, the title adjudicated in that case was the same as the one again attempted to be litigated in this action. When we attentively examine the record, the pleadings, and the final decree in the former cause, we cannot doubt that the essential question in dispute there was the same as that involved here. This being so, and the defendants and the Hellman

Distilling Company having in due course succeeded to the rights of A. M. Hellman & Co., we hold that the plea has been established, and that it is a bar to the relief now sought as to the infringement of the alleged trade-mark.

But the defendants in that cause were denied an injunction upon their cross-bill asking that relief, and it is insisted that that shows that neither themselves nor their successors have any rights in the trade-mark inasmuch as the record shows that they dismissed their cross-appeal from that part of the judgment in that case. We have not been able to see how that affects the question here involved, because, whatever effect may be given the denial to defendants of the relief they sought in that action, it is certain that in the most impressive way it was adjudged that the complainant had no equity to the relief it there prayed. At most, it might be said that the result of that litigation was to leave both parties to it, each of whom had used the trade-mark for about 40 years, free to use the trade-mark as each pleased in connection with whisky. Indeed, it might probably be that the proper conclusion is that the effect would be to open up the use of the trade-mark in connection with whisky to the public generally, because no one party had acquired a right to its exclusive use since Crow's death in 1855. Which of the views thus indicated be right is immaterial, but they afford suggestive illustration of the situation.

Again, it is insisted by the complainant that it uses the trade-mark in connection with "straight" whiskies, while the defendants have heretofore used it in connection with "blends." The bill of complaint, as we shall see, charges a broader use. The general doctrine, we apprehend, is that a trade-mark used in connection with any class of things must apply to all the various species or grades of that class. It would be an endless task to differentiate the various grades or qualities of whisky or many other articles of merchandise and say to which one or more of them a trade-mark was appropriate or applicable. Especially, we apprehend, would this be so in reference to whisky, which has as great a variety of grades (extending from the very best to the very worst) as probably any article in commerce. Some of the authorities illustrating this view are *Layton Pure Food Co. v. Church & Dwight Co.*, 182 Fed. 35, 38, 104 C. C. A. 475, 32 L. R. A. (N. S.) 274, and authorities therein cited, and *Collins Co. v. Oliver Ames & Sons Corporation* (C. C.) 18 Fed. 561, 570.

Another question of vital importance is to be considered. It is whether the registration obtained by the complainant is effective and available to overthrow a judgment finally, and under the direction of the Circuit Court of Appeals, rendered by the Circuit Court previous to the registration of the trade-mark. In an opinion delivered on February 27, 1912, we endeavored to clearly indicate our views on this phase of the case and our reasons for supposing that it was never in the contemplation of Congress that such a registration, especially if obtained *ex parte*, should invalidate the solemn judgment of a court having jurisdiction. The controlling facts in this connection are that on April 27, 1908, the opinion of the Circuit Court of Appeals was rendered in the former suit then styled *Kahn, Administrator, et al. v.*

W. A. Gaines & Co., 161 Fed. 496, 88 C. C. A. 437. After an application for a stay of the mandate was refused on June 18, 1908, the Supreme Court, on October 19, 1908, denied a petition for a writ of certiorari. On February 13, 1909, Edson Bradley, describing himself as vice president of W. A. Gaines & Co., was sworn to a statement intended to be filed as the basis of an application for the registration of the trade-mark Old Crow on straight Bourbon and rye whisky. This statement and the accompanying petition were filed in the Patent Office on February 26, 1909, nearly one year after the decision by the Circuit Court of Appeals. This latter circumstance may be most significant in connection with the fact that in the papers just referred to, and as amended later, the vice president stated under oath that W. A. Gaines & Co. in the county of Franklin and state of Kentucky "has adopted for its use a trade-mark which consists of the words 'Old Crow,' and that said trade-mark has been used in the business of ourselves and our predecessors since, to wit, January 1, 1835. The class of merchandise to which the trade-mark is appropriated is class 49, distilled alcoholic liquors, and the particular description of goods in said class upon which the said trade-mark is used is straight Bourbon and rye whisky." The vice president also swore:

"That no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive."

As we have seen, it is altogether incorrect to say that the complainant and its predecessors had used that trade-mark since January 1, 1835, because the complainant and its predecessors did not begin its use until 1867, nor then, in any legal sense, as the successors of James Crow. Besides, from the testimony and developments in the suit in St. Louis, the complainant certainly knew that its opponents in that suit had been adjudged the right to use, and that they in fact had used, the trade-mark Old Crow ever since 1863, though probably not as energetically or as extensively as complainant. Yet upon these statements the registration was obtained.

The application for the registration was dealt with in the Patent Office in an entirely ex parte way, and though there was a formal publication on May 18, 1909, in the Official Gazette of the Patent Office of the notice required by section 6 of the act of February 20, 1905, the record in no way indicates that W. A. Gaines & Co. caused notice of the application to be actually given to any of those who had been defendants in the previous suit, nor that they otherwise had such notice. There is no indication in the record that those defendants ever knew of the application until long after registration had been made on July 20, 1909. While under the act of 1905 the registration, even when thus made, affords a prima facie presumption of ownership of the trade-mark in complainant, is not that presumption entirely overcome by the judgment which had been rendered against complainant in the suit in St. Louis long before the application was made, and of which litigation and judgment no information was given by the complainant to the Patent Office? To ask the question is to answer it in

the affirmative unless such ex parte registration, obtained under such circumstance, and in the way indicated, is to override the previous judgment directed by the Circuit Court of Appeals in a litigation between the opposing claimants of that trade-mark and in which all were fully heard. That such a result is impossible is, in our view, too plain for argument. Nor can we conceive that Congress ever contemplated such a result when enacting the legislation of 1905.

Notwithstanding all this, it is insisted that there is a question of unfair trade to be considered, and we find that in stating its causes of action the complainant, in its bill, while alleging an infringement of its trade-mark, also says:

"That well knowing the premises and with full knowledge of this complainant's rights above recited, the respondents above named, without the knowledge or consent, and against the will of the complainant, did on the 21st day of July, A. D. 1909, and thence continuously from day to day until the time of the filing of this bill of complaint, in violation of the complainant's rights in and to its said trade-mark consisting of the words 'Old Crow,' and in invasion of the complainant's rights under its said registration and in infringement of your orator's said registered trade-mark, and in fraud against this complainant and against the public, did make, or cause to be made, and sell or cause to be sold, in Owensboro, in the county of Daviess, state of Kentucky, a certain spurious straight Bourbon whisky not the product of this complainant's 'Old Crow' Distillery, or distilled by this complainant, or licensed to be distilled by this complainant, and that they, the said respondents, have marked or branded the same with the words 'Celebrated Old Crow Whisky Bottled in Bond,' and have caused the same to be bottled in bond, and have applied to the labels thereon the words 'Old Crow' in script type, and have caused the same to be sold and transported in commerce among the several states of America; that a specimen of the packages so made and sold by respondents is exhibited with this bill and is filed herewith as 'Exhibit B' accompanying the bill."

The bill also states:

"That the whisky so dealt in by the respondents and marked and branded with the words 'Old Crow' was so marked and branded for the purpose and with the intent to mislead and deceive the public and consumers of whisky distilled by the complainant and bottled in bond by the complainant, and the public and consumers of whisky have, by the said acts of the respondents, been led into purchasing the respondents' whisky under the false belief that it was the whisky of the complainant, and that by means of the said fraud and imposition upon the public by means of and through the instrumentality of their said unlawful appropriation and infringement of your orator's said registered trade-mark, the respondents have sold very large quantities of their whisky so falsely marked and branded, all of which wrongful acts have resulted in injury to the complainant's business and the good will thereof, and were wantonly, willfully, deliberately, and maliciously done by the respondents, to complainant's damage in the sum of \$20,000."

If, in addition to an action for the infringement of a registered trade-mark, the bill shows a claim for damages for unfair trade in blended whiskies, it is probably multifarious. However, the defendants have not insisted upon that objection, and the court will not at this stage treat the bill as open to it, but will dispose of the question of unfair trade upon the entire record before it. Treating it thus, we think the record clearly shows that the defendants, in using the trade-mark Old Crow, whether in connection with a picture of a raven, as was usual, or not, used what they had a clear right to use. This be-

ing so, there could be no deception in doing that thing. This, however, is what is claimed to constitute unfair competition with complainant, and the testimony clearly shows that in other respects the defendants' labels, brands, and other marks are altogether different from complainant's and of themselves show that complainant did not make the whisky sold under defendants' brands.

[2] So that at last this phase of the case seems to resolve itself into a complaint that the defendants use the words Old Crow on their labels, brands, and other marks and probably in their advertising matter. After much consideration, we have concluded that the defendants have acted within their rights, and have attempted to sell their own whisky as being of their own make, and not as complainant's; each using the words Old Crow, as they had the right to do, and as the predecessors of each had done for over 45 years. Besides, while at the argument it was much asserted that complainant's whisky was "straight" and defendants' a "blend," the testimony indubitably shows that much of complainant's Old Crow whiskies are "blends" and so labeled under the pure food laws. As "blends" they are not within the registered trade-mark, which on its face refers only to "straight" rye and Bourbon whisky. The testimony also demonstrates that much of the defendants' whisky is bottled in bond, and is therefore necessarily "straight," inasmuch as under the statute nothing but "straight" whisky is permitted to be so bottled. So that as to "straight" whisky the complainant must be regarded as suing only on its trade-mark, while as to "blends" as well as "straight," it is suing for unfair competition in trade. And in this connection it may be stated as matter almost of common knowledge: First, that the purchaser of drinks over the counter of a barroom seldom knows or is told what he is getting, or if he is told it soon becomes a matter of indifference to him; and, second, that the wholesale or retail dealer who buys from a manufacturer generally knows exactly from whom he purchases and the character of spirits he gets. The danger to the manufacturer is, therefore, not great. The same may be said of a wholesale dealer who sells to a retail dealer.

It results that the decree now must be: First, that the plea of former adjudication is sustained; second, that the registration of the trade-mark under which relief is claimed in this action was insufficient to invalidate the judgment in the prior suit; third, that the charge of unfair trade has not been established; and fourth, that the action be dismissed, with costs to the defendants.

A decree accordingly will be entered.

In re RANEY.

In re B. F. AVERY & SONS PLOW CO.

(District Court, N. D. Texas. February 14, 1912.)

No. 139, in Bankruptcy.

1. CHATTEL MORTGAGES (§ 6*)—"CONDITIONAL SALE CONTRACTS"—STATUTES.

Conditional contracts for the sale of personal property, reserving title in the seller until paid for, on being filed for record, became chattel mortgages, as provided by Rev. Civ. St. Tex. 1911, art. 5654, and are to be construed as such.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 23-41; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1408-1410.]

2. CHATTEL MORTGAGES (§ 47*)—DESCRIPTION—SUFFICIENCY.

Where contracts for the sale of farm implements to the bankrupt, reserving title in the seller, which, on being filed, became chattel mortgages, as provided by Rev. Civ. St. Tex. 1911, art. 5654, described the property according to parts, and were sufficient to identify it, they were sufficient to create a lien on so much of the property as remained at the intervention of bankruptcy proceedings.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 87, 88, 96-103; Dec. Dig. § 47.*]

3. CHATTEL MORTGAGES (§ 101*)—AFTER-ACQUIRED PROPERTY—WHAT LAW GOVERNS.

Whether, and to what extent, a chattel mortgage on after-acquired property sold to the mortgagor in Texas is valid is a question to be determined by the Texas law.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 185, 186; Dec. Dig. § 101.*]

4. BANKRUPTCY (§ 184*)—CHATTEL MORTGAGES—EXTENT OF LIEN—AFTER-ACQUIRED PROPERTY—DESCRIPTION.

Where a contract for the sale of wagons and farm implements reserved a lien to the seller on the goods sold under the contract and on subsequent orders, such contract, though filed as a chattel mortgage, did not confer on the seller, as against the buyer's trustee in bankruptcy, a lien on implements and parts subsequently shipped to the bankrupt on orders made by letter or telephone during a period of more than 2½ years, concerning which there was no adequate identifying description.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

5. BANKRUPTCY (§ 184*)—CHATTEL MORTGAGES—AFTER-ACQUIRED PROPERTY—PROPERTY LEFT IN THE HANDS OF A MERCHANT FOR SALE.

Rev. St. Tex. 1895, art. 2548, provides that every mortgage or lien to be given by the owner of any stock of goods, wares, or merchandise daily exposed to sale, in parcels, in the regular course of business, and contemplating a continuance of possession of the goods and control of the business by a sale by the owner, shall be fraudulent and void. *Held*, that a provision in a contract of sale, retaining title, not only on the goods sold, but on all goods subsequently shipped, until all the buyer's indebtedness to the seller was paid, was an attempted reservation of title to all goods shipped, either under the particular contract or thereafter, and was therefore void as to goods in the hands of the buyer at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the time of bankruptcy, not purchased by the particular contract reserving the lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

In Bankruptcy. In the matter of bankruptcy proceedings of J. R. Raney. On certificate of a referee to review allowance of a lien claim in favor of B. F. Avery & Sons Plow Company. Affirmed in part and reversed in part.

Spence, Knight, Baker & Harris, of Dallas, Tex., for claimant.

Harrison & Wayman, of Brownwood, Tex., for trustee in bankruptcy.

MEEK, District Judge. Claimant, B. F. Avery & Sons Plow Company, filed proof of a secured claim against the estate of J. R. Raney, bankrupt. The claim was for a balance remaining unpaid on the purchase price of certain wagons, plows, and other farm implements and parts thereof sold by claimant to the bankrupt. At the time of bankruptcy a part of these articles purchased from claimant remained undisposed of and in the possession of the bankrupt. The securities for its debt relied upon by the claimant are certain order contracts in writing, executed by the bankrupt and accepted by claimant, under and by virtue of the terms of which the title to the wagons, plows, and other farm implements and parts thereof is sought to be reserved in claimant until their purchase price shall have been fully paid. Attached to the proof of claim are three several order contracts. Also attached to and made a part of the proof of claim are numerous bills of goods sold by claimant to the bankrupt and shipped to the latter at Santa Anna, Tex. The dates of these bills run from June 29, 1908, to January 11, 1911. The testimony also reveals that a few parts of implements were shipped to bankrupt upon telephone orders. Included in the terms of each of these order contracts above referred to is the following provision:

"The title to and ownership of all goods which may be shipped under this contract, as well as all other goods shipped by you [meaning claimant] to me or us [meaning bankrupt] on subsequent orders, shall remain in you, and their proceeds in case of sale shall be your property, until all my or our indebtedness to you shall have been paid in money; but nothing herein contained shall release me or us from making payment as herein agreed."

These three order contracts were filed for registration as chattel mortgages in the office of the clerk of the county court of Coleman county, Tex., prior to the institution of bankruptcy proceedings. The trustee of the bankruptcy estate filed a contest before the referee of the claim of B. F. Avery & Sons Plow Company as a secured claim and contended: First. That the description of the articles included in the order contracts was not sufficiently definite for third persons to identify them; and therefore these contracts do not constitute valid chattel mortgages. Second. That if the description of the articles in the order contracts is sufficiently definite to support a lien, then claim-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant's lien obtains only upon the particular articles shipped under a particular contract, and may not extend to all articles shipped under all contracts to secure the payment of the purchase price of articles shipped under a particular contract. Third. That claimant has no lien on articles shipped to bankrupt as the result of orders made by letter or over the telephone, by virtue of the above-quoted provision contained in the order contracts. The referee found in favor of the validity of claimant's lien upon all articles sold by claimant to bankrupt and in the latter's possession at the time of bankruptcy, whether sold under the order contracts or through orders made by letter or telephone. The referee directed the sale of these articles, and by proper order transferred and fixed the lien of claimant upon the proceeds of the sale. The trustee now asks a review of this order of the referee.

[1, 2] Under the provision of article 3327, Revised Statutes of Texas 1895 (now article 5654, Revised Civil Statutes 1911), the duly executed order contracts, in which the title to the wagons, farm implements, and parts thereof was reserved in the seller, became chattel mortgages, and are to be construed as such. These order contracts reveal the wagons and farm implements enumerated therein were to be shipped to J. R. Raney, Santa Anna, Tex. The description of these wagons and farm implements contained therein is very similar, if not identical, with the description of wagons contained in the order contract of Studebaker Bros., filed as a part of their proof of secured claim in this bankruptcy proceeding. The testimony as to identification is also similar, or to the same effect. I have this day held this description to be sufficiently definite. See *In Matter of J. R. Raney, Bankrupt, In re Claim of Studebaker Bros.*, 202 Fed. 1000. The same ruling will be made here.

[3] The right, if any, of claimant to a lien upon the implements and parts shipped under one order contract for the purchase price of implements and parts shipped under another order contract, and the right, if any, of claimant to a lien upon the implements or parts shipped to bankrupt on orders made by letter or telephone, must rest upon the provision contained in the order contracts above quoted. By this provision it is sought to retain title in claimant to "all other goods shipped by you to me or us on subsequent orders." Whether, and to what extent, a chattel mortgage on after-acquired property is good is a question of local law for the Texas court to decide, and if it has ruled on the question it will be followed by this court. *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956.

[4] The validity of an equitable lien upon after-acquired personal property has been recognized and announced by the Supreme Court of Texas in *Richardson v. Washington*, 88 Tex. 339, 31 S. W. 614; but it is also there announced that:

"The particular transaction must be such that the court can identify the particular property upon which the lien was intended to be created; and unless it can do so it will not fix and enforce a lien."

The leading case of *Holroyd v. Marshall*, 10 H. L. Cas. 191 (1862), which did so much to settle the doctrine of the validity of mortgages upon after-acquired personal property, recognized the necessity of specifically defining the goods or property, in order that they might be sufficiently identified as those intended to be mortgaged. *Jones on Chattel Mortgages*, § 172. As to the implements and parts shipped to bankrupt on orders made by letter or telephone, subsequently and apart from the order contracts, the essential element of description is lacking. The goods shipped included a great variety of farm implements and parts, and the shipments extended through more than 2½ years' time. As against the trustee of the bankruptcy estate, this absence of identifying description would be fatal to the lien attempted to be given claimant.

[5] But there is involved here a more serious question than this. By the above-quoted provision it is sought to retain a lien upon goods subsequently shipped, as well as upon goods shipped under the particular contract in which the provision occurs, "until all my indebtedness to you shall have been paid." This manifestly is more than a reservation of title in and to goods shipped until such time as the particular goods shipped under a particular contract are paid for. It is an attempted reservation of title to all goods shipped, either under the particular contract or subsequently, for "all my indebtedness to you"; and this whatever may have been the origin or the amount of the indebtedness. Such an attempt cannot be construed to be simply a reservation of title to secure the purchase price of particular goods, but, in addition, it must be construed to be an attempted creation of an equitable lien to secure all moneys then due or to become due.

Article 2548, Revised Statutes of Texas 1895, which is a re-enactment of section 17 of the Assignment Law of 1879, provides:

"Every mortgage, deed of trust, or other form of lien attempted to be given by the owner of any stock of goods, wares, or merchandise daily exposed to sale, in parcels, in the regular course of business of such merchandise, and contemplating a continuance of possession of said goods and control of said business, by sale of said goods by said owner, shall be deemed fraudulent and void."

The wagons, implements, and parts thereof sold by claimant to J. R. Raney became a part of the latter's stock of goods, wares, and merchandise daily exposed to sale, in parcels, in the regular course of business. It was contemplated that Raney should continue in the possession of these goods and in the control of his business, and that he should continue to sell these goods. Discussing the provisions of article 2548, R. S. of Texas 1895, in the case of *Avery & Sons v. Waples*, 19 Tex. Civ. App. 672, 49 S. W. 151, Associate Justice Rainey says:

"The provision is plain and unambiguous. If the contract entered into between the hardware company and Avery & Sons falls within the scope of its provisions, we think it clear that said contract is of no force and effect as against the assignee. That it does, we think there can be no doubt. The property embraced in the contract was a part of the general stock of hardware and agricultural implements daily exposed to sale, in parcels in the regular course of business. The Leeper Hardware Company was to re-

tain possession of the goods and control of the business, and continue to sell the goods. *Bank v. Lovenberg*, 63 Tex. 506; *Cook v. Halsell*, 65 Tex. 1; *Duncan v. Taylor*, 63 Tex. 645; *Wilber v. Kray*, 73 Tex. 533 [11 S. W. 540]. That the contract embraced only a part of the general stock is immaterial. If a part only was allowed to be mortgaged, the object of the statute could readily be defeated. The object of the statute was to prevent collusion between debtor and creditor to the prejudice of all others. *Bank v. Lovenberg*, 63 Tex. 506. If said provision of the statute should be construed so that all of the stock of goods must be embraced in the mortgage to make it void, the object for which it was enacted could readily be defeated by mortgaging the greater part thereof."

To the extent that the order contracts can be held to be a reservation by the vendor of the title to the particular wagons, implements, and parts thereof specified and enumerated in a particular contract and in possession of the bankrupt at the time of bankruptcy, I hold that the claimant is vested with a lien thereon, and is entitled to the amount for which they were sold. This is in accordance with the ruling of the Texas Supreme Court. *Bowen v. Wagon Works*, 91 Tex. 385, 43 S. W. 872. See, also, *Meyer Bros. Drug Co. v. Pipkin Drug Co.*, 136 Fed. 396, 69 C. C. A. 240; *Keeble v. John Deere Plow Co.*, 190 Fed. 1019, 111 C. C. A. 668; *In re Jacobson & Perrill* (D. C.) 200 Fed. 812. But as to the wagons, implements, and parts thereof on hand at the time of bankruptcy, upon which the bankrupt attempted to give an equitable lien through the medium of the above oft referred to provision of the order contracts, I hold that, as against the trustee, claimant has no valid lien, save as to the particular goods described in the particular order contracts covering them.

I will not undertake to declare from the record before me upon what particular goods of the bankrupt the claimant was entitled to a lien, nor to what moneys it is entitled as the result of the sale of the goods by the trustee under order of the referee. The burden of proof is upon claimant to establish what goods were on hand at the time of bankruptcy, and to which it is entitled to a lien under the view expressed in this opinion; also to show to what moneys it is entitled resulting from the sale of the goods.

An appropriate order will be entered, giving effect to the views expressed, and returning the record to the referee for further proceedings in conformity therewith.

In re RANEY.

In re STUDEBAKER BROS. OF TEXAS.

(District Court, N. D. Texas. February 14, 1912.)

No. 139, In Bankruptcy.

1. EVIDENCE (§ 460*)—PAROL EVIDENCE—CHattel MORTGAGE—DESCRIPTION.
Parol evidence is not admissible to aid in the description of a chattel mortgage, but is admissible to identify the chattels referred to and described in the mortgage.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.*]

2. CHATTEL MORTGAGES (§ 47*)—DESCRIPTION.

A contract of sale, reserving title in the seller until the goods were paid for, described the same by using technical and trade terms to describe the various parts comprising a complete wagon, setting out, in ruled columns, the quantity, catalogue number and size of axle, track, style of tongue, description of wheels as to height, kind, and tire, the width of body, and style of seat and brake, including capital letters, abbreviations, and figures, with a note that there was to be stenciled thereon the words, "Sold by J. R. Raney, Santa Anna, Texas." There was also evidence that the wagons were so stenciled. *Held*, that the description was sufficient to sustain the contracts as chattel mortgages.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 87, 88, 96-103; Dec. Dig. § 47.*]

In Bankruptcy. In the matter of bankruptcy proceedings of J. R. Raney. On certificate of a referee to review an order allowing a claim of lien of Studebaker Bros. of Texas. Affirmed.

Spence, Knight, Baker & Harris, of Dallas, Tex., for claimant.

Harrison & Wayman, of Brownwood, Tex., for trustee in bankruptcy.

MEEK, District Judge. It appears from the record accompanying the certificate of the referee that a number of wagons were sold by Studebaker Bros. to J. R. Raney, the bankrupt; that they were sold under a contract by which the title to the wagons was reserved in the seller; that before the bankruptcy of the purchaser this contract of sale was filed for registration in Coleman county, Tex., where the wagons were located. Under the statutes of Texas, it thus became a chattel mortgage, and subject to be construed as such.

The question is: Are these wagons described with sufficient definiteness that they may be identified? In the order blank, which became a part of the contract, it is revealed the wagons were to be shipped to J. R. Raney, Santa Anna, Coleman county, Tex. Their description is included in the order blank, and consists of a technical or trade description of the various parts that go to comprise a complete wagon. In ruled columns, among other things, the quantity, the catalogue number, the size of axle, the track, the style of tongue, a description of the wheels as to their height, kind, and tire, the width of body, the style of seat and brake, of these wagons are given in technical terms, which include capital letters, abbreviations, and figures. There is a note in the face of the order blank to the effect that the articles purchased are to be stenciled, "Sold by J. R. Raney, Santa Anna, Texas." The evidence is that these wagons were so stenciled.

While the description of the wagons contained in the order blank is somewhat cryptical and beclouded to the uninitiated, yet it conveys evidence to them that wagons are therein described; also that they are marked in a certain way, and are to be found in the possession of J. R. Raney, at Santa Anna.

[1, 2] I recognize the rule that parol evidence is not permissible to aid in the making of a description of chattels mortgaged. It is however, admissible to identify such chattels. I am of opinion that, while

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the description here is meager, yet it is barely sufficient, and with the parol evidence introduced aliunde the contract the wagons are sufficiently identified.

The order of the referee herein, of date February 3, 1912, allowing claimant its lien, and declaring it to be established upon the wagons covered by the mortgage and in possession of the bankrupt, and also charging and establishing the lien against the funds in the hands of the estate resulting from the sale of the wagons, is approved and affirmed.

In re RANEY.

In re TEXAS HARVESTER CO.

(District Court, N. D. Texas. February 14, 1912.)

No. 139, In Bankruptcy.

SALES (§ 474*)—CONDITIONAL SALES—DESCRIPTION.

Where contracts for the sale of goods to a bankrupt, reserving a lien for the purchase price, contained a sufficient description of the goods to identify them, the seller was entitled to a lien on the remaining goods in the hands of the bankrupt at the time of the intervention of bankruptcy proceedings.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391-1402; Dec. Dig. § 474.*]

In Bankruptcy. In the matter of bankruptcy proceedings of J. R. Raney. On certificate to review a referee's order allowing the claim of lien of the Texas Harvester Company. Affirmed.

Spence, Knight, Baker & Harris, of Dallas, Tex., for claimant.

Harrison & Wayman, of Brownwood, Tex., for trustee in bankruptcy.

MEEK, District Judge. Claimant, the Texas Harvester Company, filed proof of a secured claim against the estate of J. R. Raney, bankrupt. The claim was for a balance remaining unpaid on the purchase price of certain buggies and sisal sold by claimant to the bankrupt. At the time of bankruptcy a part of these buggies and a quantity of the sisal was on hand and in the possession of the bankrupt. The securities for its debt relied upon by claimant are certain contracts of conditional sale, under and by virtue of the terms of which the title to the buggies and sisal was sought to be reserved in claimant until their purchase price was fully paid.

These contracts of conditional sale were filed for registration as chattel mortgages in the office of the county clerk of Coleman county, Tex., prior to the date of bankruptcy. The trustee of the bankrupt estate filed a contest before the referee of the claim of the Texas Harvester Company as a secured claim, and contended that the description of the goods included in the sale contracts was not sufficiently definite for third parties to identify them; and therefore these contracts did not constitute valid chattel mortgages.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The referee found in favor of the validity of claimant's lien upon the buggies and the sisal twine, directed the sale of the articles, and by proper order transferred and fixed the lien of claimant upon the proceeds of the sale. The trustee now seeks a review of this order of the referee.

For the reasons given by me in opinions this day filed in *Re Claim of Studebaker Bros.*, 202 Fed. 1000, I hold that the description of the buggies and sisal twine contained in the conditional sales contracts filed for registration are sufficient for identification of these goods; and that the claimant is entitled to its lien upon the remaining buggies and sisal twine, respectively, for the balance of the unpaid purchase price thereof. The order of the referee herein will be approved and affirmed. The costs of this certificate will be taxed against the trustee.

In re RANEY.

In re TEXAS MOLINE PLOW CO.

(District Court, N. D. Texas. February 14, 1912.)

No. 139, In Bankruptcy.

1. CHATTEL MORTGAGES (§ 6*)—DESCRIPTION—SUFFICIENCY.

Where the description contained in a contract of sale of personal property was sufficient to identify the goods, and the contract was duly filed, it was sufficient to constitute a chattel mortgage, under the laws of Texas.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 23-41; Dec. Dig. § 6.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1098-1106.]

2. SALES (§ 465*)—CONTRACT RESERVING LIEN—REGISTRATION.

Where a contract of sale reserving a lien on the goods was not filed as a chattel mortgage, it was insufficient to create a lien in favor of the seller, under the laws of Texas.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1353; Dec. Dig. § 465.*]

3. CHATTEL MORTGAGES (§ 188*)—VALIDITY—STATE LAW.

Under Rev. St. Tex. 1895, art. 2548, providing that every mortgage on personal property of a merchant daily exposed to sale, in parcels, and contemplating a continuance of possession and a sale of the goods, shall be deemed fraudulent and void, a contract for the sale of goods to a merchant, reserving a lien, not only on the goods sold, but on goods previously sold and left in the merchant's possession for sale at retail, is void as to the goods so previously sold.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 393-404; Dec. Dig. § 188.*]

In Bankruptcy. In the matter of bankruptcy proceedings of J. R. Raney. On certificate of the referee to review an order allowing the claim of the Texas Moline Plow Company. Affirmed in part and reversed in part.

Spence, Knight, Baker & Harris, of Dallas, Tex., for claimant.

Harrison & Wayman, of Brownwood, Tex., for trustee in bankruptcy.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MEEK, District Judge. Claimant, the Texas Moline Plow Company, filed proof of a secured claim against the estate of J. R. Raney, bankrupt. The claim was for a balance remaining unpaid on the purchase price of certain agricultural implements and parts thereof sold by claimant to the bankrupt. At the time of bankruptcy a part of these implements and parts remained undisposed of and in the possession of the bankrupt. The securities for its debt relied upon by claimant are certain order contracts in writing, executed by the bankrupt and accepted by claimant, under and by virtue of the terms of which the title to the agricultural implements and parts was sought to be reserved in claimant until their purchase price was fully paid. Two order contracts were introduced in support of the proof of claim. The dates of these order contracts are July 4, 1908, and August 23, 1909, respectively. The contract of July 4, 1908, under which were shipped to bankrupt certain of the implements and parts on hand at the time of bankruptcy, was never filed for registration as a chattel mortgage in the office of the clerk of the county court of Coleman county, Tex., the county where the property was located. The contract of August 23, 1909, was so filed for registration at that place.

The claimant bases its lien upon the goods on hand at the time of bankruptcy on the following provision incorporated in both order contracts above referred to:

"It is expressly agreed that the sale and delivery of any goods under this or any other contract is conditional, and that the title to all goods ordered under or by virtue of this, or any prior or subsequent, order or contract, shall be reserved to and remain and be vested in the Texas Moline Plow Company, until all the purchase money therefor, and for any and all other goods heretofore or hereafter ordered, shall be fully paid, whether said purchase money shall be evidenced by open account, stated account, or notes, or this or any other contract; and that all cash and accounts and notes, proceeds of the sale or sales of goods delivered under this or any other order or contract, shall be held by us in trust for the Texas Moline Plow Company, subject to its order, so long as we shall owe the Texas Moline Plow Company any sum of money under this contract, or any prior or subsequent order or contract."

The trustee of the bankruptcy estate filed a contest before the referee of the claim of the Texas Moline Plow Company as a secured claim, and contended, first, that the description of the articles included in the order contracts was not sufficiently definite for third parties to identify them, and therefore these contracts did not constitute valid chattel mortgages; second, that in any event claimant has no lien on goods shipped to bankrupt under the contract of July 4, 1908, because such contract was never filed for registration as a chattel mortgage, according to law.

The referee found in favor of the validity of claimant's lien upon all goods sold by claimant to bankrupt and in the latter's possession at the time of bankruptcy, whether sold under the contract duly registered or under the contract not registered. The referee directed the sale of these goods, and by proper order transferred and fixed the lien of claimant upon the proceeds of the sale, and the trustee now asks a review of this order of the referee.

[1] For the reasons stated in my opinions this day filed in Re the

Claims of Studebaker Bros., 202 Fed. 1000, and of B. F. Avery & Sons Plow Co., 202 Fed. 996, I hold that the description of the goods sold by claimant under the contract of August 23, 1909, is sufficient to identify the goods sold under that contract and on hand at the time of bankruptcy, and that the claimant is entitled to its lien thereon, and consequently to the proceeds arising from their sale.

[2, 3] As to the goods on hand and sold by claimant to the bankrupt under contract of July 4, 1908, I hold that claimant is not entitled to a lien thereon, first, because of its failure to file the contract under which the goods were sold for registration as a chattel mortgage; and, second, because the attempted giving of a lien thereon under the subsequent contract of August 23, 1909, is futile, for the reason it is an attempt to fix a lien upon goods left in possession of the mortgagor and daily exposed to sale in parcels by him. This cannot be done. See article 2548, R. S. Texas. 1895; Cook & McElvey v. Halsell, 65 Tex. 1; B. F. Avery & Sons v. John G. Waples et al., 19 Tex. Civ. App. 672, 49 S. W. 151.

The order of the referee stands approved and affirmed, in so far as it establishes a lien in favor of claimant upon the goods on hand and sold under the contract of August 23, 1909. It is reversed and held for naught, in so far as it establishes a lien in favor of claimant upon goods on hand and sold under the contract of July 4, 1908. The costs of this certificate will be taxed one-half against the trustee and one-half against the claimant.

In re FARMERS' CO-OPERATIVE CO. OF BARLOW, N. D.

(District Court, D. North Dakota, S. E. D. February 8, 1913.)

1. BANKRUPTCY (§ 140*)—RIGHTS OF TRUSTEE—PROPERTY HELD UNDER CONDITIONAL SALE CONTRACT.

Bankruptcy Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), which vests a trustee as to all property in the custody or coming into the custody of the bankruptcy court with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, does not give him a right to property in the possession of the bankrupt but not paid for, which was delivered to him under a contract of conditional sale reserving title in the seller until payment of the price, and which was recorded in accordance with the laws of the state prior to the bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 210, 221, 225; Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 165*)—PROPERTY HELD UNDER CONDITIONAL SALE CONTRACT—RIGHT OF SELLER TO RECLAIM—"PREFERENTIAL TRANSFER."

That a conditional sale contract under which property was delivered to a bankrupt was not recorded as required by the laws of the state until within four months prior to the bankruptcy does not deprive the seller of the right to reclaim the property if unpaid for, since, never having become the property of the bankrupt, the contract could not operate as a "preferential transfer" within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1506).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

In the matter of the Farmers' Co-operative Company of Barlow, North Dakota, bankrupt. On review of order of referee. Reversed. See, also, 202 Fed. 1008.

Todd & Kerr, of St. Paul, Minn., for trustee.

Lawrence & Murphy, of Fargo, N. D., for International Harvester Co. and another.

AMIDON, District Judge. This cause comes before the court upon a certificate of the referee, certifying to the court for review an order made by him on the 10th day of July, 1912. The controversy arises out of these facts: The Northern Rock Island Plow Company on September 2, 1910, entered into a conditional sale contract with the bankrupt, agreeing to supply it with certain classes of farm implements, the title to which was to remain in the seller until the purchase price was fully paid. Thereafter, during the fall of 1910, it supplied the property involved in this controversy. The contract was not filed in the office of the register of deeds until February 24, 1912. The petition in bankruptcy was filed March 9, 1912, and the adjudication was entered on the 29th of the same month. The plow company petitioned the referee for an order directing the trustee to turn over the property to it by reason of its reserved right in the contract. This the referee refused to do, but, on the contrary, entered a decree declaring that the trustee in bankruptcy held the property free and clear of any claim of the petitioner. The plow company now seeks a review of that order.

[1] It should be noticed that the conditional sale contract was filed for record on the 24th day of February, 1912, fourteen days before the filing of the petition in bankruptcy. The referee held it void as against the trustee because the filing was within four months of the filing of the petition. This I think was clearly erroneous. The trustee in bankruptcy derives his right from section 47a, subd. 2, as amended by the act of 1910. The purpose of the amendment is now reasonably clear. Under the original act several of the Circuit Courts of Appeal had held that the filing of the petition in bankruptcy amounted to a seizure of the property of the bankrupt, and conferred upon the trustee the same rights as a creditor would have obtained by the levy of an execution or attachment at the date of the filing of the petition. In re Shirley, 112 Fed. 301, 50 C. C. A. 252; York Mfg. Co. v. Cassell, 135 Fed. 52, 67 C. C. A. 526; In re Ducker, 134 Fed. 43, 67 C. C. A. 117. But in York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, the Supreme Court held these decisions to be unsound, and ruled that the trustee simply stood in the shoes of the bankrupt, and took the property subject to every claim that could have been urged against him. The amendment of 1910 was passed for the purpose of reinstating the rule as declared by the Circuit Courts of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal. In re Williamsburg Knitting Co. (D. C.) 190 Fed. 871, 878; In re Farmers' Supply Co. (D. C.) 196 Fed. 991.

The trustee, therefore, as the amendment plainly declares, "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." This language measures the right of the trustee. The history of the statute, as above outlined, shows that those rights are obtained by the filing of the petition in bankruptcy. That act is by the amendment given the same force as the seizure of the property under execution or attachment by a creditor, and cannot be given any retroactive effect. In re Jacobson & Perrill (D. C.) 200 Fed. 812. If a creditor had levied upon the property here involved at the date of the filing of the petition, he would have acquired no rights as against the plow company, because it had filed its contract some time before; and the trustee, by the very language of the statute, has no higher right than such a creditor. The right to go back four months from the date of the filing of the petition is confined to transactions which are specifically enumerated in the Bankruptcy Act, and the courts cannot properly apply those provisions to other transactions.

[2] The trustee's main reliance, however, is that the granting of the petition of the plow company would secure to it a preference over the other creditors of the estate. By section 60a of the Bankruptcy Act, the contract must be judged as of the date of its filing. Because that date fell within four months of the filing of the petition, the referee held that to enforce the provisions of the conditional sales contract would secure to the plow company a preference. I am unable to concur in that view for two reasons: First, the bankrupt never had any title to the property. The title was, by the terms of the contract, reserved to the seller. By the great weight of authority, such a reservation is entirely valid. *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; *Williston on Sales*, 324. The only right in the property which the bankrupt secured was the right of possession. The property was not, therefore, the property of the bankrupt, and the contract could not in any aspect amount to a transfer of "its property" within the meaning of sections 60a and 60b. Second. The reservation of title in the contract does not amount to a transfer from the buyer to the seller. It is simply a reservation of title by the seller to himself as one of the conditions upon which possession of the property is transferred to the buyer. The contract cannot, therefore, be held to amount to "a transfer" of property from the buyer to the seller. It has sometimes been said by courts and text-writers that a conditional sale amounts to a sale of the property with a mortgage back. That is not its character, and nothing but confusion can result from attempting to describe a conditional sale in terms of a mortgage. If the purchaser pays down a part of the purchase price at the time of the sale, or at a subsequent date before the seller attempts to enforce the condition, it is quite true that the buyer has an equitable interest in the property by reason of the payments. When the facts present such a case, it may be that a court of bankruptcy

will find a way to protect the equitable interest of the bankrupt against forfeiture. Williston on Sales, § 579. The present case, however, presents no such question, for the evidence shows, and the referee has found, that the amount now due on the contract considerably exceeds the purchase price of the property here involved.

It is therefore ordered that the order of the referee be, and the same is hereby, reversed, and the trustee is directed to deliver to the plow company the farm implements described in its petition.

In re FARMERS' CO-OPERATIVE CO. OF BARLOW, N. D.

(District Court, D. North Dakota, S. E. D. February 8, 1913.)

1. BANKRUPTCY (§ 4*)—RIGHTS AND REMEDIES OF TRUSTEES—CONSTRUCTION OF STATUTE.

The rights and powers of a trustee in bankruptcy under Bankruptcy Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), which vests him "as to all property in the custody or coming into the custody of the bankruptcy court * * * with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon," are derived from the statute and not from the creditors of the particular estate. The rights so conferred are those of the most favored creditor under the local law, and, although such law invalidates an unrecorded conditional sale contract as to subsequent creditors only, any property held by a trustee by reason of such provision becomes a part of the general estate to be apportioned among all creditors in accordance with the provision of the Bankruptcy Act on that subject.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 3, 4; Dec. Dig. § 4.*]

2. BANKRUPTCY (§ 6*)—BANKRUPTCY ACTS—CONSTRUCTION—RETROACTIVE OPERATION.

Such amendment of the act (Act July 1, 1898, c. 541, § 47a, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438], as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1500]) is purely remedial, giving a rule of interpretation rather than a substantive right and as such and as a part of a bankruptcy act, which applies generally to contracts previously made, may properly be given a retroactive effect and applied to a contract of conditional sale made prior to its enactment, which by reason of not having been recorded is void under the state law as to certain classes of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 2; Dec. Dig. § 6.*]

In the matter of Farmers' Co-operative Company of Barlow, North Dakota. On review of order of referee. Affirmed in part and reversed in part.

See, also, 202 Fed. 1005.

Todd & Kerr, of St. Paul, Minn., for trustee.

Lawrence & Murphy, of Fargo, N. D., for International Harvester Co. and another.

AMIDON, District Judge. The International Harvester Company supplied to the above bankrupt eight manure spreaders under a conditional sale contract, bearing date February 23, 1910, which articles

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were on hand at the time the petition in bankruptcy was filed, and passed into the custody of the trustee. It also furnished to the bankrupt, under a similar contract bearing date January 14, 1911, five Deering hayrakes and one Bettendorf wagon, which articles likewise passed into the custody of the trustee. The contracts reserved title to the seller until the purchase price was paid. The price of the articles being unpaid, the harvester company filed a petition with the referee, asking that the trustee be directed to deliver the property to it. As to the articles covered by the second contract, its petition was denied, and the International Harvester Company now seeks to review that order.

[1] The action of the referee seems clearly right. The conditional sales contracts were never filed, and, by section 6181 of the Revised Codes of North Dakota, they were for that reason "void as to subsequent creditors without notice, and purchasers and incumbrancers in good faith and for value." Section 47a, subd. 2, of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]), as amended in 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1500]), provides that trustees in bankruptcy, "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." If that were important, the files in this case show that there are creditors both prior and subsequent to the date of the conditional sale contract here involved. In my judgment, however, section 47 of the Bankruptcy Act, as amended, does not depend upon any such distinction. The trustee in bankruptcy derives his rights and powers from the statute, and not from the creditors of the estate. If any creditor under the local statute can obtain priority over an unfiled or unrecorded instrument by levy of attachment or execution, the trustee in bankruptcy, under section 47 as amended, has all the rights and remedies of such creditor. The distinction between prior and subsequent creditors is confined to the decisions of a few states. By the great weight of authority seizure of the property covered by an unfiled or unrecorded instrument gives to the creditor priority over such instrument, without regard to the time when the credit was given. Leonard Jones, in an article on Chattel Mortgages (6 Cyc. 1068), says:

"An unrecorded mortgage leaves the property as open to seizure by creditors upon a writ of attachment or execution against the mortgagor, as if no mortgage existed."

He collects the authorities and shows that the rule confining the right to subsequent creditors is limited to a few states. See, also, *First National Bank v. Ludvigsen*, 8 Wyo. 230, 56 Pac. 995, 57 Pac. 934, 80 Am. St. Rep. 928; *Pierson v. Hickey*, 16 S. D. 46, 91 N. W. 338; *Karst v. Gane*, 136 N. Y. 316, 32 N. E. 1073.

To hold that the trustee derives his rights from the creditors of the particular estate, instead of the statute, would greatly embarrass the administration of estates in bankruptcy. It would require first an investigation to ascertain what credit was given subsequent to the unrecorded instrument. This in mercantile cases would be a difficult in-

quiry, and would often require the splitting of current accounts. Again, under this interpretation, the fund arising from the property covered by the unrecorded instrument would have to be first apportioned among the subsequent creditors to the exclusion of all other creditors, then to the lienholder, and finally to the general creditors. In *re Riehl* (D. C.) 200 Fed. 455. I do not think that Congress, by the 1910 amendment of section 47, intended such a result. A fair interpretation of the statute in the light of the weight of authority, as above pointed out, gives to the trustee all the rights of the most favored creditor under the local law, and any property thus held by the trustee becomes a part of the general estate to be apportioned among all creditors in accordance with the provisions of the Bankruptcy Act on that subject. The action of the referee as to articles supplied under contract of January 14, 1911, is therefore affirmed.

[2] The contract of February 23, 1910, was made prior to the act of 1910, amending section 47 of the Bankruptcy Act, and the referee for this reason held, following *Arctic Ice Mach. Co. v. Armstrong County Trust Co.*, 192 Fed. 114, 112 C. C. A. 458, that the act of 1910 did not apply to articles furnished under that contract, and directed the trustee to return them to the harvester company. The case cited is not a binding authority in this court, but, owing to the eminent court by which it was rendered, I feel great reluctance in taking a different view of the statute from that there adopted. The question, however, was not very fully considered, and it seems to me that the decision proceeds upon a wrong interpretation of the act. The history of the statute, as given by Remington, vol. 3, p. 331, and explained in *Re Farmers' Supply Co.* (D. C.) 196 Fed. 991, and in *Re Williamsburg Knitting Co.* (D. C.) 190 Fed. 871, shows that it was purely remedial, intended to correct a misinterpretation of the Bankruptcy Act by the courts. This view is also manifest on the face of the statute. It declares that trustees in bankruptcy "shall be deemed" vested with all the rights, remedies, etc. It therefore gives a rule of interpretation rather than a substantive right. Remedial and curative statutes may properly be given a retrospective effect. *Sutherland on Statutory Construction*, §§ 482, 483. The rule is peculiarly applicable in the present case, for the invalidity of the unfiled contract was created, not by the amendment of section 47, but by the state statute, which was in force at the time the contract was made. All the federal law does is to give effect to the invalidity already declared by the state law. It simply enables the trustee, as the representative of creditors, to assert the same rights which the creditors themselves would have possessed if bankruptcy had not intervened. Another reason for this interpretation is found in the fact that the statute is part of a bankruptcy act, and that act generally applies to contracts made prior to its adoption, the same as to subsequent contracts. The case comes clearly within the principle enforced by the Supreme Court in *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276, 33 Sup. Ct. 17, 57 L. Ed. —; *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; *Pittsburg Steel Co. v. Baltimore Equitable Society*, 226 U. S. 455, 33 Sup. Ct. 167, 57 L. Ed. —.

The order of the referee as to property covered by the contract of February 23, 1910, is therefore reversed, and it is ordered that the trustee hold the property free of the claim asserted by the harvester company in its petition.

LISTERS AGRICULTURAL CHEMICAL WORKS v. HOME INS. CO.

(District Court, S. D. New York. November 25, 1912.)

INSURANCE (§ 404*)—CONSTRUCTION OF MARINE POLICY—"PERILS OF THE HARBOR."

Damage to a lighter by concussion when navigating New York Harbor, caused by an explosion of dynamite which was being loaded from a near-by pier on another vessel, was not due to a "peril of the harbor," within the meaning of a marine policy insuring her against such risk, but excepting loss from boiler explosion, and containing a warranty against her carriage of gunpowder or other explosive.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1092; Dec. Dig. § 404.*]

In Admiralty. Suit by the Listers Agricultural Chemical Works against the Home Insurance Company. Decree for respondent.

Gifford, Hobbs & Beard, of New York City, for libellant.

Kneeland, Harison & Hewitt, of New York City (Lawrence Kneeland, of New York City, of counsel), for respondent.

HOLT, District Judge. This is an action upon a policy of marine insurance issued by the respondent for the benefit of the libellant upon the steam lighter Alfred & Edward. On February 1, 1911, while the lighter was proceeding up the harbor, about 100 feet off Pier 7, Jersey City, a large quantity of dynamite which was being transferred from a freight car on Pier 7 to a barge lying at the pier exploded with extraordinary violence, causing great loss of life and damage to the pier and to shipping in the immediate neighborhood. The lighter sustained damage, amounting to \$870. This damage was entirely caused by shock or concussion, and not by any waves or swell of the water or by any debris thrown upon her. The policy insured the lighter against the perils of the harbor, and that is the only provision in the policy which is claimed to render the respondent liable. The policy excluded claims arising from the bursting or explosion of boilers, unless caused by stress of weather, stranding, collision, or burning. The policy also contained a warranty by the insured not to carry, among other things, gunpowder or other explosives. The defense is that the loss was not covered by the policy.

The question is novel. No direct authority upon the question involved has been cited by counsel or called to my attention. The libellant relies on the general rule that ambiguous clauses in marine insurance policies are construed against the insurer, and claims that the injury which occurred in this case was a peril of the harbor. Counsel admits that such an explosion would not be a peril of the sea, within the meaning of that expression as used in policies of marine insur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ance, but claims that the perils of the harbor include all liability to peril from injuries which might occur while navigating the harbor from any causes of possible danger upon the piers. An injury caused by an explosion of dynamite is not ordinarily covered by a policy of fire insurance. *Everett v. London Assurance*, 19 C. B. (N. S.) 126. The expression "perils of the sea," as used in marine policies, means perils of a marine nature. *Thames Ins. Co. v. Hamilton*, 12 App. C. 484; *The G. R. Booth*, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234. The cases are somewhat in conflict upon the question whether cases of explosions on vessels are covered by a marine policy which insures against "perils of the seas, rivers," etc., and "all other perils, losses and misfortunes." In some cases it is held that such a policy covers the case of the explosion of a vessel's boilers. *Citizens' Ins. Co. v. Glasgow*, 9 Mo. 411; *West India Tel. Co. v. Home, etc., Co.*, L. R. 6 Q. B. D. 51. Cases holding the contrary view are *Thames Co. v. Hamilton*, 12 App. C. 484; *Miller v. California Ins. Co.*, 76 Cal. 145, 18 Pac. 155, 9 Am. St. Rep. 184; *The G. R. Booth*, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234. The policy in suit simply insures against perils of the harbor. It does not add "all other perils and losses," as in the case of many policies. It also affirmatively exempts losses caused by boiler explosions, and warrants against the carriage of gunpowder or other explosives. If the boiler of the lighter had exploded, obviously no recovery could be had upon this policy. If the dynamite which exploded had been in course of transportation on the lighter, no recovery could be had. Suppose the lighter had been injured by a projectile fired from a cannon situated a mile inland from the shore of the harbor, or that a steam boiler on shore had exploded and a part of it had fallen upon the lighter, could it be claimed that such an injury was a peril of the harbor within the meaning of the policy? I think not. Yet such an injury seems to be quite analogous to that upon which this suit is based. Obviously the insurance company did not intend to be responsible for any explosion on board. It inserted in the policy provisions exempting itself from such liability, and the insurer, by accepting the policy with such provisions, agreed to them. It seems to me that the inference is still stronger that injuries occurring from such explosions which have taken place away from the lighter and especially on the land were not covered by the policy.

My conclusion is that there should be a decree for the respondent.

DROVERS' DEPOSIT NAT. BANK v. TICHENOR.

(District Court, E. D. Wisconsin. February 8, 1913.)

1. REMOVAL OF CAUSES (§ 45*)—DIVERSITY OF CITIZENSHIP—PARTIES ENTITLED TO REMOVE.

A cause is not removable from a state court under section 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]), on the ground of diversity of citizenship by a defendant who is a citizen and resident of the district.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 89; Dec. Dig. § 45.*]

2. REMOVAL OF CAUSES (§ 48*)—SEPARABLE CONTROVERSY—PARTIES ENTITLED TO REMOVE.

There can be no separable controversy which will authorize the removal of a cause under section 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]), where there is a single plaintiff and a single defendant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 94; Dec. Dig. § 48.*]

3. REMOVAL OF CAUSES (§ 45*)—SEPARABLE CONTROVERSY—PARTIES ENTITLED TO REMOVE.

Judicial Code (Act March 3, 1911, c. 231, § 28, cl. 3, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]), authorizing the removal of a cause in which there is a controversy wholly between citizens of different states, contains by implication the restrictive provisions of clauses 2 and 4, requiring nonresidence of the defendant seeking the removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 89; Dec. Dig. § 45.*]

At Law. Action by the Drovers' Deposit National Bank against M. H. Tichenor. On motion to remand to state court. Motion sustained.

See, also, 200 Fed. 318.

Miller, Mack & Fairchild, of Milwaukee, Wis., and N. W. Evans, of Oconomowoc, Wis., for plaintiff.

O'Bryan & Marshall, of Chicago, Ill., and McGee & Jeger, of Milwaukee, Wis., for defendant.

GEIGER, District Judge. [1] The plaintiff commenced this action in the circuit court of Waukesha county, in the Eastern district of Wisconsin; the defendant being a resident and citizen therein. Upon the application of the latter, the action was removed to this court, and was heard upon demurrer to the complaint, which was sustained. The plaintiff, leave being granted, amended its complaint, and now challenges the jurisdiction of the court upon a motion to remand, claiming that the suit was not removable because of the residence and citizenship of the defendant within the district. It seems clear that under section 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]) the case was not removable. *Martin v. Snyder*, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. Ed. 602; *Patch v. Wabash Railroad Co.*, 207 U. S. 277, 28 Sup. Ct. 80, 52 L. Ed. 204, 12 Ann. Cas. 518.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The defendant, however, urges that removal was sought, and is sustainable under the third clause of such section, providing that in any suit in which "there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them—then either one or more of the defendants actually interested in such controversy may remove," etc.

To this, there are two answers, each as elementary and conclusive as the other:

[2] First. The clause relates to what are known as separable controversies. Counsel urges that because, upon the instrument of guaranty which is the basis of the single cause of action against the defendant, a like cause of action might exist against the defendant's co-signers who are not parties to the action, a separable controversy exists between the defendant and plaintiff. But this is fundamentally repugnant to the idea of a "separable controversy" in the removal of causes. Such controversy must arise upon the pleadings between one or more parties on the one side and one or more of several parties on the other; as distinguished from some other controversy also arising in the action upon the pleadings, between such party or parties on the one side and other additional parties on the other side. There can be no "separable controversy" in an action where there is a single plaintiff and a single defendant.

[3] Second. The clause contains by implication the restrictive provisions of clauses 2 and 4, respecting nonresidence of the defendant seeking to remove the cause. *Thurber v. Miller*, 67 Fed. 371, 14 C. C. A. 432; *Wichita National Bank v. Smith*, 72 Fed. 568, 19 C. C. A. 42.

The motion to remand is granted, and an order may be entered accordingly.

In re PODOLIN et al.

(District Court, E. D. Pennsylvania. March 1, 1913.)

BANKRUPTCY (§ 28*)—SCHEDULES—DUTY TO FILE—INCRIMINATING STATEMENTS.

Bankrupts, though under indictment for misuse of the mails, could not lawfully refuse to file any schedules of assets and liabilities on the ground that to do so would tend to incriminate them, but were bound to file a schedule which complied with the act up to the point where the court could see that further obedience would violate their constitutional privilege.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 27; Dec. Dig. § 28.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Israel Podolin and others individually and trading as the Franklin Suit & Skirt Company. On certificate of referee to review a ruling requiring the bankrupts to file schedules. Affirmed.

The following is the certificate of Richard S. Hunter, referee:

Sur Application for Order on Bankrupts to File Schedules.

The bankrupts have been indicted for using the mail with intent to defraud, and their trial is set for September. They now, under advice of counsel, refuse to file their schedules in bankruptcy on the ground that their schedules might tend to incriminate them.

The petitioning creditor asks the referee to order the bankrupts to file their schedules.

The Constitution of the United States provides in the fifth amendment that no person "shall be compelled in any criminal case to be a witness against himself." This clause means, not only that a person shall not be compelled to be a witness against himself in a criminal proceeding, but its object is to insure that a person shall not be compelled, when acting as a witness in any investigation to give testimony that may tend to show that he himself has committed a crime. *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110. The provision in the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), requiring the bankrupt to testify before the referee, but providing that no testimony then given by him shall be offered in evidence against him in any criminal proceeding, does not amount to an exemption from prosecution. *Burrell v. Montana*, 194 U. S. 572, 24 Sup. Ct. 787, 48 L. Ed. 1122.

It has been repeatedly held, and has now been settled by the Supreme Court, that books of account which the bankrupt claims contain matter which might tend to incriminate him must, nevertheless, be delivered to his trustee. In the matter of *Harris*, 26 Am. Bankr. Rep. 302, 221 U. S. 274, 31 Sup. Ct. 557, 55 L. Ed. 732. "The question," says Mr. Justice Holmes, "is not of testimony, but of surrender, not of compelling a bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is entitled to keep. * * * That is one of the misfortunes of bankruptcy if it follows crime. The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story."

It is clear, then, that a bankrupt cannot be compelled to testify against himself in a criminal proceeding; and it is also clear he cannot withhold from his trustee books and papers already in existence upon the ground that they may incriminate him. Is he compellable to file schedules which may incriminate him? Under the seventh section of the act of 1898, "the bankrupt shall prepare, make oath to and file in court within ten days after the adjudication a schedule of his property, setting forth in full its amount, location and value, and a list of his creditors." No direct penalty is affixed by the act to the failure on the bankrupt's part to file his schedules. Unless he loyally assists his trustee in all proper ways, he cannot obtain his discharge. In case the bankrupt is absent or cannot be found, the petitioning creditor, under general order 9 (18 Sup. Ct. v), must file a schedule, giving the names and places of residence of the creditors. Under section 39 it is the duty of the referee to prepare and file the schedules of property and list of creditors required to be filed by the bankrupt, or cause the same to be done when the bankrupt fails, refuses, or neglects to do so.

It is obvious from these clauses and orders that the law contemplated that in many cases the bankrupt would not or could not file his schedules. It is, of course, his duty to do so, and for a wanton refusal so to do he is liable, in the discretion of the court, to the proper penalty for contempt.

In the present case the bankrupts are actually under indictment, and in the proceedings against them as alleged bankrupts the present referee has decided that they have committed perjury of the grossest kind. No doubt the filing of schedules in the usual form might incriminate them in many ways. These schedules, if filed, are considered as voluntarily offered. *Commonwealth v. Ensign*, 40 Pa. Super. Ct. 157, 22 Am. Bankr. Rep. 797. Judge Rice in this case calls special attention to the fact that the Bankruptcy Act attaches no penalty to the bankrupt's failure to file schedules, and that it did

not appear at the time they filed them that they were under arrest or had been charged with a criminal offense.

The referee concludes that the bankrupts need not file schedules which will incriminate them. Are they, therefore, exempt from the duty of filing any schedules? It is evident that very many of the particulars which are embraced in the schedules can be given by them without self-incrimination. They should furnish a list of creditors, a list of property, and a list of books held by the firm, and in general they should file schedules under the form required by the act, and give all information they can to their trustee up to the point at which it incriminates them. Schedules so prepared may be meager and unsatisfactory, but the bankrupts will then have done what is required by the act up to the point where they can plead their constitutional privilege.

The referee orders that the bankrupts shall file their schedules in bankruptcy. Whenever particular information required under these schedules is such as may incriminate them, they must refuse to furnish it upon the specific ground that it so incriminates them.

J. Howard Reber, of Philadelphia, Pa., for petitioning creditors.
Clinton O. Mayer, of Philadelphia, Pa., for bankrupts.

J. B. McPHERSON, Circuit Judge (specially presiding). As a general proposition, the referee's ruling that the bankrupts must file schedules, so far as they can do so without incriminating themselves, is obviously correct. But, until an effort is made to comply with his order, it is practically impossible for the court to decide whether a particular fact is to be included or omitted. To decide that a bankrupt is not bound to put his hand to a declaration of fact that may incriminate him, does not advance a particular dispute very much. What is required is an effort in good faith by the bankrupt to file a schedule that obeys the act up to the point where the court can see that further obedience would violate the constitutional protection. When the bankrupts present such schedules as they can conscientiously declare to be a compliance with the order (saving their constitutional rights), the referee will then be able either to order them to do specific acts or to approve the refusal to do them; and in either event the District Court will then have something definite to rule upon. Until such a situation is presented, the discussion is almost wholly academic.

The order of the referee under date of July 18, 1912, is affirmed; and it is now ordered that the bankrupts file their schedules as directed by the referee on or before March 20, 1913.

In re CO-OPERATIVE KNITTING MILLS.

(District Court, E. D. New York. February 5, 1913.)

1. BANKRUPTCY (§ 328*)—CLAIMS—FILING—TIME—NUNC PRO TUNC.

An order may not be made nunc pro tunc in order to bring the filing of a claim in bankruptcy, not within the year from the date of the adjudication, within the statutory period.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. § 328.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 328*)—CLAIMS—FILING—TIME—ISSUE OF FACT—TRIAL.

A bankruptcy adjudication having been entered September 28, 1911, and petitioner's claim having been rejected by the referee because not filed in time, the creditor moved for an order directing the filing of the claim, and in support thereof presented affidavits that the original proof was offered for filing at the office of the referee in bankruptcy on September 11, 1912, and also on September 28, 1912, and was not actually filed by the referee or his clerk. *Held*, that the application raised a question of fact as to whether the creditor's acts constituted a filing of the claim within the time specified, which could only be determined on a hearing either on affidavits, or by the calling of witnesses.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. § 328.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Co-operative Knitting Mills. On petition to review an order refusing permission to file a claim of the Pennsylvania Yarn Company after the expiration of a year from adjudication.

Reversed and referred to another referee.

Olcott, Gruber, Bonyng & McManus, of New York City, for petitioner.

Harold R. Lhowe, of New York City, for trustee.

CHATFIELD, District Judge. [1] The Pennsylvania Yarn Company have asked for an order directing the filing of a claim herein and reversing the decision of the referee, which is worded as follows:

"The statute requires that all claims must be filed within a certain period. The claim was not filed within the required period as the attorneys have been notified and informed by letter of referee of Dec. 7, 1912, giving full statement of matter. An order cannot be entered *nunc pro tunc* to bring the filing within a statutory period."

No reference to the proof of claim appears on the records of the court, although the moving papers allege that the original proof was offered for filing at the office of the referee in bankruptcy, upon the 11th day of September, 1912. The referee has certified that according to his records no claim was filed, that September 28, 1912, was one day after the expiration of the time of filing claims, and that the clerk with whom the papers were claimed to have been left was not in his office at the time. Adjudication occurred upon the 28th day of September, 1911, and the year thereafter would not expire until September 28, 1912, nor does the referee state the facts upon which he draws the conclusion that his clerk was not in his office upon the day in question. His conclusion is not within the scope of a certificate of this sort.

[2] The creditor presented affidavits which did not serve the purpose of answering the questions raised. An issue of fact was therefore presented, and this is all that is now before the court. The present motion is brought under subdivision 10 of section 2 of the statute (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3420]), which gives the District Court authority to "consider and confirm, modify or overrule, or return, with instructions for further proceed-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ings, records and findings certified to them by referees." In the decision which the referee made herein, refusing to file the claim in question, he cited an explanation of his position in a letter written by him, under date of December 7, 1912. His stated reason for refusing to file the claim after the expiration of one year is "that an order cannot be entered nunc pro tunc to bring the filing within the statutory period."

This statement of law is entirely correct, but the referee's decision was not based upon a hearing, and in fact no proofs at all were put into the record beyond the original affidavits. The question of fact as to whether any proof of claim was presented at the referee's office for filing, and therefore whether the requirements of the statute were actually complied with so that the claim should be added to the list of those filed must be disposed of after a hearing, either upon affidavits or by the calling of witnesses, and, inasmuch as the referee himself will probably have to be a witness, it seems best to refer the question as to whether this claim was ever presented within the year to another referee for determination.

An order may be entered referring the question of an offer of this claim within the statutory period to Robert F. Tilney, referee.

In re TISCH.

(District Court, S. D. New York. December 23, 1912.)

RECEIVERS (§ 99*)—APPOINTMENT OF CUSTODIANS.

A receiver in bankruptcy is authorized only in exceptional cases to appoint custodians. It is ordinarily sufficient if he takes the same care of the assets that a prudent man would of his own property, and, if he appoints custodians not reasonably necessary, the expense will be charged to him.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 183-186; Dec. Dig. § 99.*]

In Bankruptcy. In the matter of Isaac Tisch, bankrupt. On review of order of referee. Modified and affirmed.

Strauss & Singer, of New York City (William B. Singer, of New York City, of counsel), for petitioning creditors and receiver.

Frederick M. Czaki, of New York City, for receiver.

Philbin, Beekman, Menken & Griscom, of New York City (William C. Armstrong, of New York City, of counsel), for trustee.

HOLT, District Judge. I concur with the referee in his finding that the receiver's attorneys were guilty of gross neglect of duty. In my opinion the receiver was guilty of similar neglect, and should be allowed no commissions. I think, also, that the receiver should be charged with the custodian's fees. There was no need of custodians. The bankrupt's assets consisted of a small lot of jewelry worth about \$1,200, a large safe, and some showcases. The assets might have been put in the safe and the safe locked; or if, for any reason, it was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

deemed objectionable to leave them in the safe, they could have been stored at slight expense. Apparently the custodian's services consisted in watching the safe and the showcases, but there could not have been much danger of burglars stealing them. If the custodians have rendered the service, they should be paid by the trustee, but the amounts paid should be charged to the receiver. Some receivers seem to suppose that custodians are to be employed in every case. They are not required in most cases. If a receiver takes the same care of the assets that a prudent man takes of his own property, that is ordinarily enough.

I have felt considerable doubt whether the receiver should not be charged with a part of the rent. Receivers should allow bankrupts only a reasonable time in which to try to effect a settlement or a composition. Usually a month is enough. But there is evidence in this case that several different offers of settlement were made, and that the creditors asked to have the premises retained pending consideration of the offers. On the whole, I think that, although the premises were retained a long time, the charge for use and occupation should be allowed and paid by the trustee and no part of it charged to the receiver.

The receiver is directed to pay to the trustee the cash on hand, \$125.10, and all other assets, and also the day custodian's fees, \$258.80, and the night custodian's fees, \$45, if those amounts are correct, making in the aggregate \$428.90, in cash, upon payment of which, with any other assets, if any, he should be discharged and his bond canceled. The allowance to him of \$20, recommended by the referee, is disapproved. In other respects the referee's report is confirmed.

IN RE CAMARAS.

(District Court, D. Rhode Island. February 19, 1913.)

1. ALIENS (§ 70*)—CITIZENS (§ 9*)—BOND—NATURALIZATION—EFFECT—CHILDREN.

Where an alien executed a bond required by the acting Secretary of Commerce and Labor for hospital treatment of his daughter on her being refused admission because she was suffering from a contagious disease, the alien's subsequent naturalization would not confer citizenship on the daughter, nor would it avoid the penalty of the bond.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 151, 154-160; Dec. Dig. § 70;* Citizens, Cent. Dig. §§ 8-12; Dec. Dig. § 9.*]

2. ALIENS (§ 62*)—NATURALIZATION—MORAL CHARACTER.

Where an alien, in his petition for naturalization, misnamed one of his children and stated that they all resided in Providence, when in fact one of them had not entered the country, but it did not appear that his act amounted to an attempt to conceal the identity of the daughter, such fact did not show such a lack of good moral character as to justify denial of the petition on that ground alone.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123-125; Dec. Dig. § 62.*]

Petition by Morris Camaras for naturalization. On objections of the United States attorney. Overruled.

Philip C. Joslin, for petitioner.

BROWN, District Judge. The petitioner has duly complied with all the requirements of law and has furnished sufficient proof of his right to be naturalized. Objection is made on behalf of the United States to the granting of the petition.

It is shown that the petitioner has a minor daughter, Celia, a native of Russia, age 11 years, who arrived in Boston July 25, 1912, and was held by the immigration officers as an alien afflicted with trachoma, a dangerous, contagious disease. August 9, 1912, the Acting Secretary of the Department of Commerce and Labor authorized hospital treatment upon the giving of the bond appropriate to such cases. Bond was given August 20, 1912.

[1] That the naturalization of the petitioner will not, under such circumstances, confer upon the daughter citizenship in the United States, is determined by the decision of the Supreme Court in *Zartarian v. Billings*, 204 U. S. 170, 27 Sup. Ct. 182, 51 L. Ed. 428. See, also, *U. S. v. Williams* (C. C.) 132 Fed. 894.

Neither does it seem to me that there is force in the suggestion that the naturalization of this petitioner could have any effect to avoid the penalty of the bond.

[2] It is further suggested that in his petition the petitioner gave the names of all his children as residing at Providence, but that the name Celia was not included and the name Ida was given instead. It does not appear, however, that any attempt was made to conceal the parentage or identity of this daughter Celia when she came to this country, and I am unable to find in this discrepancy alone, in the absence of any attempt to conceal the identity of this daughter, evidence of bad faith, or of such a lack of good moral character as to justify denial of the petition on this ground alone.

The objections are overruled, and the petition for naturalization will be granted.

MEMORANDUM DECISIONS

COMMERCIAL NAT. SAFE DEPOSIT CO. v. MEADER FURNITURE CO. (Circuit Court of Appeals, Sixth Circuit. January 6, 1913.) No. 2,404. In Error to the Circuit Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge. Harmon, Colston, Goldsmith & Hoadly, of Cincinnati, Ohio, and Calhoun, Lyford & Sheean, of Chicago, Ill., for plaintiff in error. Lawrence Maxwell, of Cincinnati, Ohio, for defendant in error.

PER CURIAM. Dismissed on stipulation of counsel. For decision of Circuit Court, see 192 Fed. 616.

CONSOLIDATED ENGINEERING CO. v. MONASH-YOUNKER CO (Circuit Court of Appeals, Seventh Circuit. January 7, 1913.) No. 1,855. Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois. C. Clarence Poole, of Chicago, Ill., for appellant. Thomas A. Banning and Samuel W. Banning, both of Chicago, Ill., for appellee.

PER CURIAM. Appeal dismissed pursuant to stipulation of counsel. See, also, 187 Fed. 141.

CONSOLIDATED RUBBER TIRE CO. v. B. F. GOODRICH CO. (Circuit Court of Appeals, Seventh Circuit. February 7, 1913.) No. 1,948. Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaat, Judge. Charles C. Linthicum, of Chicago, Ill., Charles W. Stapleton, of New York City, and Border Bowman, of Springfield, Ohio, for appellant. Samuel E. Hibben, of Chicago, Ill., Charles Neave, of New York City, and Edward Rector, of Chicago, Ill., for appellee.

PER CURIAM. Decree of District Court (195 Fed. 764) reversed, and cause remanded.

CONSOLIDATED RUBBER TIRE CO. v. REPUBLIC RUBBER CO. (Circuit Court of Appeals, Seventh Circuit. February 7, 1913.) No. 1,949. Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaat, Judge. Charles C. Linthicum, of Chicago, Ill., Charles W. Stapleton, of New York City, and Border Bowman, of Springfield, Ohio, for appellant. Russell Wiles and P. C. Dyrenforth, both of Chicago, Ill., for appellee.

PER CURIAM. Decree of District Court (195 Fed. 768) reversed, and cause remanded.

THE EDNA V. CREW. THE PORTSMOUTH. THE N. Y., P. & N. R. R. No. 2. THE BAKER PALMER. (Circuit Court of Appeals, Fourth Circuit. February 14, 1913.) No. 1,124. Appeal and Cross-Appeals from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge. Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge. H. H. Little, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for Joseph M. Clark & Co., claimants of the Edna V. Crew, appellants. Floyd Hughes, of Norfolk, Va. (Thomas H. Willcox and Hughes & Vandeventer, all of Norfolk, Va., on the brief), for N. Y., P. & N. R. Co., claimant of the Portsmouth and the N. Y., P. & N. R. R. Co. No. 2, appellee and appellant. Edward S. Dodge, of Boston,

Mass. (Benjamin Thompson, of Portland, Me., on the brief), for J. S. Winslow & Co., claimants of the Baker Palmer, appellee and appellant.

PER CURIAM. Our study of the record in this case impels us to the conclusion that the court below entered a decree fully justified by the evidence and the law applicable thereto. Being in full accord with the opinion he filed, we deem it unnecessary to refer to and discuss the facts he has so fully considered therein. 182 Fed. 890. The decree appealed from is without error. Affirmed.

GUARANTY TRUST CO. et al. v. CHICAGO RYS. CO. et al. (Circuit Court of Appeals, Seventh Circuit. January 8, 1913.) No. 1,508. Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois. Julien T. Davies, of New York City, Gilbert E. Porter, of Chicago, Ill., and Brainard Tolles, of New York City, for appellants. William W. Gurley and Arthur Dyrenforth, both of Chicago, Ill., for appellees.

PER CURIAM. Appeal dismissed pursuant to stipulation of counsel. See, also, 185 Fed. 411.

JEFFERSON COUNTY SAVINGS BANK v. COWAN. (Circuit Court of Appeals, Fifth Circuit. March 4, 1913.) No. 2,451. Petition to Superintend and Revise in the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge. George Huddleston, of Birmingham, Ala., for petitioner. R. Du Pont Thompson, John London, and Henry Fitts, all of Birmingham, Ala., for respondent. Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. On the facts appearing in the record, commissions were properly allowed the trustee on the agreed value of the property turned over to the mortgage creditor. For the payment of costs, and notwithstanding the agreement between the trustee and the mortgage creditor, the rent collected for the use of the mortgaged property prior to surrender of the same constituted a part of the general estate of the bankrupt. Petition denied.

PHOENIX KNITTING WORKS et al. v. RICH et al. (Circuit Court of Appeals, Sixth Circuit. March 8, 1913.) No. 2,327. Appeal in Equity from the Circuit Court of the United States for the Northern District of Ohio; John M. Killits, Judge. Flanders, Bottum, Fawsett & Bottum and Erwin & Wheeler, all of Milwaukee, Wis., and Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for appellants. J. H. Sampliner and Albert Lynn Lawrence, both of Cleveland, Ohio, for appellees.

PER CURIAM. Dismissed pursuant to stipulation of counsel. For opinion of Circuit Court, see 194 Fed. 721. See, also, 202 Fed. 1022.

PHOENIX KNITTING WORKS v. RICH et al. (Circuit Court of Appeals, Sixth Circuit. March 8, 1913.) No. 2,397. Appeal in Equity from the Circuit Court of the United States for the Northern District of Ohio; John M. Killits, Judge. Flanders, Bottum, Fawsett & Bottum, of Milwaukee, Wis., and Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for appellant. J. H. Sampliner and Albert Lynn Lawrence, both of Cleveland, Ohio, for appellees.

PER CURIAM. Dismissed pursuant to stipulation of counsel. For opinion of Circuit Court, see 194 Fed. 708. See, also, 202 Fed. 1022.

SCHMIDT v. STANDARD STEEL CAR CO. (Circuit Court of Appeals, Second Circuit. February 3, 1913.) No. 186. In Error to the District Court of the United States for the Southern District of New York. Before LA-COMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The parties having stipulated seasonably for settlement of the bill of exceptions, we are satisfied that the trial judge should have signed it, even though the term had expired. *Waldron v. Waldron*, 156 U. S. 361, 15 Sup. Ct. 383, 39 L. Ed. 453. Under the provisions of Rev. Stat. U. S. § 953, as amended by Act June 5, 1900, c. 717, § 1, 31 Stat. 270 (U. S. Comp. St. 1901, p. 696), the bill of exceptions may, in case of the disability of the trial judge, be signed by any other judge of the court in which the trial was had. We assume that the bill of exceptions in this case will be so signed, and, on being advised that it has been, are prepared to deny this motion.

SCHUMERT & WARFIELD, Limited, et al. v. SECURITY BREWING CO. (Circuit Court of Appeals, Fifth Circuit. March 12, 1913.) No. 2,444. In Error to and Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. For opinion below, see 199 Fed. 358. Henry L. Lazarus and Eldon S. Lazarus, both of New Orleans, for plaintiffs in error and appellants. Walter L. Gleason, of New Orleans, for defendant in error and appellee.

PER CURIAM. Dismissed on motion of defendant in error and appellee, for failure of plaintiffs in error and appellants to print the record.

SOUTH ATLANTIC TOWING CO. v. CHANEY et al. (Circuit Court of Appeals, Fifth Circuit. February 25, 1913.) No. 2,373. Appeal and Cross-Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge. J. P. K. Bryan, of Charleston, S. C., for appellant and cross-appellee. Anton P. Wright, of Savannah, Ga., Edward E. Blodgett, of Boston, Mass., and Howard M. Long, of Philadelphia, Pa., for appellees and cross-appellants. Before PARDEE and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. In the opinion and finding of a majority of the judges, this case was correctly ruled and decided in the District Court. *The Marie Palmer*, 191 Fed. 79. The decree appealed from is therefore affirmed. As both the appeal and cross-appeal were prosecuted on one transcript, the costs of this court will be paid by the appellant and cross-appellants equally.